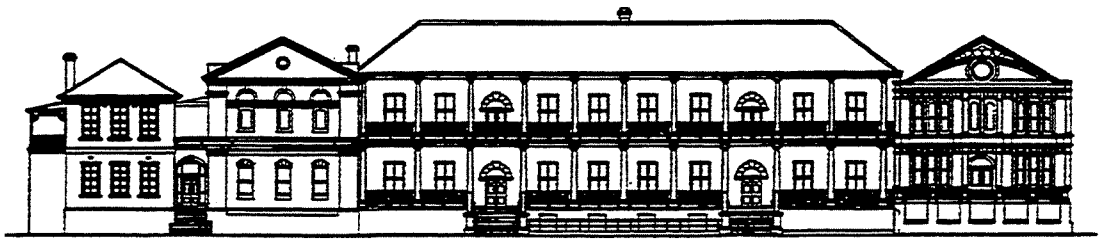
PUBLIC ACCOUNTS COMMITTEE

INQUIRY INTO

COURT WAITING TIMES



Report No. 133 **June 2002**

[No. 15/52]

This report was compiled using *Word 97*

and printed by the Parliamentary Printing Services.

This report will also be available on the Internet via:

http//www.parliament.nsw.gov.au

New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Public Accounts Committee

Inquiry into court waiting times / Public Accounts Committee. [Sydney, N.S.W.] : The Committee, 2002. – 201 p. ; 30 cm. (Report no. 133 / Public Accounts Committee)
At head of title: Parliament, NSW.
"No.15/52".
"June 2002".
Chair: Joseph Tripodi.

ISBN 0734766149

1. Courts—New South Wales.
1. Title
I. Tripodi, Joseph.
II. Series: New South Wales. Parliament. Public Accounts Committee. Report ; no. 133

DDC 347.94401

Table of Contents

Charter of the Committee

The Public Accounts Committee has responsibilities under the *Public Finance and Audit Act 1983* to inquire into and report on activities of government that are reported in the State's Public Accounts and the accounts of the State's authorities.[1] The Committee, which was established in 1902, scrutinises the actions of the Executive Branch of Government on behalf of the Legislative Assembly.

The Committee recommends improvements to the efficiency and effectiveness of government activities. The sources of inquiries are the Auditor-General's reports to Parliament, referrals from Ministers and references initiated by the Committee. Evidence is primarily gathered through public hearings and submissions. As the Committee is an extension of the Legislative Assembly, its proceedings and reports are subject to Parliamentary privilege.

Members of the Committee

The Committee comprises members of the Legislative Assembly and assumes a bi-partisan approach in carrying out its duties.

Chairman:	Joseph Tripodi MP, Member for Fairfield
Vice-Chairman:	Pam Allan MP, Member for Wentworthville
Members:	Ian Glachan MP, Member for Albury
	Katrina Hodgkinson MP, Member for Burrinjuck
	Richard Torbay MP, Member for Northern Tablelands
	Barry Collier MP, Member for Miranda

[1] See Part 4 of the Act – The Public Accounts Committee.

Committee Secretariat

Secretariat members involved in the Inquiry were:

Committee Manager:	David Monk
Project Officer:	Craig Gillman (to 17 January 2002)
Committee Officer:	Stephanie Hesford (to 14 December 2001)
	Jacqui Isles (from 29 January 2002)
Assistant Committee Officer:	Mohini Mehta
Advisor to the Committee:	Belinda Archer (to 12 April 2002)

To contact the Committee:

Public Accounts Committee	Telephone (02) 9230 2631
Parliament House	Facsimile (02) 9230 2831
Macquarie Street	E-mail pac@parliament.nsw.gov.au
Sydney NSW 2000	

Chairman's Foreword

The Public Accounts Committee is pleased to present its report on court waiting times in the Supreme, District and Local Courts of New South Wales.

The Committee appreciates the concerns expressed by the judiciary regarding the application of "private sector style" performance management in the court environment. Such measurement and management tends to focus on quantifiable issues such as delay when court performance has much more to do with issues that cannot be easily measured, such as the quality of justice.

Nevertheless, the reduction of delay is an appropriate goal for both the judiciary and court administrators as long as efforts to improve court efficiency do not adversely impact the legal system's ability to deliver "fair outcomes arrived at by fair procedures".[2]

The Committee consulted widely in preparing this report and received submissions from interested individuals, organisations and Departments. Hearings were held in Sydney in December 2001. The Committee thanks all those who have contributed to the inquiry for their time, effort and insights.

The performance of the courts of NSW has been the subject of three reports by the Audit Office of NSW since 1995 and one previous Public Accounts Committee inquiry in 1996.

The current inquiry built on this existing body of work by examining the results achieved by the Courts in the context of the justice system as a whole. The Committee has investigated the interactions between parties in both criminal and civil cases to gain a better understanding of how stakeholders inside and outside the courts can contribute to judicial delays. Nowhere else in the public sector do the activities of individuals, professionals and diverse agencies interlock in such a critical and complex manner.

The resourcing and operations of the NSW Police (as both investigators and prosecutors), the Office of the Director of Public Prosecutions, the Legal Aid Commission and the Public Defenders all affect the performance of the Courts. Similarly, the performance of the Courts influences the operations of these agencies. The culture and conduct of the legal profession is also crucial.

It is impossible, therefore, to attempt to manage court waiting times in isolation. Policy changes in the courts will not produce their anticipated results unless the other agencies in the justice system have the capacity to play their part. If resourcing in one agency is inadequate, the bottleneck will simply be moved, not removed.

---

[2] Spigelman, JJ, 2001, "The New Public Management and the Courts", *Family Court of Australia 25th Anniversary Conference,* Sydney.

Effective and efficient judicial management is not just a matter of resourcing. Easily obtainable, reliable management information is essential. Without information on activity in other agencies, appropriate resource allocation and planning is impossible. Cross agency data is not immediately available in the NSW justice system but will be provided in the medium term by the Justice System Information Sharing (JSIS) project. The Committee regards the implementation of both JSIS and the Courts Administration System as being essential to the achievement of significant improvements in court performance over the longer term.

The Supreme, District and Local Courts have all sought, with varying levels of success, to improve their timeliness through the introduction of case management procedures and associated time standards. Big improvements have been achieved in criminal waiting times in the Supreme and District Courts. In addition, the District Court has maintained steady civil performance in the face of a rapidly growing caseload. The Local Court has also continued its strong performance record in comparison to similar jurisdictions in other Australian States and Territories.

New pressures are, however, emerging and delays have proved difficult to reduce in some areas. Continued vigilance, innovation and discipline are essential.

On behalf of the Committee, I would like to thank the secretariat for its support in this inquiry. I would especially like to thank Ms Belinda Archer, on secondment from Treasury, who researched and drafted the report.

The Committee trusts its recommendations will assist the Attorney General's Department in further improving court administration in New South Wales.

Joe Tripodi

Joseph Tripodi MP
Chairman

Executive Summary

Introduction

Excessive court delay concerns Governments around the world. Research indicates that the reasons for delay in different states and countries are surprisingly similar and often have more to do with the conduct of the participants in the trial process than the conduct of the judiciary or court officials.

In May 2000, the NSW Bureau of Crime Statistics and Research released the findings of a survey of criminal cases in the District Court which found 71 per cent of matters failed to proceed to trial on the day they were listed because of:

- late guilty pleas – 35 per cent;
- adjournments – 29 per cent;
- overlisting – 22 per cent;
- other – 14 per cent – including non-appearance and no bills.

These findings echo the results of research in Victoria, Western Australia and the United Kingdom.[3]

The chief weapon against court delay is case management. This involves the court setting time standards within which most matters must be finalised and then "managing" the actions of defendants and the Crown in criminal matters, and litigants and their counsel in civil actions, to ensure these standards are met. Case management usually takes the form of a standard calendar of case processing events with which litigants must comply (for example, Practice Note 33 for matters in the General Division of the District Court) or specific judicial instructions (for example, the Defamation List of the District Court).

In either instance, case management represents a significant change for both those who judge and those who are judged. This is because, traditionally, the pace of litigation was controlled by the legal practitioners and the court's role was simply to respond to processes initiated by those practitioners:[4]

> Courts have an overriding obligation to see to it that those using their facilities are proceeding in a way best calculated to bring litigation to an end at the earliest possible moment so long as the primary goal of achieving justice is not lost sight of... Judges have power, until the hearing is concluded, to make, and to continue to make, such directions as seem to them best suited properly and adequately to manage and direct the cases in their lists. [5]

---

[3] The strategies implemented by the District Court to address these issues are discussed in Chapter Five.

[4] Australian Law Reform Commission, 1996, *Judicial and Case Management,* p 2.

[5] Du Pont de Nemours & Co v Commissioner of Patents (1987) 16 FCR 423, 424.

Findings and Recommendations

The Judiciary and Court Performance Measurement

Members of the judiciary have expressed concern regarding the increasing application of public sector performance management practices to the courts:

> The compilation and publication of statistics relating to the measurement of [court] delay is a perfectly appropriate activity. Nevertheless, the most important functions performed by a court are not capable of measurement. In particular, the fundamental issue of whether or not the system produces fair outcomes arrived at by fair procedures is not capable of quantification at all.[6]

The Committee found:

> While timeliness is only one aspect of court performance, the reduction of delay is an appropriate goal for both the judiciary and court administrators in the pursuit of a more effective and efficient legal system.

There is no Australia-wide standardisation of court data collection. This means it is difficult to achieve a valid comparison of delay or other court statistics between Australian States and Territories.

Recommendation

1. The Attorney General's Department of NSW and the Courts of NSW should continue to work vigorously with the Australian Bureau of Statistics and other Australian States and Territories to establish common data standards for the measurement of the effectiveness and efficiency of court administration.

Court Delay and the Actions of Players in the Justice System

The performance of the courts – both civil and criminal – cannot be viewed in isolation. It represents a complex interplay between a range of stakeholders – both public and private – who often have conflicting interests.

In recognition of the relationships between the players in the justice system, the Committee has explored how participants in court cases can create court delays. For example, some witnesses raised the quality and timeliness of police briefs of evidence in this regard. The Committee found:

> The quality and timeliness of police briefs of evidence continue to be a source of delay in the Local Court. NSW Police have recognised significant improvement is required and have undertaken some comprehensive reforms, particularly in the use of information technology.

---

[6] Spigelman, JJ, 2001, op cit.

Recommendation

2. The effectiveness of the reforms being implemented by NSW Police in the quality and timeliness of police briefs should be assessed at some stage in the future. In the interim, NSW Police should consider including these reforms in its review of the Court and Legal Services Division.

Several witnesses to the inquiry suggested legal effectiveness and efficiency would be advanced if police prosecutors were replaced by solicitors from the Office of the Director of Public Prosecutions (DPP) in the Local Court. A pilot study by Premier's Department in 1996-97, *Prosecuting Summary Offences: Options and Implications* was cited in support of this change.

Further, in 1997 the Final Report of the Wood Royal Commission discussed the arguments for and against retaining police prosecutors and recommended the responsibility for all prosecutions should be progressively transferred to the DPP.

Recommendation

3. The current review of the Court and Legal Services Division of NSW Police should consider the transfer of the prosecution function from NSW Police to the DPP.

Delays in developing forensic evidence are a common cause of delay in preparing police briefs of evidence. The Division of Analytical Laboratories tests exhibits for NSW Police. The Committee found:

> The introduction of DNA analysis and the continuing growth in the volume and complexity of illicit drug analysis means the provision of effective, efficient and timely laboratory services to the criminal justice system is an issue of the highest priority.
>
> The Division of Analytic Laboratories is not, currently, providing a service that meets these criteria.

Recommendations

4. As a matter of urgency, the Forensic Services Group of NSW Police develop and distribute its proposed guidelines to assist investigating officers in screening and prioritising DNA exhibits.

5. As a matter of urgency, the establishment of a State Institute of Forensic Science be considered by the State Institute of Forensic Services Committee.

Recommendations

6. As immediate measures to improve the effectiveness and efficiency of exhibit analysis:

- the *Deed of Agreement between the Commissioner of Police and the Western Sydney Area Health Service to Deliver DNA Analysis Service and the Establishment of a DNA Profile Database* should be reviewed. This review should include the consideration of a fee for service payment system and the devolution of the Forensic Service Group budget to Local Area Commands and crime agencies;

- illicit drug analysis should be reviewed to ensure: "fast track" and "controlled operations" protocols are understood and are being used appropriately; and laboratory funding/staffing is adequate to meet demand in a timely way (fee for service should be considered); and

- the Division of Analytic Laboratories should review best practice in other Australian States and Territories (and overseas where relevant) both in terms of funding and laboratory operation for all forms of criminal exhibit analysis undertaken.

7. The Division of Analytic Laboratories (or a State Institute of Forensic Services) should be part of the Justice Service Information System (see page 28).

In addition the Committee found, on the basis of evidence from practitioners, that:

> The legal profession believes the "quality of justice" has not been negatively affected by implementation of case management practices and other administrative efficiencies.

Cases involving unrepresented criminal defendants and unrepresented civil litigants take longer to finalise. The Committee found:

> The overall impact of unrepresented criminal defendants and unrepresented civil litigants on the court system is not known. What is certain is that, in jurisdictions where legal representation is the norm, unrepresented defendants and litigants can have a significant impact on court resources required by, and the "quality" of justice achieved in, their individual cases.

Recommendation

8. The courts should collect and analyse data on unrepresented criminal defendants and unrepresented civil litigants as part of their standard dataset so the extent of this issue can be determined and its impact better managed.

The Justice Service Information System (JSIS) is a cross-agency initiative which will allow the Police, DPP, Legal Aid and the Courts to share information. Given the interlinked nature of their operations, this type of cooperation is essential.

The Committee found:

Whole of justice sector coordination and cooperation has improved in recent years. Cross sector forums and initiatives, particularly in the information technology area, are proof of this growing organisational consciousness.

Policy innovations in one agency will not yield their anticipated results unless the other agencies in the "justice chain" have the capacity to play their part. If resourcing in one part of the chain is inadequate, the "bottleneck" will simply be shifted, not removed.

Recommendations

9. Proposed changes in agency policy and resourcing should be fully communicated to other agencies whose operations may be affected.

10. Central agencies should fully appreciate the interconnections within the justice sector when assessing changes in the policy and/or resourcing of individual agencies.

11. Cross-agency initiatives like JSIS and e-Briefs should be pursued as matters of high priority. The first will give agencies the cross-sector information they need to improve planning while the second represents a project which will bring genuine returns across the system.

The Committee considered practitioner concerns regarding the implementation of civil case management in the Local Court and found:

Stakeholder consultation in the District and Supreme Courts has enhanced practitioner acceptance and understanding of reforms in court practices. Lack of understanding can lead to unnecessary anxiety for practitioners and litigants.

Recommendation

12. Major reforms in court procedure should be subject to formal stakeholder consultation and, when implemented, accompanied by "plain English" practitioner education.

With regard to civil matters, the Committee heard evidence that unified court rules would benefit litigants and increase court efficiency.

Recommendation

13. The Attorney General's Department and the Courts should form a working group drawing on the existing resources of the Rule Committees of the Supreme and District Courts, which include representatives of the NSW Bar Association and the Law Society, to rationalise and simplify civil court rules in NSW.

Comparisons of Court System Performance

The Committee reviewed the available comparative data[7] and found:

> Despite the difficulties involved in comparing court performance between States and Territories in Australia, the results achieved by NSW in the 2002 Report on Government Services were relatively positive – in terms of the proportion of matters finalised within 12 months – for these types of cases:
>
> Supreme Court – NSW was comparable to the national average in both first instance and appeal civil cases;
>
> District Court – NSW bettered the national level in civil matters and recorded a significant improvement in criminal matters compared to the 2001 Report; and
>
> Local Court – NSW continued its excellent performance, beating the national average in both criminal and civil matters.

The Committee also examined measures of court performance used in the United Kingdom, United States of America and New Zealand and found:

> Despite the worldwide trend towards the use of performance indicators in the public sector, their use in court systems – with the exception of measures of timeliness – appears to be quite limited.
>
> In addition, where wider applications have been attempted, the indicators used, although easy to understand, have little explanatory power in terms of assessing the "work" of the courts concerned.

Should Court Sitting Hours be Extended?

The Committee received submissions suggesting that court hours should be extended and found:

> The extension of court sitting hours may be useful to speed the disposal of longer trials and hearings. This would not, however, create additional sitting hours "across the system" as the Judges involved would require dedicated time outside the courtroom to write their judgments.

Other witnesses suggested the introduction of US-style night courts. The Committee found:

> Night courts, although relatively successful in the United States of America, have not been well supported by the legal profession, defendants or plaintiffs in Australian pilots. Given the evidence, a further pilot or the creation of a permanent night court is not justified in NSW.

---

[7] As presented annually by the Steering Committee for the Review of Commonwealth/State Service Provision in its *Report on Government Services.*

The Committee heard evidence regarding the extent of judicial vacations and found:

> On the basis of evidence submitted by both the legal profession and the courts, judicial vacations are not excessive and are not a factor in court delay. Adequate court services are available during vacation periods

Court Governance

Some witnesses submitted that the administration of the courts would be more efficient and effective if it was controlled by the judiciary rather than the Executive Government.

While the Committee found there was no conclusive evidence that "autonomous" court administration enhanced performance, it also found consultation between the judiciary and the Attorney General's Department regarding resourcing was insufficient.

Recommendation

14. As a matter of priority, the Supreme and Local Courts should establish Resource Committees or expand current committees that already carry out some of the relevant functions. These Committees, and the Resource Committee already established by the District Court, should:

- include members of the Judiciary, the Chief Executive Officer/Principal Administrator/Director of the Court and a senior financial representative from the Attorney General's Department;
- meet each quarter to discuss demand trends and resource implications; and
- have an annual "pre Budget" meeting before the Department submits its Budget proposals to NSW Treasury. This meeting will analyse and prioritise the maintenance, enhancement and capital proposals of the Court.

With regard to staffing decisions relating to senior court administrators the Committee found:

> The NSW judiciary has an appropriate level of input into decisions regarding the appointment and performance management of SES-level court administrators.

Technology in the Courtroom

The Attorney General's Department has been criticised for the time taken to develop the Courts Administration System (CAS). The Committee reviewed the Department's evidence, examined the implementation of technology in other court jurisdictions and found:

> The delays experienced by the Attorney General's Department in implementing a case management system are regrettable. In light of experience elsewhere,

however, the Inquiry is unwilling to criticise the Department for its caution as the system now proposed appears to offer significant benefits for both the courts and their users. What is of critical importance now is that the CAS, as tendered, is completed on time and on budget.

Recommendation

15. The Audit Office should consider reviewing the CAS on an ongoing basis as an emerging case study in e-Government. The findings of this review should be reported to the Public Accounts Committee.

Concerns were also expressed regarding the size and complexity of the CAS. The Committee found:

Although the CAS a large project its implementation has been broken down into manageable units. In addition, the Attorney General's Department appears to have conducted an adequate preliminary risk assessment which has now been developed into a full Risk Management Plan.

With regard to the cost of the CAS and its importance to ongoing improvements in case management, the Committee found:

The cost of full implementation of the CAS is double the Attorney General's Department's 1997-8 estimate. This result, combined with the long delays experienced in implementing the system, is not satisfactory. Given similar delays and cost overruns interstate and overseas, however, it is not unique.

Replacement of existing court information systems is essential to support further improvements in case processing efficiency and enable the courts to better identify demand trends and their associated resource implications. Additionally, existing systems are reaching obsolescence and cannot be effectively enhanced or expanded due to design limitations.

Recommendation

16. Given the importance of the CAS and its history, the Office of Information Technology should oversee the conduct of an independent post implementation review in addition to its standard monitoring procedures.

The Inquiry also considered the potential of teleconferencing, videoconferencing, technology courtrooms, electronic callovers, electronic document lodgment and electronic transcripts in NSW courts. With regard to the availability of transcripts, the Committee found:

Barristers and their instructing solicitors have, over the years, become increasingly computer-literate. Improvements in IT and the increasing use of computers in the District and Supreme Courts clearly permit, even now, access to transcripts on a daily basis.

The provision of daily transcripts to criminal defence counsel on disc is one

obvious method. The disc could be supplied by the legal practitioners themselves. In the longer term, transcripts could be supplied electronically at low cost.

Recommendation

17. The Attorney General's Department and the Courts should consider, as a matter of urgency, the provision of daily transcript to defence counsel in criminal trials.

    In the short term, this could be as simple as the provision of a computer disc containing the transcript. The disc could be supplied by the legal practitioners themselves.

    In the longer term, the provision of daily transcript by other electronic means - in appropriate civil and criminal cases in the higher courts - should be considered.

With regard to the introduction of technology in general, the Committee found:

Courts in NSW are introducing a range of technological innovations to increase the efficiency and effectiveness of the administration of justice including cross-agency projects such as JSIS and videoconferencing. The Inquiry has received information regarding the anticipated benefits of some of these developments and is keen to ensure that these forecasts are achieved. Anecdotal feedback to date is very positive but is not a substitute for formal assessment.

Recommendation

18. New technologies introduced in the Attorney General's Department, and other justice agencies, should be subject to formal evaluation when fully implemented to determine whether projected business case benefits have been delivered.

    Where forecast benefits have not been achieved, the reasons for this failure should be analysed to determine generic risks and risk management strategies to assist in the successful implementation of future technology projects.

Waiting Times in the Supreme Court

Court Waiting Times

Waiting Time (months)	2000-01	1999-2000	1998-9	1997-8	1996-7	1995-6
Criminal (1)						
Defendant in Custody	9	13	13	16	17	18
Defendant on Bail	9	21	21	24	23	21
Civil (2)		Comparative information is not available.				
Equity Division (3)						
Admiralty List (4)	12-15	9	6-9	6-9	6-9	<12
Commercial List	9-12	9	6-9	6-9	6-9	6-9
Construction List (5)	9-12	9	6-9	6-9	6-9	6-9
Equity List	15-18	<11	<15	<13	<17	<13
Court of Criminal Appeal	9	Comparative information is not available.				
Court of Appeal (6)						
General List	10	14	21-22	23-24	23.7	33.2
Other Lists	10	6	7-8	10-16	...	...

1. Median time from commencement to plea, verdict or other finalisation.
2. The only list with longer term data is the Administrative Law List. This List's median time from commencement to finalisation has fallen from 12 months in 1995-96 to 6 months in 2000-01. The other civil lists are: Defamation, Possession (that is, property), Professional Negligence, Differential Case Management and Summons.
3. Median time from commencement to finalisation except for Equity List cases prior to 2000-01 where waiting time is the time from establishment of readiness for hearing to the hearing date. This change in timeframe is the reason for the increase in Equity List waiting times in 2000-01.
4. The low number of matters in this list (24 disposals in calendar 2000) means performance can be skewed significantly by one or two cases.
5. Case numbers in this list are also low (38 disposals in calendar 2000).
6. Before 1997-8 the figure represents the median time from establishment of readiness for hearing to finalisation. From 1997-8, the figure represents the median time from lodgment to finalisation. Waiting times have, therefore, improved more significantly than the figures suggest as the statistic now used represents the entire period to finalisation rather than a portion of it.

Source: Attorney General's Department of NSW, *Annual Report 2000-2001,* p 169-170

In relation to alternative dispute resolution, the Committee found:

> Mediation has the potential to reduce court waiting times in the Supreme Court but more information is needed on the extent of its application and the "success rates" of both court-based and external mediators.

Recommendation

19. The Supreme Court should include mediation statistics as part of the dataset to be collected by the CAS.

In general, the Committee found:

Civil case management, which has focussed on creating specialist lists to provide procedures best suited to particular types of matters, appears appropriate given the varied and complex nature of cases before the Supreme Court. To date, however, court waiting times in the Equity Division have been relatively static and lack of data means trends in performance in civil cases in the Common Law Division cannot be assessed.

First instance criminal case management has recently focused on a combination of early arraignment and the use of Acting Judges to boost disposals and has achieved good results in reducing trial delay.

With regard to the Appeal Courts, the Court of Appeal has achieved substantial improvements in waiting times. Current performance in the Court of Criminal Appeal is on par with first instance criminal matters and this also represents a good result.

The establishment of time standards in 2000 for first instance criminal and appeal cases (civil and criminal) has now provided court-determined benchmarks against which performance can be assessed. Performance against these standards was clearly and fully reported in the Court's *Annual Review* for 2000. First instance civil time standards have still to be developed, however, and this process is dependent on the implementation of the CAS.

In short, the Supreme Court has now assembled many of the elements required to improve the efficiency and effectiveness of case processing. The major outstanding issue is the availability of management information. As CAS is the "catch all" solution to this problem, it is essential this system is appropriately tailored to the needs of the Court and implemented in a timely way.

Recommendations

20. The Supreme Court should establish civil time standards as soon as data availability permits. These standards should reflect comparable best practice in other states and countries.

21. The Supreme Court adapt the proposed key performance indicators (KPIs) to its circumstances. The Inquiry recognises the implementation of the proposed KPIs will be more difficult for the Supreme Court given the varied nature of its civil case load. However, these indicators will assist in the active management of divisional and list caseloads by providing an insight into the pending caseload. Measurement of delay, by comparison, can only demonstrate what has happened.

Waiting Times in the District Court

Civil Matters: Median Time from Commencement to Finalisation (months)

	1998-9	1999-2000	2000-01
Sydney	13.4	11.4	11.9
Sydney West	10.9	10.4	9.3
Country	11.3	11.6	12.7
NSW	12.2	11.3	11.6

Source: Attorney General's Department, *Annual Report 2000-01,* p 165.

Criminal Matters: Median Time from Committal to Trial (months)

	1997-98	1998-99	1999-2000	2000-01
Accused in Custody	5.6	6.9	7.0	6.2
Accused on Bail	11.5	13.4	12.2	10.0

Source: BOCSAR Statistics provided by the District Court of NSW, 26 October 2001.

With regard to criminal case management, the Committee found:

> The proportion of cases resulting in guilty pleas on trial date remains high and is trending up in Sydney. In addition, Sydney West has failed to reduce the proportion of cases adjourning on the first day of trial.

Recommendation

22. While it is accepted that some proportion of accused persons will plead guilty on the trial date, further investigation is needed to identify factors that may be increasing the proportion of late guilty pleas and adjournments. These factors could include:

- the timeliness of applications for Legal Aid;
- the proportion of cases with privately funded defence counsel;
- the timing of involvement of senior Crown prosecutors;
- the timing of plea (or charge) bargaining;
- the timing of changes to indictments;
- the completeness and timeliness of police briefs;
- the availability of witnesses; and
- the availability of physical exhibits and expert evidence.

In general, the Committee found:

> The District Court has demonstrated a strong, strategic commitment to the effective and efficient use of court resources and this is reflected by the

significant reduction of trial delay in criminal cases. The Court's civil jurisdiction is, however, more problematic given the rapid growth in its caseload and the apparent reluctance of some practitioners to comply with case management requirements.

Recommendations

23. If practitioners continue to resist the case management of civil cases under Practice Note 33, cost orders should be applied. This remedy is preferable to dismissing matters as this latter course of action will injure the litigant who may not be at fault.

    In instances where it is clear the litigant is responsible for non compliance, the party in default should be required to show cause why their Statement of Claim, cross claim or defence should not be dismissed.

24. The greater use of alternative dispute resolution (ADR) must be promoted. Compulsory mediation should be ordered in appropriate cases. With regard to arbitration, specialist arbitrators should be considered for use in matters on the specialist lists and greater regional access should be provided.

Waiting Times in the Local Court

Waiting times in the Local Court are currently reported without distinction between civil and criminal matters.

Waiting Times in the Local Court

	2000-01	1999-2000	1998-9	1997-8	1996-7	1995-6
Median (weeks)	14	14	13	13	13	11

Source: Attorney General's Department, 2001, *Annual Report 2000-01,* p 168.

In general, the Committee found:

Although waiting times in the Local Court compare very favourably to the results achieved in similar jurisdictions in other States and Territories, case finalisation times have increased by nearly 30 per cent since 1995-96. This has occurred in an environment of strong criminal case growth although, until 2000-01, civil caseload was in decline. Given this environment, it is essential the Court seeks to understand and manage its caseload strategically and proactively.

A Guide to Best Practice Standards in Court and Case Management in the Local Court was released last year and provides the Court's first statewide time standards plus general court and case management guidelines. These guidelines were developed by the Chief Magistrate in consultation with Magistrates across the State and are presented in the Guide as a reference for both the magistracy and court administrators. The Guide, therefore,

represents a significant step toward the implementation of consistent case management practices across the Local Court.

Implementation of the Guide will also improve the quality of management information available to Magistrates and administrators as separate statistics will now be collected on civil and criminal matters. This task and the collection of data to determine the Court's Key Performance Indicators will, however, be relatively difficult using existing information systems.

As for the Supreme Court, therefore, the Local Court has assembled most of the elements necessary to improve the efficiency and effectiveness of case processing. The major outstanding issue is, once again, the availability of management information. The timely implementation of an appropriately tailored CAS in the Local Court is of critical importance.

The Committee was concerned by the significant increase in pending caseload in the Small Claims Division and was in favour of a relatively aggressive approach to ensure full practitioner compliance.

Recommendations

25. The Court should further investigate the nature of pending matters in the Small Claims Division in terms of their median age and to determine whether any particular type of action is over-represented. Further increases in resources, beyond that proposed to manage the demurrage cases, may be necessary.

26. Where appropriate the Local Court should impose available sanctions on litigants and/or practitioners.

Finally, with regard to ADR, the Committee found:

Mediation and arbitration work extremely well in the Local Court. Usage in the General Division is particularly high.

Recommendation

27. Given the build up of pending matters in the Small Claims Division, mediation should be further encouraged.

The Committee received evidence regarding the particular difficulties faced by indigenous defendants and found:

More information is needed to assess the full impact of Aboriginal and Torres Strait Island (ATSI) cultural and social differences on both individual hearings and the effectiveness and efficiency of the justice system as a whole.

Recommendation

28. The courts should collect and analyse data on ATSI litigants as part of their standard dataset. The extent and effect of current judicial training programs in ATSI cultural and social issues should also be reviewed.

The Committee also heard evidence from a number of witnesses expressing concern about the closure of Local Court facilities in rural and regional NSW. The Committee found:

> While changing patterns in case demand may mean physical court resources need to be reorganised from time to time, the issue of key importance was the provision of a "just, quick and cheap" legal system throughout the State.

Recommendation

29. The Local, District and Supreme Courts should explore, as a matter of priority, ways in which technology can be used to provide cost effective justice to court users in rural and regional NSW.

Chapter One

Introduction

Performance Audits of NSW Courts

The Audit Office of NSW has reviewed the performance of the courts on several occasions:

- Performance Audit Report: Department of Courts Administration: Management of the Courts (a preliminary report) – April 1995;
- Performance Audit Report: Management of Court Waiting Times – September 1999; and
- Follow Up Performance Audit: The Management of Court Waiting Times – September 2001.

The 1999 Report recommended:

- standard time frames and targets be established to enable better assessment and management of the progress of cases through the courts;
- performance should be reported against these standards;
- strategic plans should be prepared and published by each court, in consultation with stakeholders;
- court Annual Reviews should describe progress against these plans; and
- accountability for court management should be better defined via the development of a system of management committees for each court. [8]

The 2001 Follow-Up Report found 93 per cent of the 1999 recommendations had been accepted and 57 per cent had been implemented.[9]

Progress in the Supreme Court

Although the Court did not accept the recommendation relating to publishing a strategic plan, it had:

- developed time frames for civil and criminal appeals and criminal trials;
- identified key milestones for the assessment of case progress, although it could not report on all measures using its existing systems;

---

[8] Audit Office of NSW, 1999, *Performance Audit Report: Management of Court Waiting Times*, p 4-6.

[9] Audit Office of NSW, 2001, *Follow Up of Performance Audits: The School Accountability and Improvement Model; The Management of Court Waiting Times*, p 19.

- indicated strategic direction via the Chief Justice's annual address;
- improved the quality of information contained in its Annual Reviews; and
- established a number of committees involving key stakeholders to assist in the planning and management of administrative matters. [10]

Progress in the District Court

Many of the improvements suggested by the 1999 report were already operating in the District Court and four of the recommendations had been fully implemented by 2001: establishment of time standards; published strategic plans; reporting progress against strategic plans; and the establishment of court management committees.

The only outstanding element was the reporting of performance against intermediate milestones in civil and criminal case processing. This will be possible when the new court management information system is introduced. [11]

Progress in the Local Court

The Audit Office found the Local Court had not improved as much as the other courts:

- some time standards had been established and key phases in case progress had been identified. However, reporting against these standards was limited by existing systems;
- Annual Reviews in 1999 and 2000 included improved information and had reported against strategic plan objectives;
- there was no current strategic plan available but the Court was preparing to publish its 2002-2005 plan; and
- the Court was reviewing the role of stakeholder committees in management. [12]

A Guide to Better Practice Standards in Court and Case Management in the Local Court was, however, released shortly after the Follow Up Performance Report. The Guide includes a strategic plan and time standards for both criminal and civil matters. It is discussed in greater detail in Chapter Ten.

---

[10] ibid, p 20-24

[11] ibid, p 24-28

[12] ibid, p 28-31.

Terms of Reference of the Inquiry

Under section 57 of the *Public Finance and Audit Act 1983,* the Public Accounts Committee is given the power to examine any report of the Auditor General laid before the Legislative Assembly and to report to the Assembly upon any item connected with such reports (sub-sections (1) (c1) and (1) (d)). The functions of the Committee do not include the examination of Government policy unless the matter has been specifically referred to the Committee by the Legislative Assembly or a Minister (sub-section (2)).

Within this context, the terms of reference of the inquiry, with respect to both civil and criminal matters heard by the Local, District and Supreme Courts of NSW, were:

- consideration of demand-related issues such as increasing civil litigation and the impact of growing caseloads in other forums;
- consideration of research findings concerning the causes of court delay;
- a review of the procedures employed to manage court waiting times in NSW and consideration of the approaches used in other jurisdictions;
- a review of the management information available in NSW courts; and
- any other relevant matters.

The terms included the following caveats:

- The Committee supports the maintenance of full judicial independence. Within this context, the Inquiry is only concerned with the efficient and effective management of court resources.
- The Inquiry will refer to, but not examine, the package of exposure drafts of criminal procedure Bills tabled in the Parliament by the Attorney General on 20 September 2001.

The closing date for submissions was 9 November 2001 (Appendix One: Advertisement Calling for Submissions and Appendix Two: Submissions to the Inquiry) and public hearings were conducted on 6 and 7 December 2001 (Appendix Three: Witnesses Before the Committee).

Chapter Two

Aspects of Court Performance

Performance Measurement and the Judiciary

Under the Westminster system, the judiciary is independent of Executive Government. In recent years, however, the growing emphasis on fostering greater effectiveness and efficiency in the public sector has led administrations worldwide to seek to measure and assess court performance.

This trend has led to considerable judicial comment regarding existing sources of judicial accountability and the appropriateness of "private sector style" performance measurement in the court environment.

Existing Sources of Judicial Accountability

Judges perform their duties in public and must give reasons for their decisions which may be appealed against and reviewed by higher courts. In addition, formal complaints mechanisms exist and judges may be removed by Parliament:

> Courts are open and accountable to an extent which frankly far surpasses that of the other arms of government: the circumstance that almost everything that courts do is done in public ensures that. Modern Judges embrace innovation, where that can benefit the litigants and where resources allow: these are not "Bleak House" institutions. These circumstances in particular should lead to acceptance of the "efficiency" of the courts of law – or perhaps better put, the accomplishment of their mission.[13]

Is Performance Measurement Appropriate in the Courts?

The new public sector emphasis on the provision of services to "consumers" is not regarded as appropriate for the courts who administer "the rule of law" for citizens with rights and duties rather than "consumers" with needs and desires:

> There is a clear tension between the individualistic culture of consumerism and the wider set of stakeholder interests that justice seeks to serve. How, for example, might the victim's interests be better served without damaging those of the defendant? Or how might the interests of the convicted offender in staying out of prison and serving a restorative community sentence, be reconciled with those of the wider society/local community, for whom public protection might seem the paramount consideration.[14]

---

[13] de Jersey, Paul, Chief Justice of Queensland, 2001, *The Judiciary: The People's Indispensable though Non-Elected Government,* Dr David Williams Lecture at the University of Queensland, Brisbane.

[14] Raine, John W, 2000, "Modernising Courts or Courting Modernisation", *International Journal of Public Sector Management*, Vol 13, No 5, p 397.

Box 2.1: Judicial Views on Performance Measurement

Not everything that counts can be counted. Some matters can only be judged, that is to say they can only be assessed in a qualitative way. It is of primary significance to recognise that there are major differences between one area of government activity and another as to the centrality of these matters that are capable of being reduced to quantitative terms. In some spheres of government decision-making the things that can be measured are the important things. In other spheres the things that are important are not measurable...

The compilation and publication of statistics relating to the measurement of [court] delay is a perfectly appropriate activity. Nevertheless, the most important functions performed by a court are not capable of measurement. In particular, the fundamental issue of whether or not the system produces fair outcomes arrived at by fair procedures is not capable of quantification at all. [15]

Chief Justice James Spigelman
Supreme Court of NSW

Accountability of those in public office is sought everywhere. All institutions are being scrutinised. The catch words of this age are transparency and accountability. Accountability is sought from the judiciary as well as from the people's representatives in the executive and legislature. Accountability takes different forms for people holding office in the different organs of State. Thus, systems of accountability appropriate to those holding positions in the executive and legislature are not appropriate to the judiciary. [16]

Justice Susan Denham
Supreme Court of Ireland

...judicial accountability should not only address qualitative aspects of judicial behaviour but also quantitative aspects which in turn raises consideration of productivity and benchmarking. Courts must consider internal benchmarking so that there can be accountability to the public for the collective productivity of the judiciary. The benchmarking however, must be driven from within the judiciary. If this does not happen then there may be uninformed and idiosyncratic external benchmarking, which would threaten and undermine judicial independence. [17]

Justice Stephen O'Ryan
Family Court of Australia

Additionally, performance measurement, with its understandable focus on what can be "counted" does not cope as well with the "intangible". If quantitative

---

[15] Spigelman, JJ, 2001, op cit.

[16] Denham, S, 2000, "The Diamond in a Democracy: An Independent, Accountable Judiciary", *Annual Conference of the Australian Institute of Judicial Administration,* Darwin.

[17] O'Ryan, Stephen, and Lansdell, Tony, 2000, "Benchmarking and Productivity for the Judiciary", *Journal of Judicial Administration,* August, Volume 10, Number 1, p 46.

measures then become the focus for "high stakes" decisions (for example, resource allocation), conduct can be distorted:

> Performance indicators are always partial and are always manipulable...Strategies of targeting the indicator, rather than doing the job properly, are always capable of being adopted...
>
> An organisation can always improve performance as measured, by reducing quality in ways which are not necessarily detectable. In the case of a slow degradation of the quality of justice, nothing particularly dramatic would occur. More corners are cut, as more pressures for expedition are exerted. The wishes of litigants are overridden more often. The quality of justice may be progressively compromised in small, incremental and barely perceptible steps but with an ultimate consequence that is unacceptable. By then it is too late.[18]

Despite these concerns, there is a growing recognition by the judiciary that the courts, as an arm of government, must be accountable to the public for all aspects of their performance – qualitative and quantitative:

> There is no necessary conflict between economy, efficiency and effectiveness and the requirements of justice in the sense of fair outcomes arrived at by fair procedures. Indeed, to a very substantial extent they reinforce each other. The traditional cliché – justice delayed is justice denied – was not derived from efficiency considerations. The exercise of legal rights is always devalued if delayed. Sometimes delay makes the exercise of rights impossible. All members of the judiciary will readily accept the importance of expedition from the perspective of justice. For that reason the managerialist objective to minimise delay will find no resistance from the judiciary. There is no conflict between the two sets of values here.
>
> The same is true with respect to the minimisation of the costs of access to justice....
>
> A third area is the minimisation of the costs to government. In principle the judiciary accepts that taxpayer's money should not be wasted. This is not, however, a priority which judges would regard as a priority of their own. To a substantial degree economy in this respect may be seen to be in conflict with the commitment to justice. The scope for disagreement between judiciary and managers with respect to this matter is, accordingly, greater.[19]

While it is appropriate to regard delay as a key aspect of court performance, it should not be assessed in isolation. The time taken to dispose of both civil and criminal cases cannot be reduced indefinitely if the interests of justice are to be maintained. At this time, however, the Public Accounts Committee believes there is considerable scope to enhance justice in NSW by reducing court delays.

---

[18] Spigelman, JJ, op cit.

[19] Spigelman, JJ, 2001, "The New Public Management and the Courts", *Family Court of Australia 25th Anniversary Conference,* Sydney.

Box 2.2: Should Justice be Quicker in NSW?

I indicated last year that the legal culture in this State that accepted that it took years to get a case on for trial in the Supreme Court had to change. The better practitioners have adjusted to that change. But the culture has still not gone. I reiterate that the profession must accept that delays in excess of two years in preparing a matter for a first instance trial in the Supreme Court is no longer appropriate, in the usual case. [20]

Chief Justice James Spigelman
Supreme Court of NSW

The Court has been responsible for a major reform in the administration of justice in this State. The majority of civil cases commenced in the Court are now finalised in less than 12 months. The criminal caseload has been halved in the past three years. We need to keep on improving the quality of justice and build on those achievements. [21]

Chief Judge Reg Blanch
District Court of NSW

The Strategic Plan for the Local Court now incorporates time standards for the finalisation of the criminal business of the Court and the disposition of civil matters...

Magistrates should familiarise themselves with [these] requirements...A persistent failure to observe the time standards will require explanation and justification...

...the time standards are not remote from your day to day work on the Bench. They should not be ignored or relegated to a subordinate place in your thinking. The community has an expectation that matters in the court list will be expeditiously managed and then finalised in a timely fashion. The time standards are an important medium that allow the court to fulfil its role of rendering justice to the community. [22]

Chief Magistrate Pat Staunton
Local Court of NSW

Defining and Measuring Court Delay

In simple terms, court delay is the time taken to finalise a case that is in excess of the time necessary to serve the interests of justice. This will vary with the nature and complexity of matters under consideration.

---

[20] Spigelman, JJ, 2002, *Opening of the Law Term Dinner,* Address to the Law Society of NSW, 29 January, Sydney.

[21] District Court of NSW, 2001, *Strategic Plan,* p 1.

[22] Local Court of NSW, 2001, *A Guide to Best Practice Standards in Court and Case Management in the Local Court*, p 33.

The courts of NSW have set time standards (see Chapters Eight, Nine and Ten) within which cases are to be "finalised". The assessment of the proportion of cases which do not meet these targets provides a measure of delay.

There is no Australia-wide standardisation of data collection which means it is difficult to achieve a valid comparison of delay (or other) court statistics.[23]

Comparing Timeliness in the Civil Courts

Civil statistics from all States and Territories are published annually by the Steering Committee for the Review of Commonwealth/State Service Provision[24] in its *Report on Government Services.*[25]

At this time, however, there is no nationally-agreed classification system for civil matters which means the results from different States and Territories are based on different data definitions and cannot be compared in any meaningful way. NSW is working in partnership with the other States and Territories to improve this situation.[26]

Comparing Timeliness in the Criminal Courts

The *Report on Government Services* also provides statistics on criminal court performance. This information is based on nationally-agreed classifications but differences in the interpretation of these classifications and in the jurisdictions of criminal courts in different States and Territories make comparisons difficult.

The National Criminal Court Statistics Unit (NCCSU) of the Australian Bureau of Statistics (ABS) was established in 1994 and provides information on the higher criminal courts (District and Supreme Court level).

---

[23] This view has been recently expressed by both Chief Judge Blanch of the District Court of NSW (Merritt, Chris, "Judge attacks court comparisons", 2002, *The Australian Financial Review,* 1 February, p 56) and Judge Michael Forde of the Queensland District Court ("What Model of Court Governance Would Optimise the Expeditious Delivery of Justice, Judicial Independence and the Accountability of Queensland's Court System", 2001, *Governance and Justice Conference*, 10 July, Griffith University).

[24] The Review was initiated by the Prime Minister, Premiers and Chief Ministers at the Premiers' Conference in July 1993. It operates under the auspices of the Council of Australian Governments.

The two main tasks of the Review are to develop agreed national performance indicators for government services (which are published in the annual Report on Government Services) and to analyse service provision reforms.

The Steering Committee for the Review was established in 1994 to manage the Review. It comprises senior representatives from Commonwealth, State and Territory governments, and a representative from local government. It is chaired by the Chairman of the Productivity Commission which also provides the Secretariat.

[25] The information provided by the Report is covered in detail in Chapter Four – Comparisons of Court System Performance.

[26] Feneley, John, Attorney General's Department Further Response to Supplementary Questions.

The Unit receives funding from the Standing Committee of Attorneys-General (SCAG)[27] and is the subject of a Memorandum of Understanding recently negotiated by SCAG members and the ABS which seeks to improve the quality and comparability of court administration data by standardising definitions, classifications, coding, recording and reporting.[28]

The Unit was reviewed by Associate Professor Chris Cuneen[29] late last year with SCAG considering the review at its March 2002 meeting. SCAG noted the performance of the NCCSU was unsatisfactory, and approved funding for another 12 months subject to the outcome of a further review in 2002.[30]

Key Performance Indicators

In February 2000, a joint project by the Attorney General's Department of NSW and Justice Research Centre led to the release of *Model Key Performance Indicators for NSW Courts.* This document provides four measures to help Judges, Magistrates and court administrators determine whether cases are likely to be delayed. These indicators, therefore, will assist in the proactive management of court caseloads rather than simply measuring delay after the event:

- backlog – the number of pending cases that are taking too long (versus the Court's time standards). This measures whether the Court is meeting its time standards;
- overload – the number of cases on hand in excess of the number the Court can be expected to process within time standards. This measures whether the Court will continue to meet its time standards;
- clearance ratio – the ratio of case registrations to finalisations over a reporting period. This indicates whether the court is heading for, keeping out of, or getting out of "trouble" in terms of meeting time standards in the future;
- attendance index – requires the Court to adopt a standard for the maximum number of times parties should be required to attend Court before their case is finalised. It is the number of pending cases in which there has been more than the benchmark number of attendances. "Trips to the Courthouse" is highly correlated with the cost of litigation. [31]

---

[27] This Committee is made up of all Australian Attorneys-General (Commonwealth, State and Territory). It seeks to achieve uniform legislation in appropriate cases or to harmonise legislative and other action with the portfolio responsibility of its members. It also provides a forum for discussion by members of matters of mutual interest.

[28] Steering Committee for the Review of Commonwealth/State Service Provision (SCRCSSP), 2002, *Report on Government Services 2002*, AusInfo, Canberra, p 500.

[29] Professor Cuneen is the Director of the Institute of Criminology at the University of Sydney.

[30] NSW contributes $80,000 per annum to the Unit.

[31] Glanfield, L and Wright, E, 2000, *Model Key Performance Indicators for NSW Courts,* Justice Research Centre, Sydney, p 5.

The first three measures are now being considered and implemented by NSW Courts (see Chapters Eight, Nine and Ten). The appropriate definition and use of the attendance index is, however, still being determined.[32]

Measurement of Other Aspects of Court Performance

Steering Committee for the Review of Commonwealth/State Service Provision

In addition to statistics on case completion times, the Steering Committee provides statistics on:

- access – court fees per lodgement; adjournment rates and the proportion of court locations outside urban areas (compared to population outside urban areas); and
- efficiency – cost (expenditure less in-house revenue) per lodgment and per finalisation.

Other indicators suggested by the Committee for future reporting include:

- quality – as indicated by client satisfaction and measurement of ADR services; and
- enforcement – of court warrants.

The Steering Committee's Court Administration Working Group is currently developing a new performance indicator framework for possible inclusion in the 2003 report.[33]

The types of indicators used by the Steering Committee emphasise process. This focus is indicative of the difficulties involved in measuring the actual work, that is, the enforcement of "the rule of law", of the courts.

United States Bureau of Justice Assistance

The Bureau released the *Trial Court Performance Standards and Measurement System* in 1997.[34] This system represents one of the most detailed regimes of court assessment and was developed by a 14-member Commission including State and local judges, court administrators and academics. It presents goals in five areas:

- access to justice;

---

[32] See Chapter Ten of this Report for evidence from the Supreme Court of NSW on the attendance index.

[33] Steering Committee for the Review of Commonwealth/State Service Provision, op cit, p 501.

[34] Bureau of Justice Assistance, 1997, Trial Court Performance Standards with Commentary, Monograph and Bureau of Justice Assistance, 1997, Trial Court Performance Standards and Measurement System , Program Brief.

- expedition and timeliness;
- equality, fairness, and integrity;
- independence and accountability; and
- public trust and confidence.

These goals represent the courts' mission and each includes several performance standards with underlying measures proposed as management tools. There are 22 standards and 68 measures and, of these, only those referring to expedition and timeliness, the enforcement of fines and orders, and records handling can be assessed in a concrete, non-subjective manner.

The other measures rely on observation, simulations, surveys and interviews – techniques which are inherently difficult to apply in an environment where "service users" are split into "winners" and "losers". Appendix Four provides further details.

Conclusion

The concern of the judiciary regarding the application of "standard" performance measurement and management to the courts system appears well-founded.

Justice delayed may, however, represent justice denied and delay continues to be a problem for courts around the world.

Finding

While timeliness is only one aspect of court performance, the reduction of delay is an appropriate goal for both the judiciary and court administrators in the pursuit of a more effective and efficient legal system.

Effective use of case processing data depends on its quality and availability. It is, therefore, essential the statistical methods used in NSW are consistent internally and also provide an appropriate basis for comparison with other Australian States and Territories. While it is recognised that the Attorney General's Department of NSW is actively involved in national efforts to develop common data standards for Australian jurisdictions, this goal has yet to be reached.

Recommendation

1. The Attorney General's Department of NSW and the Courts of NSW should continue to work vigorously with the Australian Bureau of Statistics and other States and Territories to establish appropriate common data standards for the measurement of the effectiveness and efficiency of court administration.

Systems requirements for effective court data collection will be discussed in Chapter Seven.

Chapter Three

The Justice System

The performance of the courts – both civil and criminal – cannot be viewed in isolation. It represents a complex interplay between a range of stakeholders – both public and private – who often have conflicting interests.

This chapter seeks to explore the roles of the different players in the justice system and the ways in which they impact each other and the courts.

Criminal Justice

Appendix Five provides a glossary of terms and details how a case progresses through the criminal justice system.

NSW Police

The NSW Police:

- investigate reported offences under State and Commonwealth legislation;
- arrest and charge/summons alleged offenders;
- prepare briefs of evidence for use by police prosecutors or the DPP;
- prosecute alleged offenders with regard to summary offences and indictable offences which are to be dealt with summarily in the Local Court.

Changes in the rate and type of arrests by the police impact the demand experienced by other players in the criminal justice system. This has resource implications for all "downstream" agencies starting with the Local Court:

> **Ms ANDERSON:** The Local Court workload is very much related to police activities. You increase the number of arrests you increase the work in the Local Court. That is the main driver.[35]

In recent years the DPP has sought to use the Local Court, wherever possible, as an alternative to committal to the District Court.[36] The Legal Aid Commission has been actively involved with the DPP in a Pilot Committal Scheme that has effectively meant an increase in the number of matters being dealt with to finality in the Local Court (refer Appendix Six). These issues, plus increased police activity, has led to a significant increase in both the size and complexity of the criminal workload of the Local Court.[37] This has affected the Magistrates and

---

[35] Anderson, Anita, Director, Local Court of NSW, Transcript of Hearing, 7 December 2001, p 33.

[36] Local Court of NSW, 2001, *Annual Review 2000,* p 10.

[37] Case registrations have increased by 22 per cent in 6 years to 257,020 in 2000-01. Source: Attorney General's Department of NSW, 2001, *Annual Report 2000-01,* p 167.

administrators of the Court as well as the defence counsel and police prosecutors who work there:

> This policy direction by the DPP has had a significant impact upon the delivery of police prosecuting services across the State to the Local Court and logistical support within...Court and Legal Services.[38]

Investigating police officers were impacted by the 1998 amendment of the *Justices Act 1902* to make provision for the service of briefs of evidence for prescribed summary offences.[39] Police were required to serve these briefs on defendants at least 14 days before a hearing[40] where a plea of "not guilty" had been entered.

This timeframe led, in some instances, to cases being dismissed because the brief of evidence had not been served and, in cases where guilty pleas were made "on the steps of the court", police resources were lost not only in the preparation of briefs but also in attending court as witnesses.

The position was amended by Practice Direction 2 of 2000 of the Local Court which requires that the Magistrate set a timetable for the service of the brief (generally giving at least three weeks for its preparation) and that the defendant, having received the brief, confirm their plea before a hearing date is allocated (thus avoiding late pleas):[41]

> If Practice Direction No 2 of 2000 was to be altered, further reducing the current time standards for the service of summary briefs of evidence in the Local Court, the [Court and Legal] Service would be unable to meet those standards.[42]

A more recent legislative change was the introduction of the *Criminal Procedure Amendment (Pre Trial Disclosure) Act 2001.* Under this Act a "fixed indictment" needs to be served during the four weeks after committal. This means the police brief, including forensic evidence, must be complete at committal.

> **Mr COLLIER:** ...what impact would you expect [the fixed indictment requirement] to have on the workflow of police?
>
> **Mr HOLMES:** There will be an increase.
>
> **Mr COLLIER:** Significantly?
>
> **Mr HOLMES:** Particularly in complex trials. The use of listening device material, telephone intercept material, protected witnesses, a whole range of issues. The

---

[38] Holmes, Michael, NSW Police Submission to the Inquiry, p 4.

[39] A prescribed summary offence is defined in s66A as one for which a penalty notice may be issued or "an offence prescribed by the regulations for the purposes of this paragraph." Indictable matters that are being dealt with summarily are treated as prescribed summary offences (s66H).

[40] Under s66B this period may be varied if the defendant consents or if the Court determines that the circumstances of the case require a different timetable.

[41] Chief Magistrate of the Local Court, *Practice Note 2 of 2000.*

[42] Holmes, op cit, p 9.

> disclosure is going to have a major impact on the investigative regime. We have been working very closely with the DPP and establishing education packages for the service. There will be major education of police in this area.[43]

The timeliness and completeness of Police briefs was raised by the DPP[44] and the Legal Aid Commission as a continuing source of delay:

> **Mr HUMPHREYS:** Whilst the police generally are very good at providing the witness statements, they experience themselves considerable delay in getting forensic material in terms of getting post-mortem reports, toxicology reports and scientific evidence that makes the brief complete, and that can have significant impacts. For example, you can generally get the majority of the police statements normally within a month of a committal hearing - there may be some outstanding - but you may not get the forensic material for another two months after that. Now that significantly delays a matter.[45]

The Police agreed obtaining scientific evidence could be problematic:

> **Mr HOLMES:** Some of the delays are involved in getting analytical certificates and some basic mechanical certificates and forensic procedure certificates. [46]

To reduce the impact of this problem, the Police may, with the Court's permission, provide a partial brief including the majority of evidence in summary matters. The police prosecutor will advise the Court and the defendant what evidence is outstanding, when it is expected to be available and why it has been delayed. The provision of the partial brief, however, allows the defendant and their representative to start considering their case strategy.[47]

The Police advised the Inquiry that former Commissioner Ryan had targeted the issue of brief improvement. [48] The priority attached to this area is reflected by the range of initiatives that have been implemented or are under development including:

- issue of the Police Education Brief Preparation Guide to all police in November 1999 (including model briefs) accompanied by related training;
- establishment of Brief Managers at all Local Area and specialist commands. (These officers have received training in legal principles and oversee brief preparation);

---

[43] Holmes, Michael, Solicitor and General Manager, Court and Legal Services, New South Wales Police, Transcript of Hearing, 6 December 2001, p 56.

[44] Cowdery, Nicholas, Director of Public Prosecutions, Transcript of Hearing, 6 December 2001, p 15.

[45] Humphreys, Douglas, Director, Criminal Law Branch, Legal Aid Commission of NSW, Transcript of Hearing, 6 December 2001, p 23.

[46] Holmes, Michael, Solicitor and General Manager, Court and Legal Services, New South Wales Police, Transcript of Hearing, 6 December 2001, p 54.

[47] Holmes, Michael, NSW Police Submission to the Inquiry, p 6.

[48] Correspondence from former Police Commissioner, Peter Ryan to the then Minister for Police, Paul Whelan, 3 December 1997.

- issue of Standard Operating Procedures to all police regarding compliance with Practice Direction No 2 of 2000 of the Local Court;
- Brief Improvement Project – which includes some 53 initiatives in brief preparation, brief management, education, information technology and management accountability including:
  - establishment of Failed Prosecution Review Panels to systematically assess the reasons for withdrawn/dismissed prosecutions;
  - consideration of other Australian policing agencies to determine best practice in brief management;
  - enhancements to the existing Computerised Operational Policing System (COPS) – including electronic dissemination of hearing notices and brief monitoring (which will allow Brief Managers and prosecutors to record dates received and quality assessments);
  - e-Briefs – a multi-agency initiative with the DPP (lead agency), the Legal Aid Commission and the Attorney General's Department which will allow briefs to be transmitted electronically rather than in their current paper form;[49]
  - Electronic Referral of Indictable Charges (ERIC) – which allows the transfer of indictable charges to the DPP and direct communication by the DPP with investigating officers, Brief Managers, police prosecutors and Court Process Officers;
  - Multimedia Briefs Project – will allow the assembly of a brief of evidence electronically with statements, plans, photographs and video recordings; and
  - Best Practice Briefs and resources for Brief Managers on the Intranet. [50]

Finding

The quality and timeliness of police briefs of evidence continue to be a source of delay in the Local Court. NSW Police have recognised significant improvement is required and have undertaken some relatively comprehensive reforms, particularly in the use of information technology.

Recommendation

2. The effectiveness of the reforms being implemented by NSW Police in the quality and timeliness of police briefs should be assessed at some stage in the future. In the interim, NSW Police should consider including these reforms in its review of the Court and Legal Services Division.

Delays in obtaining forensic evidence will be considered in greater detail with reference to the Division of Analytical Laboratories of the Institute of Clinical Pathology and Medical Research.

---

[49] See page 23 for further details of e-Briefs.

[50] Holmes, Michael, NSW Police Response to Supplementary Questions, p 15.

Some witnesses suggested legal effectiveness and efficiency would be advanced if police prosecutors were replaced by DPP solicitors in the Local Court:

> **Mr COWDERY:** I firmly believe that my officers should replace police prosecutors throughout the system, that means right through the Local Court. I have a strong belief in that; I always have since I was appointed to this position seven years ago and it will remain my position. It is supported by the Local Court and by many other agencies as well: the Bar Association, the Law Society and so on...There was a pilot scheme conducted at the Campbelltown court complex and at Dubbo, as an example of a country court, and for six months in both of those courts my lawyers replaced police prosecutors and conducted all of the summary proceedings. That pilot scheme was subject to very close and critical analysis by a government, independent government, assessment team and the reports from that team were extremely favourable, universally favourable and supportive of the change of role because of the benefits that could be achieved.[51]

And:

> **CHAIR:** The Office of the Director of Public Prosecutions expressed a view that they would like, or are best suited, to take over the role the police prosecutors play primarily in the Local Courts. What is your opinion about that in terms of say court time management but also generally?
>
> **Mr CRAIGIE:** I would be very much in favour of that. With great respect to the Police Service, we believe, I think I can speak on behalf of my colleagues, that the administration of public justice is very much the business of people who have obligations to the court, ethical obligations to the court, and that requires the professional ethics of lawyers committed to that sort of ethos. Many police prosecutors have a strong sense of ethics but the fact of the matter is that they are not officers of the court. They may also have to work under the difficult reality that the courts must rely on them for dispassionate advocacy, when in fact their employer is also their client and perhaps in some circumstances the entity upon whom they rely for career promotion. It has always struck me to be an unsatisfactory set of affairs. If there are people within the Police Service of talent and experience who can be employed as prosecutors, in my view it should be on the basis that they have the benefit of proper qualification as lawyers, and many of them have reached the stage where they would be eligible for that qualification, and they should be brought under the umbrella of the Director of Public Prosecutions. I should say there is also the advantage of there being the potential for a seamless conduct of matters from commencement through to the superior courts.[52]

The *Final Report* of the Wood Royal Commission summarised the arguments for and against retaining police prosecutors and recommended the responsibility for all prosecutions should be progressively transferred to the DPP (see Box 3.1).[53]

---

[51] Cowdery, Nicholas, Director of Public Prosecutions, Transcript of Hearing, 6 December 2001, p 15-16.

[52] Craigie, Christopher, Acting Deputy Senior Public Defender, Transcript of Hearing, 6 December 2001, p 65.

[53] Royal Commission into the NSW Police Service, 1997, *Final Report,* p 319.

Box 3.1: The Pros and Cons of using Police Prosecutors in the Local Court

The arguments for transferring Local Court prosecutions to the DPP relate to:

- the need for independence and accountability;
- the professional skill of the DPP staff;
- the greater preparedness of DPP staff to discontinue matters that should not be before the courts;
- the greater discretion of DPP staff and greater accountability for their decisions;
- the absence of any incentive or pressure for DPP staff to defend police witnesses where their credit, reliability or integrity is contested;
- the professional duty DPP staff owe to the courts, and the professional standards that bind them as members of the legal profession; and
- the greater preparedness of DPP staff to report matters in relation to misconduct of police, seen in the course of their work.

The arguments for the retention of police prosecutors in the Local Courts relate to:

- the fact that a transfer of the prosecution function to the DPP would significantly affect the careers of police prosecutors;
- the difficulties and possible expense involved in the transfer of prosecutorial responsibility across the State;
- the loss of experience of those police who have served long periods in this work;
- the loss of a source of quick practical advice currently available to police investigating criminality or considering whether to initiate a prosecution;
- the difficulties that would be faced by a large number of other government agencies who use the police prosecutor for their advocacy; and
- the contribution prosecutors make in the training and education of other police.

Source: Royal Commission into the NSW Police Service, 1997, *Final Report*, p 317-318.

In 1996, summary offences were prosecuted by DPP solicitors in a pilot in Dubbo and Campbelltown. A report on the pilot, released by the Premier's Department in May 1997, evaluated the pilot courts in terms of legal integrity, efficiency and effectiveness, and support for victims. The findings from the pilot were:

- The legal integrity of the Pilot prosecutions were superior compared with the previous Police prosecutions.
- There was no clear statistical evidence of differences in the efficiency or effectiveness of the Pilot prosecutions, or the Pilot outcomes, compared with the previous Police prosecutions. However data not considered by the Bureau of Crime Statistics and Research suggest that the DPP prosecutors were at least as fast in disposing of defended cases as Police prosecutors, and at Campbelltown, disposed of a proportionately larger number of defeated matters.

- Victims groups, non-government community groups, Legal Aid groups, local Law Society representatives and Magistrates were strongly supportive of DPP prosecutions compared with previous police prosecutions for a variety of reasons. While stating the previous police prosecutors were, individually, hard working and honest, DPP officers were described as having a greater knowledge of the law, were usually more prepared and professional in court, showed a higher sensitivity to the needs of women victims and were seen to be actively and professionally liaising with other justice agencies to improve communication between the different agencies, develop a better understanding of each others' roles, and to discuss problems or resolve conflicts.

- Police Prosecutors and other Police and civilians employed in the Police Service's Court Process activities were not supportive of DPP prosecutions, and were strongly not supportive of working with private sector prosecutors. [54]

- When all relevant factors are considered, it is clear that having the DPP responsible for, and prosecuting, summary matters is also the most cost-effective option.[55]

The Report, therefore, recommended the DPP should take over the prosecution of summary matters for reasons of both policy and economy with the "DPP option" expected to cost $15.2 million per annum when fully operational (25 per cent cheaper than the police prosecution service at that time). [56]

However, the a report on the pilot included an evaluation by the NSW Bureau of Crime Statistics and Research (BOCSAR) which found: [57]

> ...there was **no** evidence of any changes in: the rate at which guilty pleas were entered; the conviction rate for persons pleading not guilty; and the time taken to dispose of defended cases.
>
> There are, however, two important caveats to our conclusion. The first is that the Bureau had no hand in the basic design of the study, thus it is based on the behaviour of only two experimental courts when in fact a far larger number of experimental courts, randomly selected, would in fact be required to draw a more robust conclusion. The second is that a study period of six months is very short and it might be argued that any changes could not be adequately detected within this time period.

In response to these issues, the Police have made a number of reforms, including:

- the introduction of a code of conduct for police prosecutors, based on the ODPP Guidelines and the NSW Barristers and Solicitors Rules;

---

[54] NSW Premier's Department, 1997, *Prosecuting Summary Offences: Options and Implications*, p 5-6.

[55] ibid, p 7.

[56] ibid, p 7.

[57] NSW Premier's Department, 1997, *Prosecuting Summary Offences: Options and Implications.* Written submission from Dr Don Weatherburn, Director, NSW Bureau of Crime Statistics and Research, 19 February 1997.

- the establishment of a Professional Standards Section within the Court and Legal Services Division to further impart ethical standards and encourage additional academic studies;
- the establishment of benchmarks to measure the quality of evidence presented to the Local Court; and
- the introduction of quality control and integrity audits to monitor the ethical and professional performance of police prosecutors.[58]

Recommendation

3. The current review of the Court and Legal Services Division of NSW Police should consider the transfer of the prosecution function from NSW Police to the DPP.[59]

Institute of Clinical Pathology and Medical Research: Division of Analytical Laboratories

The Division of Analytical Laboratories (DAL) carries out scientific testing for NSW Police. DAL and the Institute are, however, organisationally part of NSW Health because most of the Institute's work is performed for that Department.[60]

DAL has a total budget of $11.8 million for 2001-02.[61] Within this, the Criminalistics Directorate has a budget of $4.7 million, with NSW Health (via the Western Sydney Area Health Service or WSAHS) contributing $2.6 million. Most of the remainder represents funding from the Police for DNA testing.[62] This organisational arrangement is anomalous. In Victoria, a Forensic Science Centre encompassing all aspects of scientific investigation has been established.

> **Dr VINING:** I think at the moment the State needs a State Institute of Forensic Sciences. We desperately need that. It has been languishing for the last 15 years with multiple proposals that one be set up. There is another group at the moment trying to set one up, but there does not seem to be a lot of progress being made. [63]

---

[58] Holmes, Michael, NSW Police Response to Supplementary Questions, p 3.

[59] A review of the "performance and structure" of Court and Legal Services was announced by the Police Minister and former Commissioner Ryan on 12 February 2002 as part of Stage Two of the restructure of the NSW police force. Source: *Press Release: More Police for Local Areas – Restructure Stage Two,* 12 February 2002, p 3.

[60] The Institute acts as a hub for 17 pathology laboratories serving more than 30 hospitals. It has operations in diagnostic testing, population health and screening, food quality, drinking water quality, environmental monitoring and public health as well as forensic science.

[61] Vining, Ross, Institute of Clinical Pathology and Medical Research Response to Supplementary Questions, p 3.

[62] ibid, p 4.

[63] Vining, Ross, Deputy Director, Institute of Clinical Pathology and Medical Research, Transcript of Hearing, 6 December 2001, p 46.

The establishment of a State Institute of Forensic Science is proposed in NSW Police's *Future Directions 2001-2005.* The Institute would be an independent statutory authority serving all parties in the justice sector on a 24 hour, 7 day a week basis.[64] The Inquiry has been advised that a proposal to establish the Institute was endorsed by former Commissioner Ryan and the Minister for Police but is still to be considered by the State Institute of Forensic Services Committee.[65]

The police fund DNA testing at DAL on a lump sum basis rather than paying a fee-for-service. The payment level is reviewed every three months on the basis of the actual work completed. The Forensic Services Group (FSG) of the police provides this funding while Local Area Commands and crime agencies submit samples for testing.

> **DR VINING:** There are some problems there, in that from the Local Area Commanders' point of view we are a free service, they do not pay anything, so there are no incentives for them to prioritise the work or limit the work they send us, so one of the problems that [we get] is that in relatively simple cases an officer might bring in a couple of dozen samples and want them all analysed, because it is not going to cost him or his Command any money, and so we are then left having to prioritise these and act as a gatekeeper. That then sometimes gets us offside with the police who say, "Well, why won't you do these all for me? I brought them all in" and [we have] to say, "Well, there's probably more pressing things to do than having to analyse a dozen samples from a simple break and enter. If you can work out which one is likely to have the DNA we'll process that for you." [66]

The police generally agreed with this assessment[67] and advised that the FSG is establishing guidelines to assist officers in screening and prioritising exhibits. With regard to the issue of "fee-for-service" versus "lump sum funding", DAL advised DNA analysis in Queensland was largely funded on a fee-for-service basis although, to guard against *under* use, the Service Agreement between the police and the laboratory defined minimum basic service levels. [68]

---

[64] NSW Police, 2000, Future Directions 2001-2005, p 38.

[65] Holmes, Michael, *NSW Police Response to Supplementary Questions,* p 13. The Committee is chaired by the Police Commissioner and includes: Director General of the Ministry for Police; Director General of the Attorney General's Department; Director General of NSW Health; Director General of the Cabinet Office, Director General of the Premier's Department (independent); the State Coroner, and the Director of the National Institute of Forensic Science.

[66] Vining, Ross, Deputy Director, Institute of Clinical Pathology and Medical Research, Transcript of Hearing, 6 December 2001, p 38.

[67] Holmes, Michael, *NSW Police Response to Supplementary Questions,* Attachment H: "It appears that some Local Area Commands (LACs) have taken samples to DAL for analysis and it is obvious no initial screening has taken place" and the fact that the budget rests with the FSG "does result in some LACs not taking responsibility for the number of samples forwarded to DAL".

[68] Vining, Ross, Institute of Clinical Pathology and Medical Research Response to Supplementary Questions, p 7.

(a) DNA and Forensic Biology

DAL received 844 DNA cases from 1 January 2000 to 30 September 2000. This compares to 3,318 cases submitted over the same period in 2001 – following the introduction of the *Crimes (Forensic Procedures) Act 2001.*[69] DAL will receive $2 million from the police for this activity in 2001-02 (compared to $0.5 million in 2000-01).[70]

Biological casework supports DNA profiling and is largely funded by the WSAHS. The budget for 2001-02 is $1.1 million.[71] The impact of the *Crimes (Forensic Procedures) Act 2001* on turnaround times is reflected below:

Table 3.1: Forensic Workload and Average Turnaround Times

	Average Turnaround Time	Cases Received in Month	Cases Completed During Month	Cases Pending at End of Month	Estimated Full Time Equivalent Staff
November 2000	90 days	90	123	356	13.6
May 2001	125 days	376	130	1,129	26.8
November 2001	160 days	420	192	3,112	33.8

Source: Vining, Ross, Deputy Director, *Institute of Clinical Pathology and Medical Research Response to Supplementary Questions,* p 8. Case completion rates do not immediately increase in proportion with staff increases because of the need to train technicians for this specialised work.

These results are well in excess of the Turnaround Times specified in the Deed of Agreement between the Police and WSAHS for DNA Analysis:

- simple cases (volume crime)
  - 80 per cent of urgent cases to be completed within 10 working days of case receipt;
  - 80 per cent of all cases within 30 working days and 95 per cent within 60 working days of case receipt; and
- complex case (major crime)
  - 80 per cent of urgent cases to be completed within 20 working days of case receipt;
  - 60 per cent of all cases within 30 working days and 95 per cent within 120 working days of case receipt. [72]

---

[69] Goetz, Robert, Institute of Clinical Pathology and Medical Research Submission to the Inquiry on Court Waiting Times, p 2.

[70] Vining, Ross, op cit, p 4.

[71] loc cit

DAL's failure to achieve its forecast turnaround times is not the result of the Police underestimating the amount of additional DNA work arising from the *Crimes (Forensic Procedures) Act 2001:*

> These timeframes are not being met, even though the estimates of the workload [by the police] has been accurate and there has been an increase in staff. The current turnaround time at DAL is below most, if not all, other laboratories in Australia. These delays have frustrated the police. [73]

DAL maintains it is underfunded for DNA testing compared to other Australian States and Territories and estimates an annual budget of $4.2 million ($0.65/capita) would be required to fully fund testing and analysis in NSW.[74] Other sources of court delay arising from DNA analysis and identified by DAL were:

- time required for police to screen and collate exhibits for casework;
- submission of additional items by police immediately prior to court proceedings; and
- relative complexity of DNA testing and interpretation – particularly for very degraded material or material containing DNA traces only. Detailed reports and peer review are often required. [75]

(b) Illicit Drugs

The backlog in early November 2001 was "unacceptably long" at 700 cases (some dating back to August 2001) and had resulted from:

- police and Magistrates issuing an increasing number of "Fast Track" orders (required within three weeks);
- recent police activity in "controlled operations", which are undercover and require a quantitative response within 48 hours; and
- an increase in the amount of drugs confiscated per arrest which has increased the number of analyses per case. [76]

In addition, funding[77] is largely provided by the WSAHS and has not changed significantly in more than a decade.[78] Today, DAL processes 7,000 drug cases a

---

[72] Deed of Agreement between the Commissioner of Police and the Western Sydney Area Health Service to Deliver DNA Analysis Service and the Establishment of a DNA Profile Database, Schedule 3, p 16.

[73] Holmes, Michael, NSW Police Response to Supplementary Questions, Attachment H.

[74] Vining, Ross, op cit, p 5-6.

[75] Goetz, Robert, op cit, p 3.

[76] Donkin, Paul, Institute of Clinical Pathology and Medical Research Submission to the Inquiry on Court Waiting Times, p 1.

[77] Funding is forecast at $1.2 million in 2001-02. Source: Vining, Ross, op cit, p 4.

[78] Vining, Ross, Deputy Director, Institute of Clinical Pathology and Medical Research, Transcript of Hearing, 6 December 2001, p 35.

year[79] with an average processing time of 6 weeks.[80] The clients of DAL, however, require results within 4 weeks.[81] These statistics do not include any impact from *Criminal Procedure Amendment (Pre Trial Disclosure) Act 2001* which commenced on 19 November 2001.

The case of DAL typifies the need for greater coordination in the criminal justice system. In dollar terms, it is an extremely small agency, but its work is crucial to both the police and the courts. The DAL is aware of these issues:

> ...the key theme of our responses is about resourcing and demand management. The courts, the police and ourselves are all struggling to meet the increasing demands being placed on us and this often results in each agency being less than satisfied with the performance of the others when the problem really lies in an inadequate coordination between agencies.[82]

Finding

The introduction of DNA analysis and the continuing growth in the volume and complexity of illicit drug analysis means the provision of effective, efficient and timely laboratory services to the criminal justice system is an issue of the highest priority. The Division of Analytic Laboratories is not, currently, providing a service that meets these criteria.

Recommendations

4. As a matter of urgency, the Forensic Services Group of NSW Police develop and distribute its proposed guidelines to assist investigating officers in screening and prioritising DNA exhibits.

5. As a matter of urgency, the establishment of a State Institute of Forensic Science be considered by the State Institute of Forensic Services Committee.

6. As immediate measures to improve the effectiveness and efficiency of exhibit analysis:

- the Deed of Agreement between the Commissioner of Police and the Western Sydney Area Health Service to Deliver DNA Analysis Service and the Establishment of a DNA Profile Database should be reviewed. This review should include the consideration of a fee for service payment system and the devolution of the Forensic Service Group budget to Local Area Commands and crime agencies;

---

[79] Donkin, Paul, Principal Analyst, Division of Analytical Laboratories, Institute of Clinical Pathology and Medical Research, Transcript of Hearing, 6 December 2001, p 40.

[80] Vining, Ross, Deputy Director, Institute of Clinical Pathology and Medical Research, Transcript of Hearing, 6 December 2001, p 41.

[81] Vining, Ross, Institute of Clinical Pathology and Medical Research Response to Supplementary Questions, p 5.

[82] ibid, p 1.

Recommendations (cont'd)

- illicit drug analysis should be reviewed to ensure: "fast track" and "controlled operations" protocols are understood and are being used appropriately; and laboratory funding/staffing is adequate to meet demand in a timely way (fee for service should be considered); and
- the Division of Analytic Laboratories should review best practice in other Australian states and territories (and overseas where relevant) both in terms of funding and laboratory operation for all forms of criminal exhibit analysis undertaken.

7. The Division of Analytic Laboratories (or a State Institute of Forensic Services) should be part of the Justice System Information Sharing project (as detailed on page 28).

Office of the Director of Public Prosecutions

The Office of the Director of Public Prosecutions (DPP) commenced operation in 1987 and took over day-to-day control of criminal prosecutions from the Attorney General. The DPP acts in:

- trials for indictable offences in the District Court and the Supreme Court;
- committal proceedings for indictable offences in the Local Court;
- summary hearings in the Local Court relating to child sexual assault and matters where a police officer is the defendant; and
- appeals in the District Court, Supreme Court, Court of Criminal Appeal and the High Court.

As noted previously, the prosecution of cases by the DPP is affected by the time taken by police investigators to prepare briefs. In addition, a 1998 Report from the Council on the Cost of Government found:

> 11 per cent of the time of all DPP prosecutors and lawyers was effectively wasted in 1997-8 because of the need for rebriefing or re-familiarisation after matters did not proceed as originally scheduled. [83]

On this basis, the marked improvement in overlisting in the District Court in recent years would have represented a significant productivity gain for the DPP.

The *Criminal Procedure Amendment (Pre Trial Disclosure) Act 2001* also has implications for DPP resources. A senior prosecutor will need to be available "at an early point" to determine the terms of the charge, the exact witnesses and

[83] Council on the Cost of Government, 1998, *Review of the Office of the Director of Public Prosecutions,* Appendix 2, p iii.

evidence and other details of the indictment. Additional funding has been provided to meet this requirement. [84]

In the past, Crown Prosecutors have only become involved with cases just before trial. This can affect other parties through, for example, the negotiation of late guilty pleas:

> **Mr COWDERY:** It is a resource issue very largely. We have certainly made some improvements in that area but it is not always possible to get the Crown Prosecutors who are going to be prosecuting trials involved in the matters at an earlier stage. In fact, usually it is not possible. Because the Crown Prosecutors are running trials day after day, week after week, they cannot be taken out of that process and put into pre-trial preparation, say, weeks ahead of the trial that is going to be coming up later on.[85]

The DPP is a major supporter of information technology in the justice system. As noted previously, it is the lead agency for the e-Briefs project and a joint partner with the Police in ERIC. Box 3.2 provides details of the advantages of e-Briefs compared to current procedures.

Legal Aid Commission

The Commission is the largest legal aid agency in Australia. In 2000-01:

- its income was $98.7 million with 42 per cent coming from the State Government;
- 23,893 case grants[86] were provided and 168,730 duty appearances were made;
- the private legal profession represented 57 per cent of all legally aided people in case matters in NSW with the remainder represented by inhouse lawyers. [87]

The activity levels of the Commission are impacted by policy and resource changes elsewhere in the justice system:

> Any increase in resources to the Local Court must be accompanied by an increase in resources to the Legal Aid Commission which is "downstream" from the courts in the call on its resources.[88]

---

[84] Cowdery, Nicholas, Director of Public Prosecutions, Transcript of Hearing, 6 December 2001, p 9.

[85] ibid, p 15.

[86] This included 8,279 grants for Family Law – a Federal matter. Source: Legal Aid Commission of NSW, 2001, *Annual Report 2000-2001,* p 2.

[87] ibid, p 2 and 12.

[88] Grant, Bill, Legal Aid Commission of NSW Submission to the Inquiry, p 2.

Box 3.2: Paper Briefs versus e-Briefs

Briefs of Evidence are prepared by police in paper form and used by all agencies in this format.

A brief for an indictable offence may average 500 pages and may be up to 20,000 pages for a complex matter. This brief is copied seven times by the Police, twice by Legal Aid, at least once by the DPP (plus multiple separate extracts), twice at the Local Court, once by the District Court, and again by the Supreme Court and Court of Criminal Appeal (if the case reaches this level). It usually takes two hours to pull apart, copy, reassemble and check a brief. The paper and copying cost for the 6,000 indictable matters heard each year is $2.13 million.

Apart from the effort and cost involved, paper briefs carry the risks of loss, delay, incompleteness, lack of integrity and inconsistency.

It is also very difficult to generate other information from paper briefs. For example, to search thousands of paper briefs to see if a particular witness or offender or vehicle has been mentioned elsewhere which may assist in establishing a witness' credibility, identifying an offender's potential association with other persons, or identifying a vehicle as being in a particular place is an extremely time and labour intensive process. With electronic briefs and search software this would be a relatively straightforward task.

Building a paper brief is time consuming. Police will generate several versions before the final copy is distributed. The prosecution solicitor will review and redevelop it and the Crown prosecutor may also add changes. This involves a great deal of re-keying – particularly when source material is often available on paper only. Transcription errors are a very real risk under the pressure of court time standards and high volume workloads.

Finally, security of a paper brief is difficult to control – especially when it is in transit.

By comparison, the use of e-Briefs by the Police, the Legal Aid Commission, the DPP and the prosecution will not only offer obvious efficiency savings and security benefits but will also allow briefs to be more quickly and effectively scrutinised, analysed and prepared. This will enhance both the effectiveness and the efficiency of the court process.

Participating agencies will complete Stage 1 – which includes a test involving electronic briefs distributed on CDs – by 30 June 2002. Full implementation is expected to be completed in 2005.

Source: e-Briefs Project Business Case 2001

Table 3.2: Legal Aid in the State Courts in 2000-01

	Number of Grants		Cost of Grants	
	Number	Proportion	$ million	Percentage
Supreme Court	119	1.0%	2.33	8.3%
District Court	3,657	28.7%	20.84	74.1%
Local Court	8,956	70.3%	4.95	17.6%
State Court Total	12,732	100.0%	28.12	100.0%

Source: Humphreys, Doug, Director, Criminal Law, Legal Aid Commission of NSW – Further Response to Supplementary Questions.

It is interesting to note that while 70 per cent of Legal Aid grants go to defendants in the Local Court, 74 per cent of grant expenditure takes place in the District Court. This suggests that increases in both Local and District Court activity will have a significant impact on Legal Aid budgets.

The Commission has identified sources of inefficiency in the legal system arising from the actions of other agencies:

- in the listing of committals and hearings in the Local Court – which is often due to delays in the preparation of complete briefs;[89] and
- the DPP practice of briefing of Crown Prosecutors close to the hearing date, as mentioned previously, may result in the negotiation of a guilty plea after significant Legal Aid resources have already been expended.[90]

Delays in Legal Aid funding can lead to court delays. In 2000, BOCSAR found 29 per cent of matters in the District Criminal Court were adjourned on the date they were first listed for trial. The Defence sought 61 per cent of these adjournments with most defendants requesting extra time because of problems with legal representation. These problems usually resulted from the accused not have Legal Aid funding or being unable to find suitable representation.[91]

The Commission has sought to reduce the time and complexity involved in applying for Legal Aid by:

- creating a single grant covering committal and trial – previously defendants had to re-apply after committal; and

[89] loc cit.

[90] ibid, p 7.

[91] Weatherburn, Don, and Baker, Joanne, 2000, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court,* NSW Bureau of Crime Statistics and Research, p 22 and 30. The findings of this report are explored in more detail in Chapter Five.

- establishing a specialised grants division in 2001. During 2000-01 the average time taken to determine an application was reduced from 11 days to 6.6 days.[92]

During 2001-02, the Commission is undertaking further reforms including piloting the electronic lodgement of applications.[93]

The Commission believes the lack of easily obtainable, reliable information on the activities of other agencies is an important issue[94] and regards the Justice Sector Information Sharing (JSIS) Project as an important development.

Sector information flows are largely paper-based which means:

- an information "big picture" – such as the behaviour of an offender – is very difficult to construct as information is scattered and virtually impossible to link;
- information is often not available to justice sector employees when needed to make important operational decisions;
- errors in information are increased through multiple re-entry into multiple agency computer systems. Additionally, different agencies have different definitions for information elements (for example, charge); and
- substantial costs are incurred through paper handling. [95]

When complete, JSIS will provide an on-line shared information facility for use by operational staff and strategic decision-makers. Data entry duplication will also be eliminated.

The Department of Information Technology and Management is lead agency for JSIS which includes the Attorney General's Department, NSW Police, DPP, the Legal Aid Commission, the Department of Juvenile Justice and the Department of Corrective Services.[96] Foundation projects have been identified and a business case developed.

---

[92] Legal Aid Commission of NSW, 2001, *Annual Report 2000-01,* p 24.

[93] ibid, p 25.

[94] Grant, Bill, op cit, p 7.

[95] Feneley, John, Attorney General's Department of NSW Response to Supplementary Questions, p 11.

[96] Feneley, John, Acting Deputy Director General, Attorney General's Department of NSW, Transcript of Hearing, 7 December 2001, p 74.

Box 3.3: Why An Integrated Justice Information System is Essential

Resource and policy decisions in any criminal justice department have the potential to significantly alter the capacity of other departments to achieve their corporate objectives. Notwithstanding this fact, criminal justice agencies generally tend to pursue their objectives as if they were fully autonomous entities rather parts of an integrated criminal justice system...

To some extent, the new enthusiasm for corporate planning which has swept the public sector has exacerbated these problems rather than ameliorated them. The attention to agency-specific goals and agency-specific performance indicators has tended to obscure the need for a global view of criminal justice system functioning. This is not to deny the value of corporate planning in the public sector. The point is rather that, no matter how well defined the corporate goals of each criminal justice agency, or how effective the strategies adopted in pursuit of them, it is impossible to run an equitable, efficient or effective criminal justice system where individual agency objectives and/or strategies conflict...

Despite the extraordinary overlap in their management information requirements, most criminal justice agencies only monitor demands on their resources when they appear at the front door. The District Court, for example, will typically keep track of the new work registered in that jurisdiction but pay no particular heed to the number of committals pending in the Local Court, though this is where its work comes from. The Court of Criminal Appeal will keep track of the number of new appeals registered but not the number of cases disposed of by the District Court, though this is where most of them come from. Corrective Services will keep track of the number of unsentenced prison receptions but not the size of the pending caseload in the Local and District Courts, though this will determine how long those received on remand will stay in custody...

These deficiencies can only be overcome by setting up an integrated justice information system. That is, a system which allows one to monitor the progress of any class of individuals from commencement of proceedings to termination of the last court order issuing from those proceedings. Under such an arrangement, police, court, prosecuting, legal aid and correctional authorities would all share access to a common array of criminal justice performance indicators. These indicators would allow every criminal justice authority to anticipate changes to the level of demand on their services. They would also make it much easier to analyse the causes of common problems in criminal justice management. [97]

Dr Don Weatherburn (1993)
Director, NSW Bureau of Crime Research and Statistics

[97] Weatherburn, Don, "Strategic Issues in Criminal Justice System Management", *Criminal Justice Planning and Coordination Conference Papers*, Australian Institute of Criminology, 19-23 April 1993, p 38-40.

Public Defenders

The Public Defenders are salaried barristers who act as counsel for legally aided defendants in serious criminal matters. As such, the Defenders work in the High Court, the Supreme Court, the Court of Criminal Appeal and the District Court.

Although the Public Defenders state they have experienced a very considerable improvement in court delays in recent years,[98] they acknowledge there is potential for pressure points to emerge:

> **Mr CRAIGIE:** We have a great interest in seeing that the Office of the Director of Public Prosecutions is properly resourced. If they are not properly resourced [and therefore serve notices late] the problem flows through to us and we are obliged to act in ways which may bring about delay.[99]

In addition, the issue of the mental fitness of litigants affects the time to disposal of any matters in the Supreme Court's criminal list. In such instances it is essential, in the interests of justice, that appropriate assessments are made:

> I suspect that the factors of delay relating to persons found mentally incompetent to stand trial arise only in part, if at all, from administrative processes brought to bear on the problem. Much of the difficulty is in inevitable delays required by the process of stabilisation, treatment and observation where the mental illness is of a nature requiring time in order to make predictions of possible recovery time.[100]

Underlying mental illness is estimated to affect nearly a third of the people appearing before the Local Courts.[101] This issue is discussed in greater detail in Chapter Ten.

Private Defence Counsel

Both the Law Society of NSW and the NSW Bar Association have supported the efforts of the courts to reduce delays by including rules relating to the "efficient administration of justice" in their members' rules.[102] Formal professional support and recognition of this kind is essential if court delays are to be reduced.

---

[98] Zahra, Peter, SC, Public Defenders Submission to the Inquiry, p 1-2.

[99] Craigie, Christopher, Acting Deputy Senior Public Defender, Transcript of Hearing, 6 December 2001, p 60.

[100] Craigie, Christopher, Public Defenders Response to Supplementary Questions, p 7.

[101] Jacobsen, Geesche, 4 June 2001, "Courts and jails clogged with the mentally ill", *The Sydney Morning Herald,* p 8.

[102] Law Society of NSW: Rule A.15 provides that the practitioner must complete all necessary work in sufficient time to enable compliance with the orders, directions, rules or practice notes of the court. Where the practitioner anticipates time standards will not be met, warning must be given to their client/other parties as soon as possible. Rule A.15.A provides that the practitioner must seek to ensure: the case is confined to issues that are genuinely in dispute; is heard as soon as practicable; evidence is limited to that which is necessary to advance/protect their client's interests; and time in court is limited to that which is necessary to advance/protect their client's interests.

Bar Association of NSW Rules 41-42A are very similar to the Law Society rules detailed.

The role of the profession in increasing court effectiveness and efficiency and is echoed in evidence from the Law Society's Criminal Law Committee (CLC):

> The manner in which criminal court lists are now being run reflects very favourably not only on the courts and the Attorney General's Department, but also on co-operation between prosecution and defence legal representatives.[103]

The CLC stated the centralised committals scheme[104] had greatly reduced delay in the District Court but issued the following caution emphasising the interlocking nature of the justice system:

> There is certainly the perception that the success of the centralised committals scheme and legislation enabling the Local Court to determine an increasing number of more serious indictable offences summarily have combined to increase the workload of the Local Court. The court's ability to deal efficiently with its workload has been assisted by the number of magisterial appointments in recent years...Nevertheless it is suggested that these developments in the Local Court should be closely monitored...[105]

And, more generally:

> The State Government should recognise that changing legislation, court procedures and court management practices also impacts on the limited budgets of the various services comprising the community legal sector...
>
> The importance of the Legal Aid Commission, Aboriginal Legal Centres and Community Legal Centres and Court Support schemes in facilitating access to justice for clients who would otherwise be unrepresented is well recognised. However, the [CLC] notes with concern the proportion of people appearing unrepresented before the Local Court has been increasing since 1997. A continuation of this trend will certainly have a marked negative impact on the efficiency of the Local Court and its ability to manage its workload.[106]

The issue of unrepresented defendants is detailed on page 34.[107]

The New South Wales Bar Association is a voluntary association of practising barristers. As previously discussed, the Association has used its members' rules to signal its commitment to the efficient administration of justice.

In addition, Rule 17B specifically deals with the issue of early guilty pleas:

---

[103] Meagher, Nicholas, *Law Society of NSW Submission to the Inquiry (Submission of the Criminal Law Committee),* p 1 (Note: The Submission has not been endorsed by the Law Society's Council but reflects the expert view of the Committee – Meagher, Nicholas, President of the Law Society of NSW, Transcript of Hearing, 6 December 2001, p 1).

[104] Refer Case Study on page 39.

[105] Meagher, Nicholas, op cit, p 2.

[106] ibid, p 1-2

[107] Other issues raised by the Law Society – such as access to court facilities in rural NSW will be discussed with relation to the relevant court jurisdiction in Chapters Eight, Nine and Ten.

> A barrister must (unless circumstances warrant otherwise in the barrister's considered opinion) advise a client who is charged with a criminal offence about any law, procedure or practice which in substance holds out the prospect of some advantage (including diminution of penalty), if the client pleads guilty or authorises other steps towards *reducing the issues, time, cost or distress involved in the proceedings.*

In its submission to the inquiry, the Association advised:

> It is now well recognised that significant inroads have been made in the reduction of [court] waiting time and in the streamlining of litigation processes. Doubtless, given the increasing role the courts play in case management, the process of increasing efficiency and effectiveness in delivering justice...will continue...
>
> Our commitment to increasing the efficiency of the court processes is...concomitant with our support of the principle that the parties must be afforded justice.
>
> Clearly, there is a natural tension existing between the utilisation of the public resource and the affording to the public an unfettered and unrestrained use of the resource. It is the Association's view that the courts themselves have thus far been able to achieve an appropriate balance between those competing interests. [108]

At the public hearing, the Association confirmed that the efficiency requirements of the courts had not affected the quality of justice:

> **Mr COLLIER**: As the courts have sought to shorten the time taken to finalise cases, have your members had to change the way they do their jobs to keep up with the courts?
>
> **Mr HARRISON**: Possibly. I am thinking of my own position. If I have had to, it hasn't been a matter that has occasioned any inconvenience or difficulty. That probably says that it was a reform, or these reforms were there to be made, and they have operated well.
>
> I cannot say that I am armed with information that suggests that practitioners have had great difficulty altering their strategies on behalf of clients. I certainly don't get people complaining to me that "we just can't run cases under a regime that requires us to get these cases on within a particular framework". The courts maintain a discretion which I trust they will continue to exercise in circumstances where if a case is not ready to proceed and if it does proceed the client will be prejudiced, to offer amelioration to these case management schedules with which we are required to comply, but I am not aware of significant complaint that that discretion isn't being fairly exercised by the courts. [109]

The Law Society shared this view:

> **Mr JOHNSTONE:** I would say that our members have become more efficient and more prepared for their cases on the due date than they used to be because, for example, a lot of people knew that if they were not prepared they could generally

---

[108] Walker, Bret, NSW Bar Association Submission to the Inquiry, p 1.

[109] Harrison, Ian, Senior Vice President, NSW Bar Association, Transcript of Hearing, 7 December 2001, p 14.

get an adjournment on any spurious basis, but now, with the tightening of procedures, the chances of getting an adjournment are so much less that they tend to be better prepared and when better prepared they tend to resolve the cases sooner.[110]

Mr GLACHAN: Does this mean that your members might take on less cases because once they could have put one off and done something else and now they have to concentrate more carefully on what they are doing? Has it meant that they cannot handle so much work?

Mr JOHNSTONE: No, I think what it means is that the cases are being turned over more quickly and the need for work to be done in each case is diminishing. Every time there is an adjournment or a further hearing in a case it automatically adds to the cost of the trial and the time taken in running that matter, so what has been cut out is a lot of repeat work and a lot of waste.

Mr MEAGHER: For example, in the Local Court, with the independent costing done of this, it costs between $300 and $600 extra in each case if you adjourn a matter.

Finding

The legal profession believes the "quality of justice" has not been negatively affected by implementation of case management practices and other administrative efficiencies.

Both the Law Society and the Bar Association supported the greater use of technology in the courts and said innovations introduced to date had been enthusiastically accepted by both the profession and the judiciary.

Mr HARRISON: My perception over the past ten years or so when technologies have been introduced and become available is that they have been embraced enthusiastically both by the courts and by the practitioners. You only have to go to the Supreme Court and you can see screens in many of them now, real time transcripts, international and interstate conferencing and evidence taking facilities -- these things have all been introduced and adopted and accepted and appear to be the way forward. They are certainly productive of efficiencies. [111]

Technology is a key issue in the advancement of judicial effectiveness and efficiency and is discussed in detail in Chapter Seven.

Unrepresented Defendants

In the Local Court in 2000, 49.2 per cent of defendants were unrepresented (60,637 people).[112]

---

[110] Johnstone, Peter, Councillor and Chairman, Litigation Law and Practice Committee, Law Society of NSW, Transcript of Hearing, 6 December 2001, p 8.

[111] Harrison, Ian, Senior Vice President, NSW Bar Association, Transcript of Hearing, 7 December 2001, p 15.

[112] BOCSAR, 2001, New South Wales Criminal Courts Statistics 2000, p 19.

Table 3.3: Case Outcomes for Represented and Unrepresented Defendants

Outcome of Matter	Represented Defendants	Unrepresented Defendants
Sentence after Guilty Plea	71.3	39.2
Proceeded to Defended Hearing	18.0	9.1
All Charges Dismissed without Hearing	6.7	5.4
Conviction Ex Parte	2.6	43.7
All Charges Otherwise Disposed of	1.4	2.6

Source: BOCSAR, 2001, New South Wales Criminal Courts Statistics 2000, p 19.

A third of the criminal hearings before the Local Court, therefore, were defended by unrepresented persons (some 5,500 people). Unrepresented criminal cases are rare in the District and Supreme Courts:

> **Ms ANDERSON:** The Local Court, more than any other jurisdiction, deals with unrepresented litigants. It certainly takes longer to deal with the matter when there is an unrepresented litigant involved. Certainly in the criminal aspect there is no doubt about that.[113]

The Legal Aid Commission indicated that while 82.7 per cent of applications for criminal grants had been successful in 2000-01, 3,041 applicants had failed to secure assistance:

> The legal aid means test is quite stringent...I have no doubt that court delays would be substantially reduced if the Commission could act for more unrepresented litigants in criminal matters but the funding associated with such an initiative would have to be provided to the Commission.[114]

The Local Court is presently unable to collect data on unrepresented defendants and so the delay and cost impact of this phenomenon cannot be further explored. It should be noted that the Local Court employs Chamber Magistrates to assist unrepresented defendants in understanding their legal options and in document preparation.

Finding

The overall impact of unrepresented criminal defendants on the court system is not known. What is certain is that, in jurisdictions where legal representation is the norm, unrepresented defendants can have a significant impact on court resources required by, and the "quality" of justice achieved in, their individual cases.

[113] Anderson, Anita, Director, Local Court of NSW, Transcript of Hearing, 7 December 2001, p 35.

[114] Bill Grant, Legal Aid Commission of NSW Response to Supplementary Questions.

Recommendation

8. The courts should collect and analyse data on unrepresented criminal defendants and unrepresented civil litigants as part of their standard dataset so the extent of this issue can be determined and its impact better managed.

The Courts

Table 3.4 Criminal Jurisdiction of NSW Courts

Court	Jurisdiction
Local	The Local Court is the largest summary jurisdiction in the Commonwealth (244,000 matters finalised in 2000-01).[115] Summary offences are decided by a Magistrate sitting without a jury and include assault, some drug offences and matters relating to driving. As previously noted, the Local Court is dealing with more matters which had previously been dealt with on indictment. Magistrates in the Local Court also conduct committal proceedings to determine whether there is enough evidence for defendants charged with serious offences to be tried in the District or Supreme Courts. Apprehended Personal Violence Orders (APVOs) and Apprehended Domestic Violence Orders (ADVOs) are within the jurisdiction of this Court. Between 1995-96 and 2000-01, applications for ADVOs increased by 39 per cent to 33,295 with applications for APVOs increasing by 37 per cent to 14,043.[116]
District	The District Court deals with a wide range of indictable matters from fraud and larceny to manslaughter, sexual assault and drug importation. The Court also hears appeals from cases determined in the Local Court.
Supreme	Murder, treason and piracy and other matters that carry a life sentence including trafficking large commercial quantities of drugs and aggravated sexual assault (gang rape). Recently the Chief Justice announced offences which may be "appropriately" penalised with a life sentence may be tried in the Supreme Court. The determination of "appropriateness" rests with the DPP.[117] The Court also determines appeals on points of law from the Local Court.
Court of Criminal Appeal	Appeals from District Court decisions and from decisions made by a single judge of the Supreme Court.

[115] Attorney General's Department of NSW, 2001, *Annual Report 2000-01,* p 167.

[116] ibid, p 168.

[117] Chief Justice of the Supreme Court, *Practice Note 122,* August 2001.

As previously noted, the criminal caseload of the Local Court depends largely on the activities of the police. In recent years, however, the complexity of cases being finalised in this jurisdiction has increased due to DPP policy.

In turn, the caseload of the District Court depends on the proportion of indictable – more serious – offences committed and on the number of appeals arising from decisions of the Local Court.

Finally, the caseloads of the Supreme Court and the Court of Criminal Appeal depend, respectively, on the proportion of very serious offences and on appeals arising from decisions of the District Court. For example, as a result of recent District Court efforts to reduce delay, the Court of Criminal Appeal experienced an increase in filings of 18 per cent in 1998 followed by a further increase of 8% in 2001.[118]

> **Mrs JOHNSTON:** We are getting a downstream effect, or an upstream effect if you like, of a significant amount of work that the District Court has done in recent years to reduce its backlog and delays in its criminal case loads. We are now seeing that flowing through in terms of the next stage to the Court of Criminal Appeal.[119]

The Courts expect that the introduction of a common Courts Administration System (CAS - Refer Chapter Seven) will provide them with a much greater ability to forecast and analyse their workloads. With regard to the District Court:

> **Mr FENELEY:** Our expectation is that we will have much greater immediate access to data in the Local Court, and for that matter in the Supreme Court, because there will be less barriers between the systems. Having the data itself will not be necessarily helpful unless we understand what the likely percentage of committals is going to be from criminal work in the Local Court. Really you also need to have access to better information about variations in charge rates, so if there is an increase in policing activity leading to an increase in charging of serious matters, we should be able to do some predicting...Over the next few years we will see a major project which will improve the sharing of information between justice agencies. With that and the capacity the CAS system should deliver, we should have a better capacity to predict.[120]

> **Mr CURRY:** I would add that the [Attorney General's] Department has developed a criminal justice system model to assist the theoretical modelling of the impact on the courts and ultimately on corrective services of, for instance, changes in policing activity. The model can be used to test different policy scenarios, so this can inform the planning process. [121]

---

[118] Johnston, Nerida, "Supreme Court of NSW Response to Supplementary Questions", *Attorney General's Department of NSW Response to Supplementary Questions.*

[119] Johnston, Nerida, Chief Executive Officer and Principal Registrar, Supreme Court of NSW, Transcript of Hearing, 7 December 2001, p 46.

[120] Feneley, John, Acting Deputy Director General, Attorney General's Department, Transcript of Hearing, 7 December 2001, p 57-58.

[121] Curry, Greg, Director, Executive and Strategic Services, Attorney General's Department, Transcript of Hearing, 7 December 2001, p 58.

This model, as detailed in *Simulating the New South Wales Criminal Justice System: A Stock and Flow Approach,* is detailed in Appendix Seven.

Finally, trends in civil caseloads in all three jurisdictions will affect the level of resources available for criminal justice.

Department of Corrective Services

The Department of Corrective Services represents the final destination of a "successful" criminal prosecution. As such, the prison population represents the sum total of the policy and resourcing decisions of all other justice agencies.

If delay increases in the higher courts, the prisoner population will rise with the increase in inmates on remand. This impact should not be overstated, however, as a high proportion of persons whose cases are finalised in the higher courts are convicted and their sentences include the time spent of remand.[122]

Inter-Agency Cooperation

> **Mr HUMPHREYS:** There has been a very conscious effort over the last few years for the parties [in the justice system] to be involved in significant matters in terms of efficiency and trying to work together. For example, the electronic service of briefs project is a joint project between the DPP, Legal Aid and Courts, and the players are involved there and we believe it will have significant benefits. It requires, however, a whole-of-justice agency approach...the better information we have, the better statistics we have and the more the parties are able to work together and are jointly appropriately funded, then we will be able to get results.[123]

Current measures include:

- cooperative forums such as the Criminal Justice System Chief Executive Officers Forum and the Criminal and Civil Justice Forum. These Forums have generally been held twice a year and have enabled politicians, judicial officers, magistrates and administrators to discuss difficulties facing the justice system and opportunities for change;
- whole-of-Justice Initiatives such as JSIS, e-Briefs, the centralised committals scheme (see page 39) and cross justice video-conferencing; and
- Court-Based – Court User Forums. [124]

The submissions and testimonies of the agencies both "inside" and "outside" the courtroom created a very clear impression of the interlinked and interdependent nature of the criminal justice system.

---

[122] NSW Parliament Legislative Council Select Committee on the Increase in Prisoner Population, 2001, *Final Report,* Sydney, p 50

[123] Humphreys, Doug, Director, Criminal Law Branch, Legal Aid Commission of NSW, Transcript of Hearing, 6 December 2001, p 29.

[124] Feneley, John, Attorney General's Department of NSW Submission to the Inquiry, p 32-33.

Caseflow and timeliness depends not only on the resourcing and management of the courts but also on the effectiveness and efficiency of the other actors in the criminal justice system. Policy and resourcing decisions in the police (and the laboratories that process police exhibits), the DPP, the Legal Aid Commission and the Public Defenders Office all have an impact on court performance.

Finding

Whole of justice sector coordination and cooperation has improved in recent years. Cross sector forums and initiatives, particularly in the information technology area, are proof of this growing organisational consciousness.

Policy innovations in one agency will not yield their anticipated results unless the other agencies in the "justice chain" have the capacity to play their part. If resourcing in one part of the chain is inadequate, the "bottleneck" will simply be shifted, not removed.

Recommendations

9. Proposed changes in agency policy and resourcing should be fully communicated to other agencies whose operations may be affected.

10. Central agencies should fully appreciate the interconnections within the justice sector when assessing changes in the policy and/or resourcing of individual agencies.

11. Cross-agency initiatives like JSIS and e-Briefs should be pursued as matters of high priority. The first will give agencies the cross-sector information they need to improve planning while the second represents a project which will bring genuine returns across the system.

Civil Justice

Appendix Eight provides a glossary of terms and details how a case progresses through the civil justice system.

Counsel

In civil matters, parties "choose" to pursue an action and so counsel is generally privately funded and "public" prosecutors and defenders are not involved.

While case management has been relatively well accepted in criminal law, concerns remain among civil practitioners. The Law Society of NSW, for example, is very critical of the civil case management regime introduced in the Local Court from 1 January 2001.

Box 3.4: The Centralised Committals Scheme – A Case Study in Inter-Agency Cooperation and Planning

The objective was to reduce the number of matters committed to the District Court for trial by increasing matters finalised in the Local Court and increasing the matters referred to the District Court for sentence only. A lower level of District Court trials would allow the criminal case backlog in this jurisdiction to be reduced.

Legal Aid was provided to all eligible defendants facing committal proceedings. Previously, assistance was only available to defendants at committals for murder.

The Scheme commenced as a pilot in April 1998. Offenders who would have previously attended a committal hearing at an inner metropolitan Local Court were listed before senior magistrates in the Downing Centre and Central Local Courts. In addition to Legal Aid resources, DPP counsel were provided to assist in negotiating early guilty pleas and determining appropriate charges.

The pilot was expanded in February 1999 to Hornsby and Manly Local Courts and to Local Courts "feeding into" the Sydney West District Courts. The 1999-2000 Budget provided $2 million to the Legal Aid Commission to extend it statewide.

The Law and Justice Foundation of NSW (LJF) evaluated the Scheme by comparing the pilot period (1 April 1998 to 31 January 1999) with a period before hand (1 June 1997 to 31 March 1998). Results for the Sydney Registry were:

% of matters	Pre-Scheme	Pilot Period
Committed for Trial to the District Court	62%	44%
Committed for Sentence to the District Court	14%	17%
Finalised in the Local Court	25%	39%

The LJF developed a model to remove the impact of variables other than the Scheme. The adjusted result in Period 2 was: 46% of matters committed for trial; 19% of matters committed for sentence; and 35% of matters finalised in the Local Court. Sydney West showed similar trends. Results from country registries were based on a short pilot period and did not indicate significant changes.

A "saving", in case processing terms, of 2.4-5 District Court Judges was calculated with an annual cost of $3.8-$8 million. This was offset by Scheme costs of $2 million giving estimated savings of $1.8-$6 million.

This estimate does not include the impact on the Local Court of more matters being dealt with summarily. It appears that most of these matters will be guilty pleas and that the usual impact will be to substitute a sentence hearing for a committal. This is described as being difficult to assess but probably cost-neutral. Additional savings are anticipated in the DPP and NSW Police.

Eyland, Ann, Nheu, Natalina, and Wright, Ted, 2001, *Legal Aid for Committals: An Evaluation of the Impact of the Centralised Committals Scheme,* Law and Justice Foundation of NSW.

Mr MEAGHER: We believe that case management is important, but case management should not be used by the court in circumstances where it is going to add unnecessarily to the cost of litigation. The best example of that is the rules which have just been gazetted in the Local Court. There were 165,000 cases lodged in the year 2000 and of that roughly 7,000 cases run. These new rules will make it mandatory for every magistrate to order after a defence has been filed, within seven weeks of a defence being filed, four things which each solicitor or person appearing for themselves has to do - and remember that 47 percent of the people in the Local Court appear for themselves. You have to file all the statements you propose relying on in a form set down; you have to have a set of agreed facts between all the parties, signed by all the parties, and you have to cite all the cases you propose relying on. That applies in relation to all cases where a defence is filed.

Mr COLLIER: These are civil matters?

Mr MEAGHER: They are civil matters, the number is 165,000. That means that two things are going to happen. The cost of access to justice is going to increase if you have, for example, three witnesses, by between $1,900 and $3,000 per case and if you start costing how much extra that is going to cost the community in this State it is a figure of around $165 million extra, but more harmful is the fact that, in relation to individuals who are appearing in person, most of these cases will drop by the wayside.[125]

These comments are interesting because they do not appear to be based on a full understanding of the standards to be applied and the extent of changes required to existing practice. The Local Court advised the inquiry:

- the standards relate to cases in the General Division of the Court (cases worth more than $10,000) which are defended (approximately 8,000 cases in 2000) and which are not referred to arbitration (approximately 2,100 matters were arbitrated in 2000) – this is some 6,000 cases rather than 165,000;
- the *Timetable and Standard Directions* (pursuant to Practice Note 2/2001) state:

  Each party shall serve upon all other parties copies of written statements or affidavits of the intended evidence of all witnesses, together with copies of any annexures, reports or other documentation intended to be relied upon, on a day at least 14 days prior to the review date of this matter.

  The Review is held four months after the filing of the defence. Therefore, the period within which this documentation is to be prepared is three and a half months, not seven weeks.
- finally, similar provisions were already in place at individual Local Courts including the Downing Centre, Newcastle, Parramatta and Blacktown. The Downing Centre deals with 40 per cent of the State's civil cases. [126]

---

[125] Meagher, Nicholas, President of the Law Society of NSW, Transcript of Hearing, 6 December 2001, p 7.

[126] Olischlager, Stephen, Policy Officer of the Local Courts, Director's Office, Transcript of Hearing, 7 December 2001, p 29.

Further, the proportion of civil unrepresented litigants in the Local Court is not known. The level of 47 per cent refers to criminal cases.

On this basis, there appears to have been a serious breakdown in communication between the Local Court and the Law Society, which is surprising given these reforms were developed in consultation with the Local Court Civil Claims Rules Committee, which includes representatives from the Law Society and Bar Association.[127] It is possible, however, that the negative reaction to these civil case standards is largely due uncertainty as they are the first to be implemented in the Local Court.

In the District Court, case management has been a reality since 1996 and seems to have been subject to the same type of initial distrust and apprehension:

> **Mr FENELEY:** My observation is that the legal profession has been at times very alarmed by the proposals put forward, by the fact that, firstly, courts are saying that they will take charge of the speed at which cases run. That has been cause for alarm, less so today than it was back in 1996. We have recently reviewed Practice Note 33 in the District Court[128] and that has been done in broad consultation with the legal profession. There is no disagreement with the notion that the court must set standards and must require parties to comply with those standards despite the fact that the profession would urge, and the court I think accepts, that the cases must be judged on their merits, and if a case is a 15 months case literally you should not be squeezing it into a 12 month timeframe. I think that is broadly accepted today. Whilst the profession and individual members are understandably nervous because they are running businesses, they are delivering essential services, and they are concerned about pressures that might be placed on them and changes to the way in which they work, that is being done in a highly consultative way. From my observation the profession is largely on board with those changes and actively contributing ideas and suggestions about how it might better be done.[129]

An important element of gaining practitioner support is seeking practitioner input. Evidence presented to the inquiry suggests both the Supreme and District Courts are active in this regard:

> **Mr COLLIER**: Does the Bar Association have input into the development of those practice notes?
>
> **Mr HARRISON**: Yes. There's a very beneficial freeflow of information between both the District and the Supreme Courts and the Land and Environment Court on proposed practice notes. The courts do not operate in a vacuum and they circulate the practitioners through the Bar Association so that you get a healthy exchange of views on that. That's been very helpful and it's still going on at the moment.

---

[127] Anderson, Anita, Further Response to Supplementary Questions from the Local Court, p 1.

[128] This will be discussed in more detail in Chapter Nine.

[129] Feneley, John, Acting Deputy Director General, Attorney General's Department, Transcript of Hearing, 7 December 2001, p 77.

Mr COLLIER: So the acceptance of these would be much easier if you have had the input, obviously?

Mr HARRISON: Yes. Often there has been a reaction to some of the implementation, for example, costs orders against practitioners, but that came and the world didn't come to an end and it seems to have operated and continues to operate fairly. [130]

Finding

Stakeholder consultation in the District and Supreme Courts has enhanced practitioner acceptance and understanding of reforms in court practices. Lack of understanding can lead to unnecessary anxiety for practitioners and litigants.

Recommendation

12. Major reforms in court procedure should be subject to formal stakeholder consultation and, when implemented, accompanied by "plain English" practitioner education.

In further evidence to the Inquiry, the Law Society called for the establishment of a single set of civil court rules:

Mr MEAGHER: In terms of another issue which I think would help time is a matter very near and dear to me, is a single set of court rules and also forms. If we are fair dinkum about talking about access to justice for the community and reducing the cost of justice and time, if we could have a single set of forms with more bells and whistles as you go up, from the Local Court to the District Court...and to the Supreme Court. Queensland has done it, England has done it, places all over the US are doing it. We need, if we are concerned about the cost of people accessing justice, we need to look at forms and also rules. Very big point; and if that could be achieved in the foreseeable future that would be something that the community would applaud, because at the moment we have telephone books high of rules and forms for each court, all of them different.[131]

Uniform Civil Procedure Rules have been in effect in Queensland since 1 July 1999. The rules also embody many case management principles including expanded provisions for the dismissal of cases if steps are not taken within prescribed times.[132]

As will be discussed in Chapters Eight, Nine and Ten, the courts of NSW have introduced similar case management measures individually and incrementally over recent years. A unified approach, however, would ensure practitioners and parties to cases have a very clear understanding of what to expect in the courtroom:

---

[130] Harrison, Ian, Senior Vice President of the NSW Bar Association, Transcript of Hearing, 7 December 2001, p 14.

[131] Meagher, Nicholas, President of the Law Society of NSW, Transcript of Hearing, 6 December 2001, p 4.

[132] Moynihan, Martin (Justice), "Uniform Civil Procedure Rules", *The Queensland Lawyer*, Vol 20, No 3, December 1999, p 76.

> The new rules will change the way that those who successfully adapt to them conduct their practices. They will require clients to give early, comprehensive and accurate instructions and practitioners to act on them promptly. They will affect cost structures and when costs are incurred. Costs will be incurred at an earlier stage of proceedings than in the past and earlier than repeat player litigants (for example, insurance companies) are accustomed to. The time for taking steps in the rules or in a directions order should be taken seriously and clients committed to them...If properly used, the rules will bring about the more effective and expeditious resolution of disputes.[133]

To date, there has been no systematic evaluation of Queensland's uniform rules. The Queensland Supreme Court has, however, conducted a small survey of personal injury practitioners which has indicated strong support:

- 83 per cent of respondents advising the rules minimise undue procedural formality;
- 77 per cent of respondents advising the rules encourage greater time efficiency within law firms; and
- 77 per cent of respondents advising the rules strongly encourage settlement prior to the allocation of a trial date.[134]

The Local Court advised the inquiry a single set of rules would have benefits for litigants[135] and for court staff working in registries serving both the Local and District Courts.[136]

The Attorney General's Department told the inquiry that while unification is being explored in NSW there are barriers to its implementation.

> **Mr FENELEY:** There has been broad support for some unifying aspect to be brought into court rules in New South Wales. There has been very detailed consultation between the Bar Association, the Law Society, the judiciary and the Department about the ways in which that might be achieved. The big thing is that the jurisdictions vary very significantly. Some aspects of Supreme Court work do not lend themselves easily to a single set of rules in a sense. It may not be that you necessarily need a single set of rules, but rather an identifiable process from the Local Court through involving the way in which your forms are designed, et cetera, so that there are not unnecessary distinctions between all of those documents and processes. That is a matter that has been under active consideration for some time.

---

[133] loc cit.

[134] Feneley, John, *Attorney General's Department of NSW Response to Supplementary Questions,* p 16. This finding is supported by advice from the Queensland Justice Department that the introduction of the rules appears to have reduced civil filings – suggesting higher rates of settlement. (loc cit.).

[135] Anderson, Anita, Director, Local Courts, Transcript of Hearing, 7 December 2001, p 41.

[136] Olischlager, Stephen, Policy Office for Local Courts, Director's Office, Transcript of hearing, 7 December 2001, p 41.

The work to date has been able to identify the inhibitors in the system. We have not been able to identify all the solutions to it as yet.[137]

Finding

A unified set of court rules and forms or, at least, the rationalisation and simplification of current variations between the different jurisdictions, would have benefits for both litigants and the efficiency of court administration.

Recommendation

13. The Attorney General's Department and the Courts should form a working group drawing on the existing resources of the Rule Committees of the Supreme and District Courts, which include representatives of the NSW Bar Association and the Law Society, to rationalise and simplify civil court rules in NSW.

Litigants in Person

> Self-represented litigants are by no means a new phenomenon in the courts. However, the recent surge in self-represented litigation is unprecedented and shows no sign of abating. While no single explanation can account for this national trend, the drastic reduction in funding for civil legal services has resulted in significantly fewer attorneys serving low income individuals and is a significant contributing factor [to the growth in self representation]...The impact of increasing self-representation on the courts – on court management and the administration of justice – cannot be overstated. For court managers it manifests itself in additional demands on already limited employee time and resources, and less efficient case management. For judges, the increase represents more protracted and delayed proceedings, in addition to the fundamental dilemma of how to treat all parties fairly where one or more may be untrained in the law and court procedure. The potential impact on the public is diminished confidence in the courts, as self-represented litigants face real and perceived barriers in the pursuit of justice.[138]

While a surge in unrepresented litigants may be a US phenomenon, litigants in person are an issue in Australian civil justice – particularly in family law, housing law and debt recovery.

The most common reasons for lack of representation are:

- cost of legal services – the Legal Aid Commission does provide assistance in civil cases under State Law but the circumstances are relatively limited;[139]

---

[137] Feneley, John, Acting Deputy Director General, Attorney General's Department, Transcript of Hearing, 7 December 2001, p 78.

[138] US Conference of State Court Administrators, 2000, *Position Paper on Self-Represented Litigation.*

[139] Under the Jurisdiction Test, legal aid is available under civil State Law for: anti-discrimination cases; some consumer protection matters; cases where a person may lose their home; cases involving false imprisonment and malicious prosecution; public interest environment matters;

- choice – a person may believe they do not need a lawyer or they may mistrust the legal profession (and the courts). Some courts, such as the Small Claims Division of the Local Court, have simple processes which are "designed" to be used by unrepresented litigants; and
- no legal representative is willing or able act – because of the perceived lack of merit of the case or perceived difficulties with the conduct of the litigant.

As for unrepresented criminal defendants, there is little statistical information on the impact of litigants in person in the civil justice system.[140] There is, however, anecdotal evidence:

> **Mr COLLIER:** Unrepresented litigants are a significant source of delay in the system, do you think?
>
> **Mr HARRISON:** I do not know if they are a significant source of delay, but the delays they create in their particular cases are significant...
>
> I am personally involved in one that is likely, against a self litigant plaintiff, to run something in the order of 15 days. That is an inefficiency that is really unacceptable but the courts, as you would be aware, go out of their way not to disadvantage such people and that, of course, is proper.
>
> **Mr COLLIER:** Is it possible to put an estimate on the length of that case if the person was represented?
>
> **Mr HARRISON:** I think three or four days, or five at maximum, but I know it will run for 15 days.
>
> **Mr COLLIER:** Is there any way we can better manage the issue of unrepresented litigants in the system, besides representation?
>
> **Mr HARRISON:** I think you have given me the answer. There seems little alternative. You have to bear in mind that people who represent themselves, as you would often know, are very suspicious of the legal profession. Sometimes they have had a bad experience with the legal profession and offering legal assistance to them is almost an affront to their dignity because they, if you have like, have been there and done that and want to do it themselves. [141]

The judiciary has provided similar anecdotal commentary:

---

inquests under limited circumstances; and Protected Estates Act 1983 matters. The greatest area of Legal Aid involvement in civil law is in Family Law (a Federal jurisdiction).

[140] Note, however, that in the 1999 Supreme Court Registry survey of court clients, 8 out of 266 responses were received from litigants representing themselves (3 per cent). In the 2001 survey, out of 165 responses, 8 were received from litigants representing themselves (4.8 per cent). Given the limited number of survey respondents these statistics cannot be regarded as indicative of the position across the case load. The Chief Executive Officer and Principal Registrar of the Supreme Court is conducting a special survey early in 2002 to determine the extent of self-representation and its impact on registry services (in terms of additional assistance sought). Source: Johnston, Nerida, "Supreme Court Response to Supplementary Questions", *Attorney General's Department Response to Supplementary Questions*.

[141] Harrison, Ian, Senior Vice President of the NSW Bar Association, Transcript of Hearing, 7 December 2001, p 16.

> Whilst the right of a litigant to appear in person is fundamental, it would be disregarding the obvious to fail to recognise that the presence of litigants in person in increasing numbers is creating a problem for the courts. The problem is well documented in the United States...It would be mere pretence to regard the work done by most litigants in person in the preparation and conduct of their cases as the equivalent of work done by qualified legal representatives. All too frequently, the burden of ensuring that the necessary work of a litigant in person is done falls on the court administration or the court itself. Even so, litigation involving a litigant in person is usually less efficiently conducted and tends to be prolonged...The costs of legal representation for the opposing litigant are increased and the drain upon court resources is considerable.[142]

Research has been conducted by the Federal Court of Australia and the Administrative Appeals Tribunal to assess the impact of litigants in person on their "business". The conclusion reached was:

> This study does not offer a definitive answer to one of the most important questions in today's courts, that is, whether the numbers of litigants in person are increasing or decreasing. It does, however sound a note of caution over assumptions that the greater occurrence or visibility of litigants in person in certain jurisdictions constitutes a national or international phenomenon or a general crisis. Data collection...needs to be far more sophisticated if it is to facilitate better informed or more easily executed studies in the future...Data collection methods are required to identify unrepresented litigants, the stages at which people are and are not represented, the nature of their causes of action, and the services used and outcomes achieved by litigants in person compared with represented parties.[143]

The evidence heard by the inquiry suggests the position in NSW is also not well understood.

Finding

The overall impact of unrepresented civil litigants on the court system is not known. What is certain is that, in jurisdictions where legal representation is the norm, litigants in person can have a significant impact on the resources required by, and the "quality" of justice achieved in, their individual case.

---

[142] Cachia v Hanes (1994) 179 CLR 403 at 415

[143] Gamble, Helen and Mohr, Richard, 1998, "Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal: A Research Note", *16th Australian Institute of Judicial Administration Annual Conference*, Melbourne, 4-6 September, p 7.

Recommendation (Repeat)

8. The courts should collect and analyse data on unrepresented criminal defendants and unrepresented civil litigants as part of their standard dataset so the extent of this issue can be determined and its impact better managed.

The Courts

The level at which a case enters the civil system is determined by its monetary value:

- Local Court – Small Claims Division – up to $10,000;
- Local Court – General Division – up to $40,000;
- District Court – generally up to $750,000; unlimited for motor and accidents claims and other claims where the parties agree to the case being heard in the District Court; defacto relationship claims up to $250,000;
- Supreme Court – unlimited damages claims and injunctions; appeals on points of law from the Local Court;
- Court of Appeal – appeals from the District Court and from the decision of a single judge in the Supreme Court.

Research into workload trends in the District Court has found variations associated with changes in legislation, jurisdiction and in the economic environment:

- changes to Motor Accident legislation relating to compensation for non economic loss led to a significant fall in cases between 1995 and 1996;
- caseload fell from November 1991 when the jurisdiction of the Local Court increased to $40,000 and increased from July 1993 when the District Court's jurisdiction increased from $100,000 to $250,000. It increased again from July 1997 when the District Court's jurisdiction increased to $750,000 in general and became unlimited for Motor Accident cases; and
- while difficult economic conditions increase filings, the work of the Court does not increase as dramatically. This is because the proportion of liquidated claims rises but far fewer are defended. [144]

Increased filings have an impact on delay – an additional 100 filings per month is associated with an increase in the median time to finalisation of 2.5 per cent in Motor Accident cases and 6.6 per cent in non Motor Accident cases.[145] This is because Motor Accident cases:

- are more homogenous in terms of factual and legal issues;
- have, as a class, been case managed for a longer period; and

---

[144] Eyland, Ann, Law and Justice Foundation of NSW Submission to the Inquiry, p 3-4.

[145] ibid, p 2.

- the defendant is usually one of the major insurers.

Additionally, trends in criminal caseloads in all three jurisdictions will impact the level of resources potentially available for civil justice.

Consultation and Collaboration

As the civil system generally represents an interplay between private players and the courts, the issue of "inter-agency cooperation" is not as relevant. What needs to be considered in this environment is the degree to which private practitioners are accepting case management and complying with its timetables.

Statements from professional bodies to this inquiry suggest the need for increased effectiveness and efficiency in the court system is widely recognised.

The introduction of cost sanctions[146] in all three jurisdictions, however, suggests some practitioner resistance as do recent statements from the Chief Justice as quoted in Chapter Two.

Cost sanctions have also been introduced overseas but, as in NSW, appear to be used sparingly.[147] In some countries, there is considerable practitioner support for their greater use:

> As the practice of law becomes more of a business and less of a profession, the judiciary must work to increase the efficiency of the court system for the benefit of the public...The sanctioning of trial attorneys may therefore at times become a necessary tool to achieve this goal. When this tool is used properly, the practice of law will become more profitable; clients will be better represented; and the majority of the Bar...will get the recognition it so richly deserves and has so wrongly be denied in an era of lawyer bashing and unending attacks on the judiciary. In the end some lost dignity will be restored to the courthouse.[148]

In most instances, the judiciary has relied on the threat of sanction – as an indicator of judicial commitment to the enforcement of time standards – rather than actually "punishing" members of the profession:

> It is understood that such orders are rarely made, however, the availability of such orders assists the courts to case manage. Both of the legal professional

---

[146] Legal practitioners may have costs awarded against them personally where they have delayed proceedings unnecessarily by, for example, seeking unwarranted adjournments or not meeting court deadlines. In appropriate cases, particularly those involving repeated defaults, the Court may refer an incident or incidents to the Law Society, Bar Association or Legal Services Commissioner.

[147] For example, Balter, Bruce M and Simone, Michael J, 1998, "Sanctions for Frivolous Conduct during Civil Litigation", *New York State Bar Journal,* Sept/Oct, Vol 70, No 6, p 2 - argues the judiciary appears to be using its discretionary power to sanction sparingly.

[148] ibid, p 6.

> associations have made rules consistent with the courts' approach in this area to promote the quick and cheap resolution of matters.[149]

Experience in the United States indicates reforms to reduce delay are only successful where they are supported by real commitment from the judiciary and the profession:

> In [the few jurisdictions where time limits reduced delays] one or more judges were committed to reducing delays and willing to spearhead efforts to do so.
>
> By contrast, in court systems where speedy trial acts failed, they were often enacted over the strong objections of judges, lawyers and other judicial actors.
>
> ...no program can succeed without the active participation of those directly involved in administering justice. Courts are governed by a complex set of formal rules and informal practices. Judges, lawyers and other who work in the court system know these norms far better than any outsider and can use this information advantage to defeat reforms with which they disagree. Bringing judicial insiders into the reform process is thus a crucial step in designing a successful delay reduction program. [150]

Such commitment is evident in the statements and actions of the heads of the NSW judiciary and magistracy and is now being increasingly reflected in the reported judgements of the courts, for example:

> The Court now operates under tight time standards which reflect its own determination and the public expectation that appeals and other applications in this Court will proceed with dispatch. It goes without saying that the resources of this Court are limited and that to vacate a hearing date at short notice will mean that it is impossible for alternative matters to be put into the list. The consequence will be that the body of cases awaiting hearing will be imperceptibly but definitely shifted further down the line due to the fact that a vacated matter will have to come back into the list seeking a later date.
>
> I think it is vital that the profession understand that the Court list is not a fixture sheet at some suburban golf club in which players can add or remove their names according to their interests at the time. A fixture is a fixture and it will remain unless it is vacated on proper application and for good cause. It is not open to parties to file consent orders or to seek directly or indirectly to have matters taken out of the list simply because it is inconvenient to the counsel originally retained.[151]

What remains to be assessed is whether case management is improving court delays. This will be partially considered in the next chapter where statistics comparing the performance of NSW courts to results in other States and Territories are presented. Performance trends in the Local, District and Supreme Courts will be reviewed in Chapters Eight, Nine and Ten.

---

[149] Feneley, John, Attorney General's Department of NSW Response to Supplementary Questions, p 20.

[150] World Bank, 1999, "Reducing Court Delays: Five Lessons from the United States", *PREM Notes Public Sector,* December, Number 34.

[151] Mason, P in Cockburn & Ors v GIO Finance Limited [2001] NSWCA 155.

Chapter Four

Comparisons of Court System Performance

Introduction

Lack of Australia-wide standardisation of court data makes valid State-to-State and State-to-Territory comparisons difficult. Despite this, the annual *Report on Government Services*, published by the Steering Committee for the Review of Commonwealth/State Service Provision (SCRCSSP), attracts considerable attention and comment. This Chapter summarises the findings of the 2002 Report and also presents statistics from some overseas jurisdictions. The caveats regarding comparability are, of course, even more applicable in the latter case.

Note that the SCRCSSP measures timeliness in terms of the period from lodgment (or date of registration) to finalisation. Finalisation is defined as the process within a court after which a matter is no longer "an item of work" in that court. Therefore, finalisation may be an administrative function such as closing a case file or issuing a final order which is unrelated to "court delay".

Report on Government Services 2002

Table 4.1: Civil Jurisdiction Limits

	NSW	Vic	Qld	WA	SA	ACT	NT
Magistrates	$40,000	$40,000	$50,000	$25,000	$30,000 (commercial) $60,000 (personal injury)	$60,000	$100,000
District/ County	$750,000 Unlimited for motor accident	$200,000 Unlimited for compensation resulting from injury or death	$250,000	$250,000 Unlimited for personal injuries.	General claims up to $30,000; motor accident personal injury up to $60,000; property up to $60,000	-	-

Source: SCRCSSP, 2002, *Report on Government Services 2002,* Canberra, Table 9A.39. No information provided for Tasmania. Tasmania and the Territories do not have district/county courts. [152]

[152] Steering Committee for the Review of Commonwealth/State Service Provision, op cit, p 455-514.

Comparative Court Caseloads

Table 4.2: Civil Court Lodgments 2000-01

Thousands	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total	NSW/Total
Magistrates	241.0	183.0	98.0	61.0	40.0	13.0	10.0	4.0	650.0	37.1%
District/County	19.0	10.0	11.0	4.0	3.0	-	-	-	47.0	40.4%
Supreme	10.1	4.8	4.3	3.7	1.6	2.7	1.0	0.4	28.6	35.3%
All Civil	270.1	197.8	113.3	68.7	44.6	15.7	11.0	4.4	725.6	37.2%

Source: SCRCSSP, ibid, p 463.

Table 4.3: Criminal Court Lodgments 2000-01

Thousands	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total	NSW/Total
Magistrates	284.0	101.0	204.0	87.0	59.0	65.0	10.0	12.0	822.0	34.5%
District/County	8.0	4.0	8.0	3.0	1.0	-	-	-	24.0	33.3%
Supreme	1.0	0.7	1.4	0.5	0.3	0.5	0.2	0.4	5.0	20.0%
All Criminal	293.0	105.7	213.4	90.5	60.3	65.5	10.2	12.4	851.0	34.4%

Source: SCRCSSP, loc cit. Cases from electronic registries are excluded. Children's Court cases are included.

Tasmania and the Territories do not have district/county jurisdictions. This means they will have relatively simple cases being tried in their Supreme Courts, which will skew their waiting time statistics favourably. Also, the low number of criminal cases finalised in some Supreme Courts (NSW, Victoria and South Australia) means that results can fluctuate quite widely – positively or negatively – because of a small number of cases.

Supreme Court

Table 4.4: Non Appeal Criminal Matters Finalised 2000-01

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
Number of cases	144	113	920	238	88	394	213	349	2,459
			Percentage of finalised matters completed:						
<6 months	11.8	33.6	79.6	87.4	42	78.2	46	36.7	63.7
6-12 months	26.4	35.4	13.2	8.8	31.8	14.7	18.3	33.5	18.8
12-18 months	22.2	28.3	5.4	1.3	17	4.3	17.8	11.5	9.2
>18 months	39.6	2.7	1.8	2.5	9.1	2.8	17.8	18.3	8.3

Source: SCRCSSP, ibid, p 478.

Table 4.5: Criminal Appeal Matters Finalised 2000-01

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
Number of cases	906	413	312	195	109	40	46	33	2,054
				Percentage of finalised matters completed:					
<6 months	31.8	46.7	83.0	45.6	89.9	40.0	67.4	48.5	48.2
6-12 months	42.3	38.3	16.0	30.8	8.3	35.0	15.2	42.4	33.8
12-18 months	16.6	10.4	-	15.4	-	15.0	6.5	-	11.3
>18 months	9.4	4.6	1.0	8.2	1.8	10.0	10.9	9.1	6.7

Source: SCRCSSP, ibid, p 483.

The Supreme Court finalised 1 per cent of all NSW criminal matters in 2000-01:

- 39 per cent of first instance cases were finalised in 12 months compared to 51 per cent in 1999-2000 and the national average of 83 per cent. Interstate scores range from 64 per cent (ACT) to 96 per cent (Western Australia); and
- a better result was achieved in appeal matters with 74 per cent finalised in a year compared to the national average of 82 per cent. Interstate scores range from 75 per cent (Tasmania) to 98 per cent (South Australia). Note that NSW accounted for half the criminal appeals finalised.

Measurement using different parameters can produce very different results. BOCSAR measures the time from committal to outcome (trial determination) for non appeal matters and found that for calendar 2000 compared to calendar 1999:

- the median delay for accused persons on bail fell 13.7 per cent from 632 days to 546 days; and
- the median delay for accused persons in custody fell 8.5 per cent from 405.5 days to 371 days. [153]

These quite significant improvements tell a different story to the worsening performance shown in the Report on Government Services. This improvement has continued with median delay below 12 months in November 2001.[154]

[153] Doak, Peter, September 2001, "Recent Trends in Criminal Court Delay", *Crime and Justice Statistics Bureau Brief,* NSW Bureau of Crime Statistics and Research, p 2. Note that the Australian Bureau of Statistics reports on the same basis.

[154] Weatherburn, Don, 14 November 2001, *Media Release: Criminal Court Statistics 2000.*

Table 4.6: Non Appeal Civil Matters Finalised 2000-01

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Cwth	Total
Number of cases	10,244	1,887	4,804	2,225	1,031	1,435	790	225	4,669	27,310
				Percentage of finalised matters completed:						
<6 months	52.7	78.2	60.9	38.6	66.4	43.7	25.3	36.9	61.5	55.4
6-12 months	13.7	5.7	7.9	21.3	14.1	13.5	17.6	14.7	19.8	13.9
12-18 months	10.5	14.3	6.2	12.1	5.9	8.9	15.2	4.9	7.8	9.5
>18 months	23	1.8	25	28	13.6	33.9	41.9	43.6	10.9	21.2

Source: SCRCSSP, ibid, p 481.

Table 4.7: Civil Appeal Matters Finalised 2000-01

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Cwth	Total
Number of cases	658	241	275	367	265	34	46	166	574	2,626
				Percentage of finalised matters completed:						
<6 months	31.9	51.0	51.0	48.0	79.6	55.9	60.9	65.1	58.0	51.3
6-12 months	29.6	14.9	40.0	25.1	20.0	32.4	21.7	25.9	25.8	26.6
12-18 months	23.1	14.1	8.0	15.0	0.4	5.9	15.2	6.6	8.5	12.7
>18 months	15.3	19.9	1.0	12.0	-	5.9	2.2	2.4	7.7	9.4

Source: SCRCSSP, ibid, p 483.

The Supreme Court finalised 19 per cent of all civil matters in NSW in 2000-01:

- first instance civil cases showed a marked improvement with 67 per cent finalised in 12 months versus 29 per cent in 1999-2000. This result was still marginally below the national average of 69 per cent, however, with individual scores ranging from 43 per cent (ACT) to 84 per cent (Victoria); and
- 74 per cent of NSW civil appeal cases were finalised in 12 months in 2001 versus the Australian total of 82 per cent. Interstate scores ranged from 75 per cent (Tasmania) to 98 per cent (South Australia).

Given NSW's much higher case load and the differences in civil jurisdiction previously cited, it seems reasonable to expect the Supreme Court of NSW and the Court of Appeal to experience difficulty achieving finalisation within the same time periods as other states. The results recorded by these two civil jurisdictions are, however, quite competitive with the other States and Territories, which is encouraging.

District/County Court

Table 4.8: Criminal Matters Finalised 2000-01

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
Number of cases	4,111	1,872	8,306	3,027	1,306	-	-	-	18,632
				Percentage of finalised matters completed:					
<6 months	52.9	61.4	73.5	61.5	63.0	-	-	-	65.1
6-12 months	23.9	19.7	16.8	13.7	26.0	-	-	-	18.8
12-18 months	10.5	9.8	7.7	16.7	8.0	-	-	-	10.0
>18 months	12.7	9.1	2.0	8.1	3.0	-	-	-	6.1

Source: SCRCSSP, ibid, p 478.

The District Court finalised 6 per cent of all NSW criminal matters. The Report on Government Services shows that 77 per cent of cases were finalised within 12 months compared to 56 per cent in 1999-2000. Although this is a significant improvement, the Australian total in 2000-01 was 84 per cent with individual States and Territories ranging from 75 per cent (Western Australia) to 90 per cent (Queensland).

Table 4.9: Civil Matters Finalised 2000-01

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
Number of cases	12,954	7,623	7,157	4,843	1,317	-	-	-	33,894
				Percentage of finalised matters completed:					
<6 months	16.2	26.7	30.3	22.3	31.4	-	-	-	23.0
6-12 months	37.0	31.1	17.6	14.8	24.6	-	-	-	27.9
12-18 months	27.8	27.0	13.7	26.6	15.8	-	-	-	24.0
>18 months	19.1	15.3	38.5	36.3	28.2	-	-	-	25.1

Source: SCRCSSP, ibid, p 481.

The District Court finalised 22 per cent of all NSW civil matters in 2000-01. Of these, 53 per cent were finalised in 12 months compared to an Australian level of 51 per cent. Individual levels ranged from 51 per cent (Western Australia) to 58 per cent (Victoria).

Although this was a good comparative result for NSW, it represents a decline from the 1999-2000 level of 69 per cent which can be attributed to recent significant increases in the civil caseload.[155]

However, the SCRCSSP cautions that reported finalisations may or may not include cases withdrawn after initial lodgement. This further lessens the validity of comparing data between states.

---

[155] Refer Chapter Nine.

Magistrates/Local Courts

Table 4.10: Criminal Matters Finalised 2000-01

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
Number of cases ('000)	113	102	NA	87	57	59	14	13	445
				Percentage of finalised matters completed:					
<6 months	93.7	89.2	NA	94.5	80.7	77.5	75.7	74.5	87.9
6-12 months	5.2	8.1	NA	3.8	10.9	13.8	13.9	12.0	7.9
12-18 months	0.7	1.4	NA	0.9	2.7	4.9	3.7	5.3	10.0
>18 months	0.4	1.3	NA	0.8	5.7	3.8	6.7	8.1	2.2

Source: SCRCSSP, ibid, p 478.

The Local Court finalised 93 per cent of all NSW criminal matters within six months in 2000-01 and continued its leadership of Australia in terms of timeliness with 99 per cent of cases finalised within a year. This compares with a national average of 96 per cent and individual results ranging upwards from 86 per cent (Northern Territory). Tasmania and the Territories recorded relatively poor results because, as they do not have District/County courts, their local courts must deal with more complex matters.

Table 4.11: Civil Matters Finalised 2000-01

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
Number of cases ('000)	32	181	38	21	38	2	7	2	321
				Percentage of finalised matters completed:					
<6 months	85.4	98.1	86.2	86.8	52.6	89.8	70.3	75.6	88.5
6-12 months	9.2	1.5	9.0	7.2	11.8	9.7	20.1	10.2	5.2
12-18 months	2.8	0.3	2.4	2.4	29.9	0.2	3.9	5.6	4.5
>18 months	2.6	0.2	2.3	3.5	5.7	0.3	5.7	8.7	1.7

Source: SCRCSSP, ibid, p 481.

The Local Court finalised 59 per cent of all NSW civil matters in 2000-01 and continued its leadership of Australia in terms of timeliness with 95 per cent of cases finalised within a year. This compares to the national average of 94 per cent and individual results ranging from 64 per cent (South Australia) to 99 per cent (Victoria).

The SCRCSSP again cautioned that finalisations may or may not include cases withdrawn after initial lodgement. The high number of cases shown by Victoria and South Australia, which are almost equal to total lodgments for the year for these states, suggests the statistics for these states have not been developed on the same basis as the other states. Once again, valid comparisons are difficult.

Finally, while performance for NSW is strong it has declined from 1999-2000. During that year, 94 per cent of matters were finalised within 6 months versus 85 per cent in 2000-01. While part of this trend is undoubtedly Olympics-related (the Court did not hear civil cases during September 2000) it should be noted that the continued growth in the criminal jurisdiction of the Court has the potential to reduce the resources available for civil cases.

Finding

Despite the difficulties involved in comparing court performance between States and Territories in Australia, the results achieved by NSW in the *2002 Report on Government Services* were relatively positive – in terms of the proportion of matters finalised within 12 months – for these types of cases:

- Supreme Court – NSW was comparable to the national average in both first instance and appeal civil cases;
- District Court – NSW bettered the national level in civil matters and recorded a significant improvement in criminal matters compared to the *2001 Report*; and
- Local Court – NSW continued its excellent performance beating the national average in both criminal and civil matters.

Overseas Jurisdictions

This data is provided for information rather than comparison to give a "flavour" of the type of court measurement and assessment being undertaken elsewhere.

United Kingdom – Court Service Annual Report and Accounts 2000-2001

The Court Service administers all courts in the United Kingdom except for the Magistrates' Courts and the House of Lords. The 2000-01 Annual Report for the Service includes information on a courthouse-by-courthouse basis for both the Crown (criminal jurisdiction equivalent to District Court) and County (first instance civil) Courts for a range of targeted measures (see next page). [156]

Targets and actual performance are also provided for the Court of Appeal and the High Court and for the Tribunals.

[156] The Court Service (An Executive Agency of the Lord Chancellor's Department), 2001, *The Court Service Annual Report and Accounts 2000-2001: For the period April 2000 to March 2001*, London: The Stationery Office, p 17-19 and Annexes A-D.

Table 4.12: Court Service Measures

Court	Measure	Target	Actual (National)
Crown	Average waiting time (committal to commencement of trial) – defendant in custody	8 weeks	9.9 weeks
	Average waiting time (committal to commencement of trial)– defendant on bail	NA	15.7 weeks
	Average length of sitting day (hours)	4.37	4.36
	% of juror sitting days of attendance and non attendance	62%	63.2%
	% of defendants committed for sentence waiting 10 weeks or less	78%	86%
	% of appellants waiting 14 weeks or less	78%	90%
County	% of administrative process dealt with in target time	92%	NA – Individual Courthouse Results Only
	Warrants paid as a % of all correctly directed	70%	
	Quality of service provided to court users	84%	

The Service states its operational objective is to *provide a good quality service in a cost effective manner.* This is measured by five indicators:

- the quality of service provided to court users – measured by an indicator of key standards from the Court's Charter;
- the percentage of Crown Court cases that commence within target – measured by a composite indicator reflecting the time taken from committal to sentence hearing/trial and the time taken to hear appeals from the Magistrates' Court;
- the percentage of administrative work in the civil courts that is processed within target time – measured by a composite indicator reflecting: the percentage of family cases heard within target time; the average length of the courtroom day for Judges; and effective warrant enforcement;
- average waiting time for Asylum appeals from receipt at the Immigration Authorities to decision; and
- the percentage of the cost of the civil courts recovered through fees.

Given the overarching nature of the objective the measures, although indicative, are partial at best.

United States of America

US District Court

The United States District Courts are the trial courts of the Federal Court system. As such, they hear nearly all categories of federal cases. Common civil case types include contracts and torts. In terms of felonies, immigration offences, weapons offences, drug matters and fraud cases dominate.

Table 4.13: Waiting Times in the US Federal District Court

	2000	1999	1998	1997	1996	1996
From Filing to Disposition (includes cases that do not proceed to trial) – in Months						
Criminal Felony	6.5	6.5	6.4	6.6	6.8	6.6
Civil	8.2	10.3	9.2	8.4	7.0	8.9
From Filing to Trial – in Months						
Civil	20	20	19	19	18	18

Source: US District Court, 2001, *Judicial Caseload Profile 2000.*

US State Courts – Felony

In 2000, the National Institute of Justice released a study on the percentage of felony (major crime) cases settled in 1994 which were resolved within 180 days of indictment in nine State criminal trial courts in large urban or suburban counties:

- on average, 68 per cent were resolved within 180 days; and
- the range for individual courts was 49 per cent to 89 per cent.[157]

US State Courts – Civil

In 2001, the National Centre for State Courts released a study of civil cases settled in 1996 in 75 of the largest counties which found:

- for tort cases, the median time from filing to jury verdict ranged from 586 days (automobile claim – 50.9 per cent of cases) to 1,525 days (asbestos claim – 2 per cent of cases);[158] and
- for contract cases, the median time from filing to jury verdict ranged from 554 days (rental/lease agreement – 7.1 per cent of cases) to 748 days (fraud – 16.7 per cent of cases).[159]

General Comment on US State Court Data

It is interesting to note that the consolidated comparisons of trial delay in different states are not particularly timely (data analysed in the studies above comes from 1994 and 1996).

More timely data is available via State websites but it is evident that time standards are not uniformly applied between States and that all jurisdictions within

---

[157] Ostrom, Brian J and Hanson, Roger A, 2000, "Efficiency, Timeliness and Quality: A New Perspective from Nine State Criminal Trial Courts", *Research In Brief,* National Institute of Justice, p 4.

[158] Ostrom, Brian J, Kauder, Neal B, and LaFountain, Robert C (eds), 2001, *Examining the Work of State Courts, 1999-2000: A National Perspective from the Court Statistics Project,* p 38.

[159] ibid, p 39.

individual States are not reporting case finalisation times. The three examples which follow demonstrate varying degrees of detail and transparency in assessing court performance.

1. Judicial Council of California, *2001 Annual Report*

The Judicial Council oversees all Californian Courts and, therefore, the statistics below reflect a wide range of case complexity.[160]

(a) Civil Case-Processing Time

Time standards for processing general civil unlimited cases are: 90 percent disposed of within 12 months of filing; 98 percent within 18 months; and all cases within 24 months.

Table 4.14: Civil Case Disposal in Californian State Courts

Five County Total – Percentage of Cases Disposed Of	1999-2000	1995-96
Within 12 Months	62	49
Within 18 Months	85	69
Within 24 Months	93	78

(b) Criminal Case-Processing Time

Time standards are: 100 percent of felonies (except for capital cases) disposed of within 1 year from first court appearance; 90 percent of misdemeanours disposed of within 30 days; and 98 percent of misdemeanours within 90 days.

Table 4.15: Criminal Case Disposal in Californian State Courts

Five County Total	1999-2000	1995-96
Percentage of Felonies Disposed of Within 12 Months	95	96
Percentage of misdemeanours disposed of within:		
- 30 days	77	77
- 90 days	91	91

[160] Judicial Council of California, 2001, *2001 Annual Report,* Administrative Office of the Courts, San Francisco, p 6 (www.courts.state.ca.us).

(c) Other Aspects of Performance

Table 4.16: Measurement of Objectives in Californian State Courts

Goal	Measures used in the Judicial Council 2001 Annual Report
Access, Fairness and Diversity	NA. Qualitative commentary on court interpreter services and unrepresented litigants.
Independence and Accountability	NA. Qualitative commentary on long range planning and budgeting and the development of revised Court Rules.
Modernisation of Management and Administration	Case processing times and commentary on the creation of a single trial court system.
Quality of Justice and Service to the Public	NA. Qualitative commentary on jury reform, developments in the family court and drug courts.
Education	NA – although the number and duration of education programs is reported.
Technology	Visitors to the website and commentary on access to technology across the system.

Once again, the difficulty of determining "measures" of court performance – aside from the timeliness of case disposal - is demonstrated.

2. New York - *Report of The Chief Administrative Judge of the Courts For the Calendar Year January 1, 1997 - December 31, 1997*

Table 4.17: Waiting Times in New York State Courts

Jurisdiction		% of Cases Satisfying Standard in 1997
Supreme and County Courts – Felony		
100 per cent of cases to be finalised within 6 months of indictment		83%
Supreme Court – Civil		
100 per cent of cases to meet these standards:		
Filing to Readiness for Trial	12 months	52%
And, for Complex Cases	15 months	
Readiness for Trial to Disposal	Another 15 months	76%
And, for Complex Cases	Another 15 months	
Filing to Disposal	27 months	76%
And, for Complex Cases	30 months	

Commentary in this report is limited to detailing the structure and caseload of the individual courts. No additional objectives or measures are included.[161]

3. *Texas Judicial System Annual Report Fiscal Year 2001*

Table 4.18: Waiting Time in Texas State Courts

Jurisdiction	Criminal	Civil
Courts of Appeals[1]		
Average Time between Filing and Disposition;	10.5 mths	8.7 mths
Average % of cases Filed but not yet Disposed for 24 Months	1.6%	2.8%
Average time between submission and disposition	1.8 mths	2.3 mths
Average % of Cases under submission for >12 months	2.1%	3.2%
District Court[2]		
% of Cases Disposed of in 90 days or less;	44%	28%
% of Cases Disposed of in 120 days or less;	52%	47%
% of Cases Disposed of in less than a year;	NA	68%
County Level Courts		
% of Cases Disposed of in 90 days or less;	NA	31%
% of Cases Disposed of in 120 days or less;	NA	52%
% of Cases Disposed of in less than a year;	NA	75%

1. The Courts of Appeals are the intermediate appeals courts. They also measure clearance rate and provide information on the number of cases pending in various age groups. A case is "submitted" when the court hears oral argument or when it is referred to the justices for formal consideration if no oral argument is heard.

2. The District and County Level Courts include additional classifications for civil cases: percentage of cases disposed of that were over 12 months old but less than 18 months and the percentage of cases disposed of that were over 18 months old. The District Courts are the civil courts of first instance for matters over $200, divorce proceedings, land title disputes, contested probate matters, juvenile matters and felony. The County Level Courts hear civil matters to $5000, non contested probate, and misdemeanours with fines above $500 or gaol terms.

Once again, commentary in this report is limited to detailing the structure, caseload and demand pressures of the individual jurisdictions. No additional objectives or measures are included.[162]

[161] Chief Administrative Judge of the Court, 1998, *Report of The Chief Administrative Judge of the Courts For the Calendar Year January 1, 1997 - December 31, 1997,* New York, p 10 and 14, (www.courts.state.ny.us).

[162] Office of Court Administration and the Texas Judicial Council, 2001, *Texas Judicial System Annual Report Fiscal Year 2001,* (www.courts.state.tx.us)

New Zealand

Table 4.19: Waiting Time in New Zealand Courts

	1999	1998
Percentage of High Court criminal jury trials disposed of within 1 year of charge	88%	82%
Percentage of High Court civil cases disposed of within 1 year of filing of a defence	56%	60%
Percentage of District Court criminal jury trials disposed of within 52 weeks of charge	77%	75%
Percentage of District Court civil cases disposed of within 1 year of filing of a defence	64%	NA

Source: 1999 Report of the New Zealand Judiciary, p 7.[163]

A detailed breakdown reflecting the performance of cases against the trial processing steps set out in High Court and District Court practice notes is also provided.

As in previous examples, commentary in this report is limited to detailing the structure, caseload and demand pressures of the individual jurisdictions. No additional objectives or measures are included.

Finding

Despite the worldwide trend towards the use of performance indicators in the public sector, their use in court systems – with the exception of measures of timeliness – appears to be quite limited.

In addition, where wider applications have been attempted, the indicators used, although easy to understand, have little explanatory power in terms of assessing the "work" of the courts concerned.

[163] *1999 Report of the New Zealand Judiciary,* 2001, p 7-9, (www.courts.govt.nz).

Chapter Five

Reasons for Court Delay

Factors Affecting Caseload

The impact of increasing caseloads – due to police activity and numbers, changes in jurisdiction, changes in legislation, and economic conditions – on delay has already been touched on in Chapter Three.

Other factors which affect caseload are discussed below.

Population Levels

This is important for the Local Court. The majority of criminal matters arise from offences by males aged 16 to 24[164] and so changes in the size of this demographic group will affect caseload.

In terms of civil matters, an increase in population will statistically result in increases in certain matters including dividing fence disputes, family matters, bad debts and bankruptcies. The latter two classes are also influenced by economic conditions.[165]

Community Attitudes and Expectations

Annual civil registrations have increased by 31 per cent in the past five years in the District Court.[166] This has been attributed to the development of a more litigious culture with the Chief Judge reported as saying that most of these cases do not require a court judgment.[167] In response, the Court is making greater use of alternative dispute resolution (ADR).

The incidence of class actions has also increased in the last decade. These cases are lengthy because they have multiple litigants, large total claims and usually involve complex issues.[168]

Case Complexity

More complex cases take longer to hear and therefore absorb more court capacity in terms of Judge-time or Magistrate-time.

---

[164] Attorney General's Department, 2000, *Capital Investment Strategic Plan,* p 39.

[165] loc cit.

[166] District Court of NSW, 2001, *Annual Review 2000,* p 25.

[167] Morris, Rachel, "How Ally is Choking our Court System", *The Daily Telegraph,* 25 May 2001, p 2.

[168] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry,* p 34.

For example, the diversion of more straightforward matters to ADR in the District Court has increased the proportion of cases going to trial which are complex and, therefore, lengthy.[169]

There is also a trend toward longer criminal trials in the Supreme Court with a 35 per cent increase in the average length in the past 10 years. [170]

Factors Affecting Court Capacity

Resource Levels

Table 5.1 Net Cost of Services of the Local, District and Supreme Courts

$ millions	2000-01	1999-2000	1998-9	1997-8	1996-7	1995-6
Expenses	266.72	250.43	247.28	232.49	222.99	202.38
Revenue	78.31	74.43	69.73	69.57	80.57	60.51
Other	-0.03	0.17	0.01	0.35	-0.08	0.25
Net Cost of Services	188.37	176.17	177.56	163.26	142.34	142.11
Percentage Change	6.9	-0.8	8.8	14.7	0.2	

Source: Annual Reports of the Attorney General's Department , 1995-6, 1996-7, 1997-8, 1998-9, 1999-2000 and 2000-01. Justice Support Services (Attorney General's and Law Courts Library, Office of the Sheriff and Reporting Services) was established as a separate program in 1999-2000. The figures for 1999-2000 and 2000-01 include 85 per cent of this program as an estimate of the "share" of these courts.

Compound growth is 5.8 per cent per annum.

Current data availability and comparability makes it impossible to assess what would represent an "appropriate" level of funding for the courts. Changes in funding for each individual court and trends in case numbers will be considered in Chapters Eight, Nine and Ten.

As discussed in Chapter Three, the resource levels of other justice sector agencies also affect delay.

Capital resources are important as they determine court capacity – in terms of the number of courtrooms and the facilities offered – in the medium to long term.

Court Sitting Time

It is often suggested that court delays would be reduced if court sitting times were increased, particularly in the Local Court.

Witnesses before the inquiry, however, did not generally support this proposition:

---

[169] loc cit.

[170] loc cit.

Mr COLLIER: Are you in favour of extending the court sitting times in the Local Court and the District Court?

Mr COWDERY: No I am not.

Mr COLLIER: Why not?

Mr COWDERY: Because there is a huge amount of work that needs to be done outside of court sitting hours by Magistrates, Judges and by legal practitioners appearing in those cases and I think it would be false economy to take up more of the day with sitting times, unless there was some trade-off, unless those Magistrates and Judges who were involved were given time out of court at some other time.

CHAIR: Between cases?

Mr COWDERY: Between cases or, for example, in some jurisdictions, I think in some parts of Canada, for example, Judges have one day a week out of court...

CHAIR: Assuming that the caveats, if placed, are implemented, do you think the system would be working more efficiently?

Mr COWDERY: Ten until four is a long day in a contested hearing and the Judges and Magistrates have to concentrate right through that time. Typically there is a short break mid-morning and then there is an hour for lunch, but in a strongly contested hearing it is a big burden on the judicial officer and I think if you extend court sitting hours you increase that burden, and at some risk.

Mr GLACHAN: What about minor matters where there would be no custodial sentence?

Mr COWDERY: Well, there is a different aspect to that. If a Magistrate or Judge has a very long list of minor matters that officer has to change his or her mind and apply the mind to a long succession of what might be very different sets of circumstances involving different facts, different law, jumping from one regime to another, and so there is a burden of a different kind which, you know, can be very tiring.

Mr COLLIER: But Magistrates are experienced and they are used to jumping from case to case, surely.

Mr COWDERY: Yes.

Mr COLLIER: The view that comes across to me is that it is really quite archaic to have an institution sitting there and starting at 10 and finishing at 4, like the banks, for example. Why can we not start at 9 and finish at 5 or extend it beyond? Is that not a more modern way of thinking?

Mr COWDERY: Well, I do not think that Magistrates and Judges do start at 10 and finish at 4, not any more. It used to be the case years ago perhaps, they would go off and play golf in the afternoon, but these days they will be at work at 8 o'clock, preparing, researching. Bear in mind that it is not only the work in court that Magistrates and Judges have to do. I think the burdens on the Bench generally at the moment are horrendous. There is not enough time for proper research, the law is constantly changing and Magistrates and Judges have to keep abreast of

> changes which affect their jurisdiction. There is not enough time for reflection on large volumes of evidence that they might be hearing in cases; there is not enough time for the preparation of properly considered and reasoned judgments and they are required to turn out cases like sausages. I think it is an awful burden that has been put on judicial officers generally.[171]

The Law Society supported extended court hours for some long matters:

> **Mr JOHNSTONE:** The extended hours would most particularly be relevant to the Supreme Court and the District Court for the longer running trials, particularly matters like building arbitrations and other large contractual disputes that go longer than a week.[172]

The Society stated, however, that if Judges were to sit for longer hours they would need to be provided with dedicated time to write judgments.[173]

Finding

The extension of court sitting hours may be useful to speed the disposal of longer trials and hearings. This would not, however, create additional sitting hours "across the system" as the Judges involved would require dedicated time outside the courtroom to write their judgments.

Night Courts

The Law Society also suggested the establishment of a night court:

> **Mr MEAGHER:** We know that in America [night courts] work extremely well, particularly in relation to minor criminal matters. [174]

---

[171] Cowdery, Nicholas, Director of Public Prosecutions, Transcript of Hearing, 6 December 2001, p 20.

[172] Johnstone, Peter, Councillor and Chairman, Litigation Law and Practice Committee, Law Society of NSW, Transcript of Hearing, 6 December 2001, p 4.

[173] Johnstone, Peter, Councillor and Chairman, Litigation Law and Practice Committee, Law Society of NSW, Transcript of Hearing, 6 December 2001, p 2. Note that the Attorney General's Department has advised that it is "not unusual" for courts to sit longer hours once a case has started. Source: Feneley, John, *Attorney General's Department of NSW Further Response to Supplementary Questions,* p 1.

[174] Meagher, Nicholas, President of the Law Society of NSW, Transcript of Hearing, 6 December 2001, p 2.

US Night Courts are not without their critics. In November 2001, plans for two night court trials in the UK were shelved. Leaks to *The Guardian* newspaper in September suggested the trials, which were a pre-election commitment by the Blair Government, did not have full Home Office support because of problems with the perceived "quality" of justice provided by the courts in the United States ("assembly line justice"). *Source: Travis, Alan, "GBP5m night court test projects shelved", Guardian Unlimited Website (*www.societyGuardian.co.uk*), 3 November 2001.*

Further, the highly successful Night Narcotics Courts in Cook County – which started operation in 1989 – are now being phased out. The courts were created to address the exploding felony drug caseload. Concerns regarding security, costs and the size of the caseload being managed (475 cases per year per judge in 1997) have led to this decision. Note that the proportion of defendants

The Local Court has conducted three significant night court pilots in the past 25 years. The first, in the 1970s, dealt with traffic matters at North Sydney and Parramatta and ceased operation because of lack of client demand. The second was held at Blacktown for 12 months from July 1986. This pilot dealt with criminal matters where the defendant was on bail and was going to plead guilty:

> **Ms ANDERSON:** Again we came up with problems of getting people to come and what we found in the end was that people who came were represented by Legal Aid and not the private profession and, of course, that just increased the costs for Legal Aid and in the end there were dwindling numbers. You also had concerns [that] you had to ensure it was a matter where the person wasn't going to go into custody because you had no ability to put the person into custody and when that did happen the person was kept in the police cells, which is no longer permissible.
>
> The problem that we face in any night court trial is the large number of interdependencies in the Court. I mean you've got to get lawyers there, there are issues about prisoner transportation, and there are issues about all the support services that are available. Today, as a matter of right, defendants have rights to access interpreters and we provide a large range of court support services, particularly the domestic violence clients, in terms of court support for those. [For a] night court you'd have to duplicate all of those things. There is also an issue about police rostering as well. Police are already concerned about the amount of time they spend in court.[175]

The most recent pilot ran from March to June 1998 at Burwood, Gosford, Liverpool and Parramatta courts. Full registry services, determination of small claims matters and Chamber Magistrate appointments[176] were made available until 8.30 on Thursday evenings. This had the added advantage of not requiring the presence of legal practitioners or other specialist staff. The pilot was promoted through the Legal Aid Commission, Community Legal Centres, posters at the Courts and in nearby Courts and the distribution of printed fliers to other agencies (police, probation and parole) in the area. The results for each service area were:

- registry services – varied considerably between sites (low at Burwood and Liverpool) with most users contacting the registry before 7pm;
- chamber services – generally well utilised although these services could also be provided by outreach (that is, be located outside the court itself) and this was actually preferable for people from some cultural backgrounds; and
- small claims – matters listed for evening hearing averaged two cases a night. This benefited parties as there was additional time available to consider different options for resolution. In Burwood, which had the highest demand,

---

represented by private attorneys has fallen from 37 per cent to 23 per cent in recent years. *Source: Office of the Chief Judge, Donald P O'Connell, "Chief Judge O'Connell announces two night narcotics courtrooms to close", 11 February 1999 and Erickson, David A et al, Committee on the Courts for the 21st Century – Subcommittee on 26th and California, Illinois State Bar Association, www.isba.org, February 2002.*

[175] Anderson, Anita, Director, Local Courts, Transcript of Hearing, 7 December 2001, p 31.

[176] These services had been identified by a survey of court clients as being most in demand for evening usage.

clients tended to be legally represented. Burwood Court staff indicated they encountered difficulties with listing because of the unwillingness of the legal profession to attend after 5pm.[177]

The pilot services were not made permanent because of insufficient client demand although the Parramatta Registry is now open 7 days a week, 8am to 11pm.[178]

In its submission, the Law Society mentioned the success of the Night Court at Prahran Magistrates' Court in Victoria. This court commenced operation in July 1987 and largely dealt with motor traffic matters (in which the defendant pleaded guilty) with some minor criminal matters. An empirical review of the court,[179] while praising its operation, found it was under-utilised. The review suggested that greater promotion, via brochures in metropolitan courthouses and posters on court noticeboards, would largely solve this problem. This type of promotion was undertaken by the Magistrates' Court of Victoria in 1996 with little effect and the Prahran Night Court ceased operation on 20 December 1996.[180]

It should also be noted that the proportion of defendants who need to attend court has been reduced by recent changes in the *Justices Act 1902* which allow defendants in many minor matters to lodge guilty pleas, including the presentation of mitigating information, in writing. Defendants who wish to plead not guilty may also arrange a hearing date without attending the court.[181]

Finding

Night courts, although relatively successful in the United States of America, have not been well supported by the legal profession, defendants or plaintiffs in Australian pilots. Given the evidence, a further pilot or the creation of a permanent night court is not justified in NSW.

Judicial Vacations

The issue of judicial vacations, and their impact on court use and delay, has generated significant press coverage in recent months.[182] The legal profession, however, does not appear to share the concerns of the media.

---

[177] Local Court of NSW, 1998, *Extended Hours Service Pilot – Evaluation Report,* p 3-5.

[178] Anderson, Anita, Director, Local Courts, Transcript of hearing, 7 December 2001, p 31.

[179] Seifman, Robert D, 1996, "Night Court – Dispensing Justice After Dark or Time to Turn Off the Lights?", *Journal of Judicial Administration,* Volume 5, Number 4, May, p 226.

[180] Magistrates' Court of Victoria, 1997, *Annual Report 1996-97,* p 8.

[181] Anderson, Anita, "Local Court of NSW Response to Supplementary Questions", p 7, *Attorney General's Department of NSW Response to Supplementary Questions.*

[182] For example, Marshall, Kate, "Traditional summer holiday in the dock", *The Australian Financial Review,* 14 December 2001, p 53 and Robertson, Robin, "Backlog no bar to a six-week holiday", *The Australian Financial Review,* 7 December 2001, p 50.

Box 5.1: Judicial Vacations – Comments from Practitioners

In my view, the break taken by the Supreme Court between approximately the middle of December and the end of January has little or no impact upon Court waiting times at all. Judges are entitled to leave on terms which are well known. From my observation there appears to be no shortage of Judges throughout the year and this occurs notwithstanding the fact that some Judges choose to take their vacation at times other than the end of year period in December and January. The Court rosters some Judges for duty during this period for urgent matters. This appears to cope adequately with the need for Courts at this time.

It also has to be borne in mind that the legal profession itself chooses to take advantage of the period before and after Christmas for holidays and other non-work related activities. This has inherent in it an efficiency in as much as it corresponds to the time when the bulk of the Court are also on leave.[183]

Ian Harrison, SC
Senior Vice President
NSW Bar Association

So far as I am aware, the summer break does not impact adversely upon Court waiting times in the Supreme Court's Common Law and Bails (ie Criminal) Division. Given the present rigorous level of case management for trials and the necessity for some respite for all those involved at a professional level the summer break is necessary and desirable. There is a fairly identifiable body of specialised professional, judges, prosecutors, defence counsel and forensic medical specialists working in the criminal courts at the highest level of difficulty involved in the Supreme Court. I do not believe that a sufficient core of those people is available to keep the whole of the superior court system working at the same level of intensity throughout the year without problems of quality and resources arising. Urgent matters are accommodated by duty judges during the break and the present situation does not otherwise merit any curtailment of the summer break.[184]

Christopher Craigie, SC
Deputy Senior Public Defender

[183] Harrison, Ian, *Bar Association of NSW Response to Supplementary Questions,* p 1.

[184] Craigie, C B, *Public Defenders Response to Supplementary Questions,* p 1.

Table 5.2: Judicial Vacations in NSW

Jurisdiction	Extent of Judicial Vacation
Supreme Court of NSW	The 6 week Law Vacation commences each year on the Monday before 24 December. During this time the registry remains open, bail lists continue and vacation Judges are available for urgent matters. Cases may continue during this period – many cases are listed for judgment to be handed down, for mention and sometimes for hearing. During the first week of the 2001-02 Law Vacation, in addition to rostered judicial officers, there were between 7 and 11 judicial officers sitting each day for each of the Court of Appeal, Common Law Division and Equity Division. Judges also use this period for writing judgments.
District Court	The Court's calendar still provides for a fixed vacation (in 2001-02 from 15 December 2001 until 28 January 2002) but the Court now sits during this period as demand dictates. During the 2001-02 vacation, Judges were rostered at: Week commencing / Sydney / Other Venue 2 January 2002 / 1 / 0 7 January 2002 / 1 / 0 14 January 2002 / 18 / 0 21 January 2002 / 21 / 2 (Campbelltown and Lismore) This provided 43 weeks of sittings where formerly no sittings would have taken place.
Local Court	In 2001-02 the Court commenced its Christmas break on 24 December 2001 and resumed normal sittings on 8 January 2002. During the vacation period the Court continued to sit at Parramatta Local Court and Lidcombe Children's Courts. Magistrates at these locations dealt with accused persons in custody, urgent applications for apprehended violence orders from across the state and other urgent matters from the Sydney metropolitan area. In regional and rural NSW, Clerks of the Local Courts conducted bail hearings.

Sources: Johnston, Nerida, "Supreme Court of NSW Response to Supplementary Questions", p 8-10, Attorney General's Department of NSW Response to Supplementary Questions: Feneley, John, "District Court Response to Supplementary Questions", Attorney General's Department of NSW Response to Supplementary Questions, p 7: and Anderson, Anita, "Local Court of NSW Response to Supplementary Questions", p 5, Attorney General's Department of NSW Response to Supplementary Questions.

The evidence above indicates that the Christmas break taken by the Local Court is probably shorter than that taken by many private sector organisations. The vacation periods for the District and Supreme Courts are longer but hearing capacity is available, if necessary.

Finding

On the basis of evidence submitted by both the legal profession and the courts, judicial vacations are not excessive and are not a factor in court delay. Adequate court services are available during the periods under consideration.

Case Management

This aspect of resource use is of such key importance that it is dealt with on a court by court basis in Chapters Eight, Nine and Ten.

Research into Delay in the District Court

Introduction

Although court delay is a long term problem in the NSW, the factors responsible for it were not subject to systematic analysis prior to the publication of *Managing Trial Court Delay* by BOCSAR in May 2000.

This report, which dealt with matters heard in the NSW District Court, found:

- the capacity of the District Criminal Court had increased by 92 per cent between 1995 and 1999[185] and excess capacity was 5-10 per cent (depending on the assumptions made);[186]
- the actual number of criminal matters requiring a trial (that is, defended matters) declined by 19 per cent between 1996 and 1999;[187]
- sentence registrations had declined by 10 per cent between 1996 and 1998 and appeal registrations were relatively static;[188] and
- trial durations had increased slightly.[189]

Given these statistics, why did trial court delay increase by 23 per cent from 1996 to 1999?

The report found the reasons lay not with the actual trial process but in the failure of matters to proceed to trial when listed.[190] Of 519 matters surveyed in 1999, 71 per cent failed to proceed to trial on the day they were listed because of:

- late guilty pleas – 35 per cent;

---

[185] Weatherburn, Don and Baker, Joanne, 2000, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court,* BOCSAR, p 8.

[186] ibid, p 13.

[187] ibid, p 8.

[188] loc cit.

[189] ibid, p 10.

[190] ibid, p 5.

- adjournments – 29 per cent;
- not reached (that is, overlisting) – 22 per cent;
- non-appearance – 6 per cent;
- no bill – 5 per cent; and
- other – 3 per cent.[191]

Late guilty pleas

Sixty per cent of guilty pleas were not entered until the day of the trial. The most common reasons for pleas "on the steps of the Court" were:

- late decision by the Crown to accept a plea to a lesser charge, another charge or fewer charges;
- defence counsel was unable to discuss the matter with the Crown until late in the process;
- defence counsel had difficulty getting firm instructions from their client until late in the process;
- the client changed their instructions just before trial; and
- there was no clear sentence benefit for the client to plead at an earlier stage.[192]

In this context, it is easy to see why the Centralised Committals Scheme has been so successful because it provides defendants with access to counsel and the opportunity to negotiate with Crown counsel at an early stage.

Adjournments

Sixty one per cent of adjournments in the study were sought by the defence, 33 per cent by the Crown and six per cent of applications were made jointly.[193] Almost 60 per cent of adjournments were granted on the trial date and, even when sought in advance, often did not provide sufficient notice to schedule an alternative case.[194]

The chief reasons given by defence counsel for seeking adjournments were:

- difficulties with legal representation – 28 per cent – no legal aid funding or difficulty finding suitable representation;
- further case preparation required – 26 per cent;
- illness/family reasons – 13 per cent;

---

[191] ibid, p 22.

[192] ibid, p 26-27.

[193] ibid, p 29.

[194] loc cit.

- legal representation unavailable – 12 per cent;
- witness unavailable – 8 per cent; and
- other – 13 per cent – including late applications for Judge-alone trials, changes in venue and changes in plea.[195]

The chief reasons given by the Crown for seeking adjournments were:

- witness unavailable - 47 per cent across the State but the source of 75 per cent of Crown adjournments in the country;
- further preparation required – 14 per cent – this was a more common reason in Sydney;
- need to join with other matters – 10 per cent;
- consideration of no bill – 9 per cent;
- reasons related to the accused – 7 per cent;
- interlocutory result/appeal outstanding – 5 per cent; and
- Crown prosecutor unavailable – 3 per cent. [196]

Case Not Reached

Historically, the District Court has responded to the problem of late pleas and adjournments by listing more matters than can be tried in the time available. This means that when a trial does not proceed, another is ready to take its place. Sometimes, however, a greater proportion of cases proceeds than is anticipated and cases are "not reached".

Unfortunately, failure to reach matters exacerbates the adjournment issue as regular experience of over-listing reduces the readiness and availability of counsel and key witnesses for any one appearance.

No Bill

Accused persons or their representatives or prosecutors may apply to the Court to have a charge or charges discontinued or varied.[197] The DPP uses three tests to determine whether it is in the public interest to proceed with a case:

1. whether or not the admissible evidence available is capable of establishing each element of the offence;
2. whether or not there is a reasonable prospect of conviction by a reasonable jury (or other tribunal) properly instructed regarding the law; and where (1) and (2) are established

---

[195] ibid, p 30.

[196] ibid, p 31.

[197] Office of the Director of Public Prosecutions, 1987, *Prosecution Guidelines,* Guideline 7.

3. whether or not discretionary factors nevertheless dictate that it is not in the public interest for the matter to proceed. These factors include issues such as whether the case is of a trivial or technical nature or whether it involves an obsolete or obscure law.[198]

Conclusion

The Report estimated that if half of all matters which were finalised as a guilty plea were "weeded out" before being listed for trial and if each matter proceeding to trial were finalised, on average, on its second listing, the number of matters listed for District Court criminal trial would fall by 33 per cent.[199]

Recommended Reforms

Note: Although these recommendations were made in the context of problems observed in the District Court, commentary on their implementation or achievement will be extended to the Supreme and Local Courts where relevant. [200]

1. *Increasing trial date certainty by reducing over-listing quotas to the extent that it is highly unlikely a matter will not be reached.*

The District Court has made considerable progress in this regard:

> **Mr FORNITO:** In crime the percentage [of not reached cases in Sydney] is nil. We have not had a not reached trial in Sydney since September 1999. In Sydney West it is 5.5 percent. That is up from 2.5 last year, but down from 18 percent the year before. In the country it is 16.5 percent...the year before it was 26 percent and the year before that it was 30 percent. [201]

It is more difficult for the Court to manage the "not reached" figure in the country as the isolation of some circuits makes it impossible to use underutilised capacity that may exist in other circuits to hear cases that may not be reached. By comparison, if a case does not look like it will be reached in Sydney it may be transferred – without prohibitive inconvenience – to an alternative courtroom in Sydney West.

In November 2001, 7.6 per cent of all cases (civil and criminal) listed for hearing in the Local Court were not reached.[202] Given this jurisdiction's rapid case turnaround, the Committee does not regard this as a significant issue.

---

[198] Office of the Director of Public Prosecutions, 1987, *Prosecution Policy,* Policy 5.

[199] Weatherburn, Don and Baker, Joanne, 2000, op cit, p 32.

[200] ibid, p 33-34.

[201] Fornito, Robert, Manager, Case Management and Listing, District Court of NSW, Transcript of Hearing, 7 December 2001, p 69.

[202] Anderson, Anita, "Local Court of NSW Response to Supplementary Questions", p 10, *Attorney General's Department of NSW Response to Supplementary Questions.*

The Supreme Court uses "prudent overlisting" in the criminal list to ensure its resources are fully utilised. Any cases which are expected to be relatively short and (generally) where the accused is on bail can be listed as "back-up" or reserve trials. These matters are heard if another trial is much shorter than expected or falls through. If all other trials go ahead as scheduled the back-up trial can be run by drawing on the availability of Acting Judges. Approximately fifteen back-up trials were listed in 2000 with one being not reached.[203] Between January and August 2001, an average of 17 criminal cases were listed each month and all were reached. During the same period, 50 Common Law Division civil cases were listed each month with, on average, only one not reached.[204]

2. *Where a matter is not reached or adjourned, it should be given a new trial date as soon as possible. Where a matter is adjourned, it should be relisted before the Judge who granted the adjournment to discourage "Judge shopping" ensure that, on the matter's next appearance, the Judge is aware of its history.*

Information is not currently available regarding the average amount of time between an adjournments and new trial dates.

3. *Senior Crown Counsel should be involved at an early stage (to allow the Crown to negotiate potential guilty pleas) and Legal Aid should be available to eligible defendants (to ensure the accused is capable of entering a plea). The initial Crown representative should carry matters through to finalisation whenever possible.*

These principles and practices are embodied in the Centralised Committals Scheme (refer page 39).

With regard to the early involvement of Crown counsel in general, the inquiry was advised that, in most matters, Crown counsel did not have the "luxury" of extensive lead time in terms of case preparation

> **Mr TORBAY:** *Managing Trial Court Delay...* recommended a number of reforms including early involvement of senior Crown counsel to consider potential guilty pleas promptly and also clear sentence benefits for early guilty pleas...What determines when senior Crown counsel gets involved in a case?
>
> **Mr COWDERY:** Resources, the number of counsel who are available to deal with the number of matters that need to be prosecuted, and we are, and have been, certainly throughout my time in this position - in the position of having to put people into the gaps as they occur without having the luxury of people being able to be given matters in advance to do proper and thorough preparation, consultation with the other side working towards a plea or towards reducing the issues that are going to be tried. If we had more Crown Prosecutors we could do more of that sort of work by not constantly having to have them appear in Court day after day.

---

[203] Highet, Jeannie, Policy and Research Officer, Supreme Court of NSW, Transcript of Hearing, 7 December 2001, p 54-55.

[204] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry*, p 13.

Mr COLLIER: But at what point in the process do they get involved? At what point in the general process does senior Crown [Counsel] get involved?

Mr COWDERY: Usually not very long before trial...it might be during the week before, sometimes it might be the Friday before a Monday trial, sometimes it might be a couple of weeks before the trial. It is variable, it depends on the demands at the time, it depends on the number of Crown Prosecutors who are available at the time, and that varies during the course of the year.

Mr COLLIER: But generally are we talking about a very short space of time between picking up the brief and the trial?

Mr COWDERY: Usually, yes. We make special provision for some particular cases. If we can identify a case as being particularly difficult or particularly lengthy, requiring an unusual amount of preparation, then we try to nominate a prosecutor well in advance to do that sort of work, but they are the exceptional cases. [205]

4. *Adjustment of legal aid funding. Defence representatives earn a higher fee if the accused changes their plea to guilty on the day of the trial rather than at committal or an early stage of Court proceedings.*

The Legal Aid Commission advised the inquiry that a change in fee structure would require additional resources and, as pleas are typically being entered "very early now", the provision of a fee incentive to counsel was not "such an issue" as it had been in past years.[206]

Legal Aid now provides a single grant covering committal proceedings and trial. Previously, the defendant had to make a second application after committal which could lead to delays in engaging legal representation for trial.

5. *Clear sentence benefits for early guilty pleas.*

This recommendation pre-dates *R v Thomson; R v Houlton.* There the Court of Criminal Appeal, at the request of the Crown, made a guideline judgment to encourage early guilty pleas through greater transparency in the sentencing process for State offences:

(i) A sentencing Judge should explicitly state that a plea of guilty has been taken into account. Failure to do so will generally be taken to indicate that the plea was not given weight.

(ii) Sentencing Judges are encouraged to quantify the effect of the plea on the sentence insofar as they believe it appropriate to do so. This effect can encompass any or all of the matters to which the plea may be relevant - contrition, witness vulnerability and utilitarian value - but particular encouragement is given to the quantification of the last mentioned matter.

---

[205] Cowdery, Nicholas, Director of Public Prosecutions, Transcript of Hearing, 6 December 2001, p 17.

[206] Humphreys, Douglas, Director, Criminal Law Branch, Legal Aid Commission of NSW, Transcript of Hearing, 6 December 2001, p 27-8.

Where other matters are regarded as appropriate to be quantified in a particular case, eg assistance to authorities, a single combined quantification will often be appropriate.

(iii) The utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10-25 percent discount on sentence. The primary consideration determining where in the range a particular case should fall, is the timing of the plea. What is to be regarded as an early plea will vary according to the circumstances of the case and is a matter for determination by the sentencing Judge.

(iv) In some cases the plea, in combination with other relevant factors, will change the nature of the sentence imposed. In some cases a plea will not lead to any discount.[207]

The Court defines the "utilitarian value" of a plea as "the collateral benefits for the efficiency and effectiveness of the criminal justice system as a whole" which flow from a plea of guilty, particularly an early plea. These benefits, however, are said to "require acknowledgment of some character by way of an incentive, so that [they] will in fact be derived by the system."[208]

Sentencing is, however, an issue of individual judicial determination in each case:

> **Mr COWDERY:** One has to bear in mind, though, that the process of sentencing is an art rather than a science and there will be a host of features of a case that have to be taken into account when a Judge or Magistrate picks on a particular sentence as the appropriate one, so it is simply not possible to dissect the sentence and any reductions that are given and to ascribe part of that deduction to the fact that a plea was entered one day on the first appearance rather than on the third appearance, but, generally speaking, Judges and Magistrates are required to give greater benefit the earlier the plea is entered. [209]

6. *Improved data collection and monitoring including:*

- *separate monitoring of listing outcomes by each registry to identify individual problems. The proposed outcome classifications include proceeded to trial, not reached, adjourned by Defence, adjourned by Crown and change of plea;*
- *monitoring of additional data including: the age of each matter being listed for trial (matters that have exceeded the Court's time standards should be given priority) and the age of the pending trial caseload (which indicates whether the Court is at risk of breaching its time standards).*

The collection of such data would be very difficult given the existing information systems of the *Courts*. Chapter Seven discusses the development of the proposed Courts Administration System.

---

[207] R v Thomson; R v Houlton [2000] NSWCCA 309.

[208] ibid, at 115.

[209] Cowdery, Nicholas, Director of Public Prosecutions, Transcript of Hearing, 6 December 2001, p 22.

Research in Other Jurisdictions

United Kingdom – Criminal Justice: Working Together

This report, by the National Audit Office, found that the number and length of adjournments granted by Magistrates was a key factor in court delay. Half of all cases were not completed at their initial Magistrates' Court hearing and were adjourned.[210] On average, minor cases had one adjournment and more serious cases had 2.6 adjournments prior to finalisation in the Magistrates' Courts.[211]

Fifty nine per cent of adjournments were "procedural" – for example, to allow a pre-trial review or pre-sentencing report to be prepared – and had a standard length of 27 days.[212]

The other forty one per cent resulted from ineffective hearings. That is, they resulted from errors or omissions on the part of one or more participants. On average, these cases were delayed for 18 days.[213]

The reasons for ineffective hearings were:

25%	Defendant did not attend
23%	Defence – other reasons (for example, further instructions required)
27%	Prosecution (15% Police; 12% Crown Prosecution Service)
9%	Court
9%	More than one party
7%	3rd party, Prison Service, Probation Service[214]

Half the ineffective hearings, therefore, were caused by problems within, or in liaison between, the courts, the police, the Crown Prosecution Service, the prison service, prisoner escort and custody and the probation service.

With regard to the Crown Court, a third of all trials scheduled in 1998 were disposed of in some other way on the day of the trial. Sixty per cent of these resulted from late guilty pleas.[215]

In addition, another 26 per cent of trials were "ineffective" and had to be adjourned for the following reasons:

25%	A witness did not attend court.

---

[210] National Audit Office, 1999, *Criminal Justice: Working Together,* The Stationery Office, London, p 62.

[211] ibid, p 66.

[212] ibid, p 69-70.

[213] ibid, p 74.

[214] ibid, p 75.

[215] ibid, p 103.

22%	Matter not reached (overlisting)
29%	Defence-Related
15%	Prosecution-Related
6%	No Single Party
2%	Judge or jurors unavailable
1%	Prison Service[216]

County Court of Victoria

The Court analysed the disposition of criminal cases in the 12 months prior to 1 September 1999 and found:

- 37 per cent of trials adjourned and a further 43 per cent were subject to late pleas of guilty;
- on average an adjournment added 90 days to the eventual elapsed time for a case;
- the number of cases finalised was steady but case duration was increasing meaning more Judge sitting days had to be employed;
- the median time to disposition for trial cases was 269 days versus the Court's standard of 180 days.[217]

A new Case List Management System was adopted from 1 September 1999 including:

- a Case Conference (early judicial intervention focusing on issues and resolution) approximately 10 weeks after committal; and
- a Directions Hearing approximately 12 weeks after the Case Conference and four weeks before the trial date. This hearing is a requirement under the *Crimes (Criminal Trials) Act 1999.*[218]

The full process was introduced for reserved plea committals in Melbourne from 1 September 1999, excluding sexual offence cases. This was expanded to all "not guilty" and reserved plea circuit cases from 1 May 2000 and all "not guilty" plea cases in Melbourne from 1 June 2000.

By 30 September 2000, 157 cases had been finalised under the new system:

- 83 per cent had been resolved at case conference;
- 8 per cent were resolved at the Directions Hearing;
- 4 per cent were resolved at trial date by a guilty plea; and

---

[216] ibid, p 105-106.

[217] County Court of Victoria, 2000, *Annual Report – 1 July 1999 to 30 June 2000,* Melbourne, p 95-96.

[218] ibid, p 103.

- 5 per cent went to verdict (none of these cases adjourned at trial).[219]

This system will be compared to practice in the District Court of NSW in Chapter Nine.

Magistrates' Court of Western Australia

The Magistrates' Court consists of the Court of Petty Sessions (criminal) and the Local Court (civil). A 1996 study of the Court by the Office of the Auditor General found:

- in the Court of Petty Sessions, 55 per cent of matters did not proceed to trial as scheduled:
  - 23 per cent – adjourned;
  - 17 per cent – changed plea;
  - 9 per cent – defendant did not appear;
  - 3 per cent – withdrawn; and
  - 3 per cent – guilty plea before trial.[220]
- in the Local Court, only 55 per cent of sitting time was used with the remaining 45 per cent represented by matters which had:
  - 19 per cent – settled;
  - 11 per cent – postponed;
  - 7 per cent – discontinued;
  - 4 per cent – overestimated trial time; and
  - 3 per cent – been subject to default judgment.[221]

Finding

Research interstate and overseas has identified similar causes for trial delay to those highlighted by the work of the Bureau of Crime Research and Statistics in the District Court of NSW.

The Inquiry does not, therefore, propose any further potential sources of trial inefficiency that should be investigated in NSW courts.

---

[219] ibid, p 98.

[220] Office of the Auditor General, 1996, *Order in the Court: Management of the Magistrates' Court,* Perth, p 21.

[221] ibid, p 22.

Chapter Six

Court Governance

Introduction

The structural and operational relationship between the judiciary and executive is an issue that provokes the expression of strong views supporting both change:

> **Mr MEAGHER:** Court staff are in fact employed by the Government and not by the Courts and Judges...
>
> ...to me, as a lawyer, I have an inherent problem with the separation of powers as to whether or not the Courts actually have control of their own destiny or whether in fact they are a puppet of Government.[222]

And the maintenance of the status quo:

> **CHAIR:** Do you believe that funding for court administration should be provided directly to the courts, rather than to the Attorney General's Department? As you know, the Federal Court and South Australian courts have that kind of arrangement.
>
> **Mr HARRISON:** Our view would be that there is a possibility of an interference with the independence of the courts if it were not done through the Attorney General's Department.
>
> Courts are not commercial enterprises. They do not make money. They do not earn money. They do not distribute money and to the extent that they are an arm administering justice in the way that they do, the filtering process through the Attorney General's Department would be our preference.
>
> **CHAIR:** So the current arrangement?
>
> **Mr HARRISON:** Quite so.[223]

Added to this range of views is uncertainty whether a change in administrative arrangements would actually have a favourable impact on court operation:

> **Mr JAMBRICH**: Not necessarily the biggest, but certainly one of the problems that we identified back in the first [Audit Office] report was what we called fractured responsibility. Really basically the support system is provided by the Attorney General's Department and, as such, the administrative officer is looking after that. The administrative officer has a dual responsibility and the administrative officer has to report to the head of the court and also to the Attorney General's Department. As soon as you have to start reporting and you are responsible to two masters, it's going to be very very difficult to satisfy both...

---

[222] Meagher, Nicholas, President of the Law Society of NSW, Transcript of Hearing, 6 December 2001, p 3.

[223] Harrison, Ian, Senior Vice President of the NSW Bar Association, Transcript of Hearing, 7 December 2001, p 12.

CHAIR: We have received submissions in the past suggesting that control should be completely transferred back to the judiciary. Do you have an opinion about that?

Mr JAMBRICH: It is not something for us, I would think, to say. We outlined the difficulties with the current system. My understanding is that in certain jurisdictions the responsibility is within the court system itself but as to which is better, well, we have not evaluated it and really that would be only a conjecture on our part to make any comment.[224]

Governance Models

Five models of court governance have been identified:

1. Traditional – a general department (usually a justice or attorney general's department) provides services to the judiciary which has no responsibility for, or formal power over, those employed to provide that support.

2. Separate Department Model – a "courts administration" department provides services to the judiciary which has no responsibility for, or power over, the administration.

3. Federal Court or "Chief Justice Autonomous" Model – where each court individually controls its own administration and receives a separate budget.

4. High Court or "Autonomous Collegiate" Model - the court controls its own administration and the administrative functions of the court are generally discharged by the Chief Executive and Principal Registrar (who is appointed by the Governor-General, on the nomination of the Court).

5. South Australian or "Judicially Autonomous" Model – a judicial governing council and a separate courts administration which together provide for the needs of the courts under judicial direction and control. [225]

While the "judicially autonomous" model has been dominant in the United States for some years,[226] it is still to be conclusively established that varying court administrative arrangements actually improves the effectiveness and efficiency of court operation. Some issues to be considered:

- whether or not court administration is "controlled" by the judiciary or a multi-disciplinary state department, it is still funded by the executive;

- the courts, negotiating on their own behalf for budgetary support, have not been uniformly successful in Australia, particularly in times of crisis:

---

[224] Jambrich, Thomas, Assistant Auditor-General, Audit Office of NSW, Transcript of hearing, 7 December 2001, p 5.

[225] Sallmann, Peter, 1998, "Courts' Governance: Whither Queensland?", *Journal of Judicial Administration,* Volume 8, Number 1, August , p 26.

[226] Sallman, Peter, 1994, "Where are we heading with Court Governance", *Journal of Judicial Administration,* Volume 4, No 1, August, p 15.

> The failure of the Attorney and moreover Parliament to recommend the necessary appropriation to meet shortfalls in funding in the Family Court in previous years raises a serious question about the desirability of the semi-autonomous model. It certainly reflected adversely upon the judiciary.[227]

In addition, the experience of trial delay in South Australia, whose courts have the highest level of administrative independence in Australia, is not compelling.

As seen in the comparative data presented in Chapter Four, South Australia has relatively few cases and, while its performance in the higher courts is generally good, performance in the Magistrates' Court – the only jurisdiction where South Australian caseload is significant – is four per cent below the national average for criminal matters and 29 per cent below the national average for civil matters (on the basis of the percentage of cases finalised within 12 months).

> It cannot be said that the autonomous, self-managed courts have produced a more efficient and effective model of court governance. The output as evidenced by the statistics for South Australia would not support that proposition.[228]

Department of Courts Administration – A Brief History

The Department of Courts Administration was established in NSW in July 1991 in response to a recommendation of the 1989 *Review of the Courts*.[229] In April 1995, the NSW Audit Office published a Performance Audit Report on court management that commented favourably on the progress since 1989:

> Audit found that progress had been made in reducing delays and backlogs. Improvements are particularly apparent in both the criminal and civil jurisdictions of the District Court. The Supreme Court Common Law and Equity Divisions also show marked improvement as do the Local Courts.[230]

However, given the large range of other reforms[231] that were implemented during the same period, it is impossible to assess the individual impact of the separation of courts administration from the Attorney General's Department. Further, courts administration was rolled back into the Department in April 1995.

---

[227] Parliament of the Commonwealth of Australia, Joint Select Committee on Certain Family Law Issues, 1995, *Funding and Administration of the Family Court of Australia,* AGPS, Canberra, 4.82.

[228] O'Ryan, Stephen, and Lansdell, Tony, August 2000, op cit, p 31.

[229] Coopers & Lybrand, WD Scott, 1989, *Report on a Review of the New South Wales Court System,* Executive Summary p 1.

[230] Audit Office of NSW, 1995, *Performance Audit Report: Department of Courts Administration – Management of the Courts (A Preliminary Report),* Sydney, p 2.

[231] These reforms included: additional Supreme and District Court judges; pre trial hearings and conferences in the District and Supreme Courts; introduction of the Philadelphia system of arbitration in Sydney; introduction of Differential Case Management in the Supreme Court; establishment of Children's Court; changes in dollar limits for civil cases in the Local and District Courts; and some $200 million in capital works including $105 million on the Downing Centre. (Source: ibid, p 19-20).

Mr FENELEY: The only thing that can be said about the fact there was a period of separate courts administration is that it probably was not long enough to produce any results. [232]

Finding

There is no conclusive evidence that "autonomous" court administration enhances court performance – particularly with regard to court delays.

Governance under the Attorney General's Department of NSW

Box 6.1: The View from the Department

I do not believe sufficient research has been undertaken to determine which court administration model is best or what combination of court governance principles delivers the best "justice" overall. I do believe...the qualities of leaders can be as or more important than the systems in which they work. For example, rules of court can be applied ruthlessly and arbitrarily or compassionately and flexibly. The question of how fairly those rules operate cannot be determined by looking at the rules alone.

Equally the effectiveness of a court cannot be determined by looking at its structure or processes alone. In reality, it will be the qualities of the judicial and administrative leaders which will set the "corporate culture" of the court and which in turn will determine how efficient, effective and accountable the court is...

[In NSW] we do not place great emphasis on structure but rather on co-operation and consultation...

Whilst we have sought to be more accountable by encouraging the setting of time standards and the publication of performance data, the NSW judiciary has been fully supportive. We see ourselves in partnership not in conflict with the judiciary.

No doubt there are times when we fall short but I believe the current structural governance arrangements are no impediment to court efficiency. [233]

Laurie Glanfield
Director General

Judicial Involvement in Developing and Negotiating Court Budgets

In November each year all budget dependant agencies, including the Attorney General's Department, submit their budget proposals to NSW Treasury. These

---

[232] Feneley, John, Acting Deputy Director General, Attorney General's Department of NSW, Transcript of Hearing, 7 December 2001, p 78.

[233] Glanfield, Laurie, 2000, *Governing the Courts – Issues of Governance Beyond Structure,* 18th Annual AIJA Conference, Darwin, July 2000.

proposals may be for recurrent[234] or capital funding and the Department has advised the Inquiry that each Court and Business Centre provides input into the overall "bid".[235]

Following Budget Committee deliberations, agencies receive Allocation Letters in March that advise them which of their budget proposals have been accepted:[236]

> [The Allocation Letter] triggers the setting of the Department's internal budgets.
>
> The Budget is devolved centrally to the Court jurisdictions. The Budget for the Court jurisdictions generally reflects incremental changes from the previous year's Budget...Other adjustments may include successful enhancements or maintenance bids proposed by the Courts.
>
> A preliminary Budget allocation for the coming year is forwarded to the Senior Court Administrator in April. Meetings are held between the Director General, Director Management Services, Director Financial Services and the Senior Court Administrator of each jurisdiction. This meeting provides an opportunity for the Court Administrator to present their case for additional funding either as an on-going proposition or for a one-off special project they wish to undertake but cannot fund from within existing resources. This meeting also gives the Court Administrator the opportunity to discuss/determine the link between the Budget and the Business Plan.
>
> Input from the initial Budget allocation discussions will help determine the final Budget allocation given to a court jurisdiction by mid to late June. Once the Budget is allocated there is constant reporting and monitoring. During the year both the Judiciary and the Senior Court Administrators may initiate requests for amendments to the Budget allocation.[237]

For some members of the judiciary, however, the position is less clear cut. The Resources Committee[238] of the District Court was created to establish and maintain effective linkages with the Attorney General's Department to ensure the Court is appropriately resourced. The Committee's current Business Plan includes the following statements:

> To achieve its goals, the Court must communicate its requirements for resources in a formal way to the Executive and co-operate with the administration to most effectively deploy these resources...

---

[234] Recurrent proposals are classified as maintenance (to meet anticipated increases in demand for existing services) or enhancement (to provide new services) proposals.

[235] Feneley, John, *Attorney General's Department of NSW Response to Further Supplementary Questions*, p 1.

[236] These Allocation Letters include amounts for the Budget Year and the three following years (the forward estimates).

[237] Feneley, John, *Attorney General's Department of NSW Response to Further Supplementary Questions*, p 1.

[238] The Committee comprises four judges.

> In the longer term [the Committee] will seek to make a direct contribution to the Department's budgetary process. This will take time. The Judiciary and the Executive have differing attitudes and approaches from time to time to the allocation of funds...There is also a long history of the Department acting through its internal processes and consequently in little consultation with the Judges.[239]

These comments, and indeed the Resource Committee's Terms of Reference, suggest the Judges of the District Court do not believe they have satisfactory formal links with the Budget process and that consultation is, at best, limited.

Historically, few Judges and magistrates would have sought involvement in the "mechanics" of Budget development. Similarly, 10-20 years ago, few Judges and magistrates would have sought to actively manage the progress of the cases before them. Today, case management is the norm. In the courts of 21st century New South Wales many things have changed and are changing and it is now essential that the views of both groups of court professionals – the judiciary and the administrators – are actively sought in the development of the Budget of the Attorney General's Department.

The Supreme and Local Courts do not have Resources Committees although the Supreme Court has a Policy and Planning Committee.[240] The Local Court has a Strategic Committee comprising magistrates and court officials, which examines resource issues, and a Strategic Plan Review Committee.[241]

Finding

Consultation between the judiciary and the Department on key issues such as resourcing, which is necessary because the courts are administered as part of the Department, has not yet reached appropriate levels.

---

[239] District Court of NSW Resources Committee, 2001, *Business Plan,* p 1.

[240] The Court's Chief Executive Officer and Principal Registrar acts as the Department's representative on this Committee and is also a member of the Education Committee, Building Committee, Information Technology Committee and the Alternative Dispute Resolution Steering Committee. The Building Committee, Information Technology Committee and Jury Task Force also include senior officers from the Attorney General's Department. Source: Supreme Court of NSW, 2001, *Annual Review 2000,* p 71-8.

[241] The Committee includes a representative from the Department. Other Local Court Committees which include representatives from the Department: Local Court (Civil Claims) Rule Committee; Local Court Rule Committee; Capital Works and Courthouse Renovation Committee; and the Video Conferencing Committee. Source: Feneley, John, *Attorney General's Department of NSW Response to Further Supplementary Questions.*

Recommendation

14. As a matter of priority, the Supreme and Local Courts should also establish Resource Committees or expand current committees that already carry out some of the relevant functions. These committees, and the Resource Committee of the District Court, should:

- include members of the Judiciary, the Chief Executive Officer/Principal Administrator/Director of the Court and a senior financial representative from the Attorney General's Department;
- meet each quarter to discuss demand trends and resource implications; and
- have an annual "pre Budget" meeting before the Department submits its Budget proposals to NSW Treasury. This meeting will analyse and prioritise the maintenance, enhancement and capital proposals of the Court.

Judicial Involvement in Staff Decisions impacting Court Administration

Court registry staff are employed by the Attorney General's Department under the Public Sector Management Act NSW 1998 and are permanent public sector employees.[242] Recruitment is undertaken jointly by the relevant registry and the Human Resources division of the Department.

Staff report through line managers to each Court's Chief Executive Officer.[243] Each Chief Executive Officer is on contract and is a member of the Senior Executive Service (SES). Due to its size, the Local Court has two other SES-level managers. The Selection Committee for SES-level appointments includes the Director General of Attorney General's Department and the head of the relevant Court.[244]

When an SES contract is due to expire, the position is usually advertised in the open marketplace. Contract extension without advertising may occur, however, where an officer has demonstrated a high standard of performance and the role and responsibilities of the position are largely unchanged.

Both SES and non SES staff are subject to compulsory performance management. If poor performance is identified and is not appropriately resolved, a number of remedies are available including grade regression and dismissal. The Director General meets with head of each Court every month to discuss issues of significance which may include the performance of the Court's Chief Executive Officer, if necessary. The employment of SES officers may be terminated at any time.

---

[242] From time to time temporary staff will be used to meet short-term needs.

[243] The title of the Chief Executive Officer varies between the jurisdictions. In the Supreme Court it is the Chief Executive Officer and Principal Registrar; in the District Court it is the Principal Courts Administrator; and in the Local Court it is Director, Local Courts.

[244] Feneley, John, *Attorney General's Department of NSW Further Response to Supplementary Questions,* p 2.

Finding

The NSW judiciary has an appropriate level of input into decisions regarding the appointment and performance management of SES-level court administrators.

Chapter Seven

Technology in the Courtroom

Introduction

> **Mr CRAIGIE:** I think we are on the edge of a considerable blossoming of the use of technology. It is a question of educating all of the users of the system to take advantage of it. Things such as video link conferencing, video link connections during bail hearings, video link evidence of interstate and intrastate witnesses, it has really only been in the last year or so that that technology has started to be introduced. I would suspect that it will have a favourable impact, as things like the electronic recording of interviews with suspected persons have in the past. I would not automatically assume that [technology] will make cases shorter, but it may make their results more certain.[245]

As discussed in Chapter Three, technology will be a key element in improving the effectiveness and efficiency of the justice system in future years through projects including JSIS, ERIC and e-Briefs. Other major initiatives include:

- Courts Administration System (case management);
- teleconferencing;
- video conferencing;
- technology courtrooms;
- electronic callovers and electronic lodgment; and
- electronic transcripts.

The advantages of new technologies were discussed in evidence:

> **Mr MEAGHER:** IT is vital. To give you examples in relation to that, New South Wales leads the world in relation to usage of IT in the Land and Environment Court...Once you have an encrypted signature you can file your process by way of IT. The court returns it equally in that way. I can do my callovers by way of the Internet; I can do small motions by way of the Internet; I can get days for hearing over the Internet. How much is that saving the community? For one solicitor who practices in that jurisdiction from Campbelltown, it is saving his clients one trip a week to Sydney. Now it has to be the way of the future, there is no doubt about that, and I think the Government has the will to do it.
>
> **Mr TORBAY:** Is there resistance in the profession [to the use of IT]?

[245] Craigie, Christopher, Acting Deputy Senior Public Defender, Office of the Public Defender, Transcript of Hearing, 6 December 2001, p 62.

> **Mr MEAGHER:** Not at all. In terms of the world market in terms of legal services, the solicitors of New South Wales have more usage of IT than anywhere, including the United States. Our take-up...is getting up to 97 percent.[246]

Courts Administration System

The Attorney General's Department has identified the courts' existing case management systems as a major barrier to further progress in case processing:

> During the recent past, NSW courts have initiated significant reforms in response to requirements for the more timely and cost effective resolution of matters that come before them. These reforms however have been limited because without any effective underlying case management system, the courts have had to rely on manual processes, the 17 year old inflexible and now poorly suited Courtnet system or locally developed "stop gap" systems. The combination of these inhibitors has in turn limited the Courts' ability to enhance registry efficiency, monitor compliance rates, effectively manage caseloads, introduce uniform processes and time standards, streamline case movement, and improve listing and resource allocation processes. The lack of timely and relevant information for planning and review has held back a coordinated approach to performance improvement to increase the level of services provided for the resolution of criminal and civil disputes.[247]

Project History

The need for an integrated courts information system was first identified in 1989:

> In our opinion the inadequacy of planning data has been a significant contributing factor to the present delays. It is difficult for governments to make major and early resource commitments in the absence of reliable information about past trends and future projections of workload and about productivity relationships between increased resources and expected outputs, in terms of disposition rates and delay reduction.[248]

The project has been to tender three times. In 1993, open tenders were called for a packaged application system and supporting infrastructure for a Case Management System. The infrastructure requirement was massive – for example, there was no PC technology in the 160 Local Courts.[249]

In 1994, the project was deferred due to:

---

[246] Meagher, Nicholas, President of the Law Society of NSW, Transcript of Hearing, 6 December 2001, p 9.

[247] Attorney General's Department of NSW, 2001, "Business Case for Phase 2 of the Courts Administration System", September, p 3, Appendix Three, *Response to Supplementary Questions.*

[248] Coopers & Lybrand and WD Scott, 1989, *Report on a Review of the NSW Court System,* May, p 62 para 727.

[249] Glanfield, Laurie, 2000, "Transformation and Technology in the NSW Attorney General's Department", *Information Technology and Telecommunications Industry Seminar,* 5 June, Sydney.

- its perceived risk, as it combined software and infrastructure acquisition and rollout; and
- the amalgamation of the Department of Courts Administration with the Attorney General's Department and resulting organisational changes. [250]

In 1996, the Department started infrastructure installation to establish networks and desktop equipment across the state and, in 1998, tendered for the supply, installation and commissioning of a Courts Administration System (CAS). Funding of $14.8 million was announced in the 1997-98 State Budget with an estimated completion date of 2001. Once again, a "packaged solution" was sought to avoid the risk of software development.

The NSW court system is, however, unusual in that it combines a relatively large number of cases in diverse geographic locations and includes courts with very low case volumes (for example, Local Courts in rural and regional NSW) as well as centres with very large volumes (for example, the Downing Centre). The systems submitted in response to the tender, while potentially providing reasonable functionality after significant reworking, were unlikely to be "technically feasible" in this environment. Once again the tender was unsuccessful.

The Western Australian Government was developing a system to manage civil cases in its Local Court at this time. As Western Australia also has diverse courtroom locations, the NSW Attorney General's Department explored the potential for joint development. Significant difficulties were, however, identified and this option was abandoned in 2000.[251]

Following extensive dialogue, a Request for Quotation was invited from seven organisations in January 2001. A successful tender has now been identified and the contract is being finalised.

The Audit Office is critical of the time taken by the Department to implement the CAS:

> **Mr JAMBRICH**: In the first [Audit Office] report we reported that the matter was recognised as far back as 1989 [by the Coopers and Lybrand Report]. In the [1998 Audit] Report it was reported to us that [the system] was not in progress and it would be developed...
>
> In the follow-up report in response to our audit again, we are told that the CAS is going to be implemented some time in 2002-2003. I suppose our concern is the length of time it is taking to implement and devise a system that will serve the court,

---

[250] NSW Attorney General's Department, 2001, "Business Case for Phase 2 of the Courts Administration System", September, p 18, Appendix Three, *Response to Supplementary Questions*.

[251] Western Australia ceased further development and use of the system (Genisys) late in 2000. The *2000-01 Annual Report* of the WA Ministry of Justice announced a new Integrated Courts Management System to be piloted in the Supreme and District Courts in 2001-02. This system will replace 14 different systems across the State and "address requirements identified when developing GENISYS Version 2" (p 33).

when really the need for it was established back more than 12 or 13 years ago. It is the time lapse that is of concern to us.

CHAIR: Mr Jambrich, on that point, the Attorney General's Department have explained to us that really the technology has not been available until recently for them to be able to properly, or to put a system into place that would best co-ordinate and integrate all the different parts of the justice system.

Mr JAMBRICH: A couple of things on that one. I think we have reported in the 1998 report that in fact it is easy to blame the technology. I think we already said at the time that there are certain steps that the court should take in order to be better informed as to why the delays occur and how they could improve on it...

Mr GLACHAN: Mr Jambrich, you said that there has been a long delay [with the information system] and, I think...you were saying that it really should not have been that long, [the Attorney General's Department] should have got something up and running and operating satisfactorily in a shorter time. Is that correct? Is that the view of the Audit Office?

Mr JAMBRICH: I suppose the short answer is, on a yes/no basis, yes.

Mr GLACHAN: They should have?

Mr JAMBRICH: Yes, they should have, because I really think that the delay has been far too long when the need has been established. Look, you can always find an excuse as to why you can't do it and it is always true that the technology will improve and tomorrow there will be a better technology that will serve you better. The question is do you really want to wait until tomorrow, next year or the year after, or do you really want to start doing it today in order to help you to determine where you are and how to improve? [252]

Experience Interstate and Overseas

While the Committee is also concerned about the delays experienced in developing the CAS, the experiences of court administrations in other states and countries suggest there may be some merit in approaching IT implementation with caution.

South Australia

The South Australian Auditor General reported:

- the Courts Administration Authority (CAA) had, since 1988, developed and implemented a suite of fully integrated courts case management systems which were, initially, very successful. By 1993, however, these systems were technically obsolete and software suppliers were withdrawing support;
- a new system, the Courts Case Management System, was proposed and was to have been implemented by September 1997 with a project cost of $6.9 million;

---

[252] Jambrich, Thomas, Assistant Auditor-General, Audit Office of NSW, Transcript of Hearing, 7 December 2001, p 2-3.

- the civil case element was operational by February 1998 but further work had to be undertaken to correct programming faults and enhance functionality;
- as the civil system had not met expectations, the CAA hired a consultant to review the proposed criminal system. The Authority was advised to use a different software platform at a cost of $7 million versus the original estimate of $2.1 million; and
- another $12.3 million business case was proposed in 1999 which included the development of the criminal system on a different platform and the redevelopment of the civil system. [253]

This business case was not approved and the CAA continued work on the existing civil system to improve its operation. By 30 June 2000, the Authority had spent a total of $9.3 million[254] to build a civil case management system which did not entirely satisfy its requirements. This compares to an initial budget of $6.9 million for both a civil and a criminal system. The 2000-01 and 2001-02 State Budgets of South Australia do not include any spending on new information technology projects by the Authority.

Difficulties in implementing court management systems have also been encountered overseas.

New Zealand

In 1998, the New Zealand Department for Courts contracted with a US company to provide a fines collection and case processing package. By 1999, however, it had become apparent that the modifications needed to suit local conditions would cost substantially more than anticipated and the Department terminated the contract.[255] This result supports the NSW Department's position that the modification of existing solutions can be prohibitively expensive.

United Kingdom

In the Magistrates' Court, where data collection and case scheduling is still performed manually, the development of a computer-based management system has been "on the drawing board" since 1989. Between 1989 and 1995, two proposals were accepted, started and then terminated due to inadequate project design and planning.

The advent of the Private Finance Initiative (which involves the private sector in service support and operation as well as construction) saw ICL win a 10 year £183 million contract in 1998 to provide infrastructure, software, full office

---

[253] South Australian Auditor-General, "Courts Administration Authority", *1998-99 Annual Report of the Auditor-General.*

[254] South Australian Auditor-General, "Courts Administration Authority", *1999-2000 Annual Report of the Auditor-General.*

[255] Chief Justice of New Zealand, 2001, *Annual Report of the New Zealand Judiciary 1999*, p 4.

automation, training and support.[256] The success of this ambitious venture is still to be evaluated.

United States of America

Research indicates both public and private organisations suffer delays, unclear expectations and cost overruns in acquiring information technology.

Studies over the past decade indicate:

- 31 per cent of projects are cancelled before completion and more than half cost 189 per cent of the original estimate while containing only 42 per cent of the originally proposed features;
- only 16 per cent of projects are completed on time and on budget; and
- for every 100 projects there are 94 restarts. [257]

Finding

The delays experienced by the Attorney General's Department in implementing a case management system are regrettable. In light of experience elsewhere, however, the Inquiry is unwilling to criticise the Department for its caution as the system now proposed appears to offer significant benefits for both the courts and their users.[258] What is of critical importance now is that the CAS, as tendered, is completed on time and on budget.

Recommendation

15. The Audit Office should consider reviewing the CAS on an ongoing basis as an emerging case study in e-Government. The findings of this review should be reported to the Public Accounts Committee.

Risk Management and the CAS

The Audit Office is also concerned about the size and complexity of the project:

> **Mr JAMBRICH:** Another concern that we had [in 1998], and we still harbour that concern, that the system [the Attorney General's Department is] building is so big that it can be very difficult to implement and design to be efficient right across all the courts, so it is an aspect that they would need to look at. We certainly recognise the benefit that comes from a unique system that can go across all the courts, but

[256] National Audit Office, 1999, op cit. p 120-121.

[257] Crawford, Christopher, 2001, "Court Technology Projects: What Goes Wrong and Lessons Learned", *Justice Served Newsletter*, 17 August, p 2.

[258] See discussion of the CAS commencing on page 96.

against that you would have to accept that there are individual needs for the courts and the system would need to provide service to those courts.[259]

The Inquiry agrees that large scale IT projects which seek to meet the needs of diverse users carry significantly greater risks than smaller, more limited proposals. In this context, it is interesting to note:

- one of the chief factors identified as a source of difficulties in South Australia was that a separate system was being developed for each court jurisdiction;[260] and
- in 1999, the Law Reform Committee of the Victorian Parliament recommended that a uniform case management system should be developed for all Victorian courts and tribunals "as a matter of priority."[261]

Table 7.1 (see next page) takes the top five reasons for IT project failure[262] and contrasts them to the risk management strategies proposed by the Department.

The Department's preliminary risk assessment identified 34 risks including the five detailed in Table 7.1. This assessment has now been developed into a full Risk Management Plan based on Office of Information Technology (OIT) Risk Management Guidelines which is monitored and updated by the CAS Steering Committee each month.[263]

Finding

Although the CAS a large project its implementation has been broken down into manageable units. In addition, the Attorney General's Department of NSW appears to have conducted an adequate preliminary risk assessment which has now been developed into a full Risk Management Plan.

System Details

The CAS will provide an integrated court registry computer system for the Local, District and Supreme Courts and process management facilities for the Sheriff's Office.[264] It will provide:

---

[259] Jambrich, Thomas, Assistant Auditor-General, Audit Office of NSW, Transcript of hearing, 7 December 2001, p 3.

[260] Cossey, Bill (Chief Executive Officer of the Courts Administration Authority), 1999, "The Use of Modern Technology in Making Court and Operational Procedures More Effective", *Justice Delivery: Meeting New Challenges - 17th Australian Institute of Judicial Administration Conference,* August.

[261] Parliament of Victoria Law Reform Committee, 1999, *Technology and the Law,* May, p 159.

[262] These reasons are derived from US research on IT implementation in general (that is, not court specific) but are still relevant in this context.

[263] Feneley, John, *Attorney General's Department of NSW Further Response to Supplementary Questions.*

[264] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry,* p 29.

Table 7.1: Risk Management and the CAS

Reason for IT Project Failure	CAS Management Strategy
Lack of top management commitment	The Director General of the Department is sponsoring the project which is managed by the CAS Steering Committee comprising senior members of the judiciary, court administrators and the Department.[265]
Inadequate user involvement	Each court has established a working party of relevant users to clarify requirements, examine processes and conduct acceptance testing. Additionally, validation is a deliverable under the supplier's contract. Information exchange with other justice agencies is achieved through the Justice Sector's CEO Standing Committee.
Inexperienced project management	A specialist Project Manager has been engaged and formal project and change management methodologies are being implemented. The Project Manager reports to the Director, Information Technology Services of the Department with weekly project reviews complemented by formal monthly reports to the Director, the Director General and the Steering Committee. The supplier's project manager will also report to the Attorney General's Project Manager and to the CAS Steering Committee.
Unclear statement of requirements	The Public Accounts Committee believes the Department has demonstrated an appropriate awareness of the need to comprehensively define the deliverables of the system in its evidence to the Inquiry.[266] In addition, the business case recognises that the CAS will need to interface with systems in eight other justice agencies and five separate areas in the Attorney General's Department. Refinements to existing court processes are being identified and, as previously noted, the Department will source change management expertise externally. The change manager will be responsible for: communicating and coordinating plans and changes throughout the Department and courts; assisting in the development of strategies to support implementation; introducing support tools such as on-line help facilities; streamlining workflows and procedures; integrating training with implementation; and establishing post implementation support facilities and procedures.
Project scope is too large	The project consists of three relatively independent systems that can be implemented in stages: case flow support, rostering/listing support and debtor management support. Each stage has its own costs and benefits and is a "stable situation" in its own right. Case flow support will be piloted in each jurisdiction prior to full implementation.

Source: Crawford, Christopher, 2001, "Court Technology Projects: What Goes Wrong and Lessons Learned", *Justice Served Newsletter*, 17 August, p 2.

Attorney General's Department of NSW, 2001, "Business Case for Phase 2 of the Courts Administration System", September, Appendix 3, *Response to Supplementary Questions*.

[265] Steering Committee: Director General; Supreme Court Judge; Supreme Court Master; CEO and Principal Registrar, Supreme Court; Principal Courts Administrator, District Court; Director, Local Courts; Sheriff of NSW; Directors of Management Services, Information Technology Services and Executive Support and Strategic Services from the Department; and the Project Manager.

[266] Feneley, John, Acting Deputy Director General, Attorney General's Department, Transcript of Hearing, 7 December 2001, p 72: "We have to settle the finer details as far as the contract is concerned and it is an extremely complex matter as we have to define with some particularity exactly what it is that must be delivered under the contract across the entire system."

- significant improvements in the standard of management information and reporting;
- electronic interchange of information with other justice agencies and major court users; and
- process improvements via the re-engineering of court operations that will accompany its implementation. [267]

> CAS will...provide seamless access to all the jurisdictions of the Supreme, District and Local Courts together with other courts and tribunals...The centralised database structure of the selected CAS software will mean that matters can be easily transferred between courts and locations, and that the Department and the courts will be able to obtain a single view of court business. The structure of the relational database will ensure that a vast variety of views, statistics, management and performance information and operational reports will be possible.
>
> CAS will also support common data requirements, both within the courts and between the Department and other Justice sector agencies and will use data standards developed under the Justice Agencies Data Exchange project. XML, the emerging language for web based systems, will be used as the means for data exchange with other Justice agencies and court users.
>
> The system will provide the opportunity to exchange information with the legal profession, insurance companies and financial institutions. Case initiation and outcomes will be electronically transferable with the Police, Roads and Traffic Authority, Corrective Services, BOCSAR, Juvenile Justice and the Office of the Director of Public Prosecutions. CAS will also interface directly with the Department's GSAS Financial Management System for accounting business processes and court outcomes and with the State Debt Recovery Office for fine enforcement...
>
> CAS will promote and support electronic lodgment and access by the public, legal profession and other interested parties for specific documentation and information and provide opportunities to carry out commitments electronically, ie payments.
>
> Among the other benefits, the CAS system will provide significant improvement in the quality and timeliness of court, operational and management information and enhance the capacity of the courts and Department to more effectively plan and manage the workload and resource allocation of the courts. The improvement in case management and operational data will also ensure the reasons for court delays can be more accurately pinpointed and accountability for the performance of the courts more appropriately assigned. [268]

---

[267] loc cit.

[268] Attorney General's Department of NSW, 2001, "Business Case for Phase 2 of the Courts Administration System", September, p 6-7, Appendix Three, *Response to Supplementary Questions.*

CAS in the Supreme Court

The Supreme Court's Courtnet system was brought online in 1988-89[269] and is used, in combination with manual reporting, for managing cases and waiting times:

> **Mrs JOHNSTON**: The reports at the moment are collected through a fairly laborious process which is intrinsic with the current case management system that we have.[270]

Each month a report is prepared for the head of each Supreme Court division, the Chief Justice and the President of the Court of Appeal. This report details divisional caseloads and indicates recent trends. The information is considered within divisions, in terms of its implications for resourcing, and also by the Policy and Planning Committee of the Supreme Court:

> **Mrs JOHNSTON**: The reports are also used to develop and review and refine the Court's time standards...and to adjust resourcing at, say, the Common Law Annual Conference, where the planning is done for the following year [to determine] the need to shift any balance [of resources] between the judges of the Common Law Division and between the Court of...Appeal work, crime and civil work.[271]

It is anticipated that CAS, which will be operational in the Supreme Court from early calendar 2003, will provide reports much more quickly and easily:

> **Mrs JOHNSTON**: We will be able to identify reporting by a range of attributes that we cannot presently obtain reports for and we can combine attributes, so it will give us much better insight into a range of case functionality.
>
> **Mr COLLIER**: Can you give us examples of what you will be able to do that you cannot do now, that you need to do now?
>
> **Mrs JOHNSTON**: Yes. I think the most relevant one is the ability to drill down into what is happening with our case load in terms of milestone events [refer Figure 7.1]. At the moment we can get a broad picture about how long a case takes, but we cannot really understand what is happening between the beginning and end of a case as well as we might. We cannot understand where shifts are occurring say between the filing of a matter and the beginning of case management, between the beginning and end of case management, between case management and the allocation of a hearing and then from the end of the hearing to the final judgment. So it will give us a better understanding of where delays are occurring across the process and an opportunity to adjust those processes as appropriate to fine tune the way we are managing cases.[272]

---

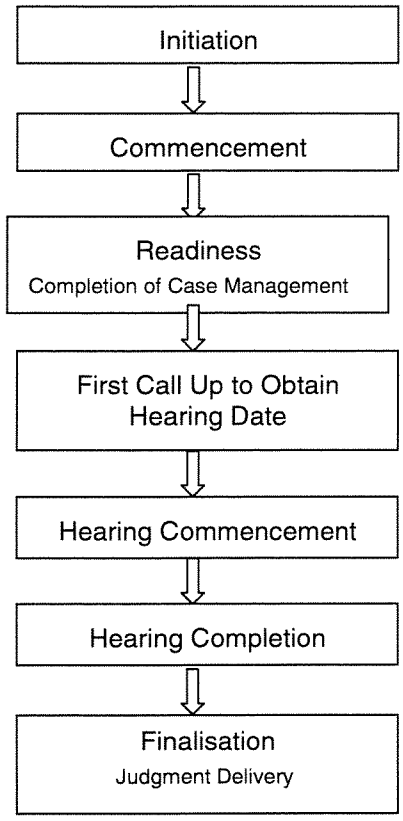
[269] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry*, p 26.

[270] Johnston, Nerida, Chief Executive Officer and Principal Registrar, Supreme Court of NSW, Transcript of Hearing, 7 December 2001, p 43.

[271] ibid, p 44.

[272] loc cit.

Figure 7.1: Milestones in Case Progression in the Supreme Court



Source: Johnston, Nerida, "Supreme Court Response to Supplementary Questions", *Attorney General's Department of NSW Response to Supplementary Questions.*

CAS in the District Court

The District Court also uses Courtnet system to collect data on civil cases in Sydney. Manual statistical returns are received from venues outside Sydney although the feasibility of using Courtnet for these reports is being assessed.[273]

Since late 1995, the Chief Judge of the District Court has received reports on civil cases from all court venues including: number of pending actions at the start of the month, case registrations for the month and for the year to date, case disposals for the month and the year to date, number of pending actions at the end of the month, number of pending matters waiting in excess of 18 months, and number of matters on the "not ready" list.[274]

The Judicial Information System is used to generate reports for the Chief Judge on Criminal Cases. These reports have been provided since 1996 and include, for trials, sentences and appeals: pending cases at the start of the month; registrations during the month and for the year to date; case disposals for the

---

[273] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry*, p 26.

[274] loc cit. The "not ready" list was established to accommodated cases which must commence due to legislative time limits but which cannot be concluded because the final effect of injuries experienced has not been resolved.

month and the year to date; and pending actions at the end of the month. Data on compliance with time standards for the month and previous six months is also provided as well as average trial duration and statistics on the age of pending criminal trials.[275]

In terms of its criminal case load, the District Court can report on current cases but does not have easy access to the information needed to accurately predict its future caseload (for example, trends in committals in the Local Court). In the civil area, the Court uses trends in its current year's filings and medium term trends over the past 3-5 years to estimate demand.

The Inquiry heard evidence on the shortcomings of the existing civil system from the Law and Justice Foundation which had used it to extract information for research:

> **Dr EYLAND:** The old system was a flat file system on a dreadful server. It was very slow, it took a long time to operate and they used a strange language to talk to the machine. [The District Court] used the old system very sensibly given the basic technology they were using, but it needed upgrading badly and I understand that is going on now.[276]

Significant benefits are anticipated with the implementation of the CAS:

> **Mr FENELEY:** Our expectation is that we will have much greater immediate access to data in the Local Court, and for that matter in the Supreme Court, because there will be less barriers between the systems...[277]
>
> [CAS will be] a system which is controlled at the coal face in a sense, because what will happen is that if I was at the District Court and our Civil Business Committee, for example, decided it was important for us to monitor a certain area of work, our local expert would be able to change the system in order for instance to track a certain type of matter or track a certain type of litigant.
>
> At the moment, all of that work has to be done essentially through a specialist consultant who does that work, and not only is it slow and that is a cost and we have to rank in order of priority with everybody else who wants a change to their system, but also there is the actual cost that we are paying someone else to do all this work as a specialist, whereas this will be local knowledge essentially being able to tune the system as we go along. That is one saving. The other savings are more in the area of process in terms of what we avoid having to do in removing duplication.[278]

Note: Implementation in the District and Local Courts is part of CAS Phase 2.

---

[275] ibid, p 27.

[276] Eyland, Ann, Principal Researcher, Law and Justice Foundation of NSW, Transcript of Hearing, 6 December 2001, p 70.

[277] Feneley, John, Acting Deputy Director General, Attorney General's Department of NSW, Transcript of Hearing, 7 December 2001, p 57-58. The information sharing system referred to is JSIS – see Chapter Three.

[278] ibid, p 74.

CAS and the Local Court

The Court produces monthly reports indicating: registrations, finalisations, pending cases, number of cases not reached and part heard, average delay in finalisation, cases disposed of by defended hearing, cases disposed of by guilty plea, committals for trial, cases disposed of by ex parte hearing, cases withdrawn and/or dismissed, and court utilisation rates.[279]

> **Mr COLLIER**: Could you describe how management information is being collected at the Local Court at present?
>
> **Ms ANDERSON**: We rely upon two systems at present, our computer systems and our...monthly manual collection.
>
> We have two computer systems in Local Courts, one deals with our civil workload, the other deals with our criminal workload.
>
> Our computer systems for civil workload are in all of our courts now except the extremely small courts that might only be open one day a month. Most of our management information in relation to civil comes from that computer system.
>
> In relation to crime we have another computer system...which covers 56 of our courts. We have 162 court registries. Of those 56 sites, that covers 80 per cent of our criminal workload. We draw information from that computer system.
>
> The additional information we need we collect manually, we have a monthly manual collection system where Clerks of the Court fill out information that we require. We have a Courts Statistics Unit attached to my office. That has the job of collating that information and analysing it.[280]

As for the District Court, implementation in the Local Court is still to be funded. The system is, however, expected to have a dramatic impact when introduced:

> **Ms ANDERSON**: Our current systems are very inflexible. As you know, they are 15 years old, they are written in very old computer language...they are very limited in what they can do, which is really only a case tracking, case record management system. The new systems we are looking at will give us a lot more versatility in the types of matters that we can do; records management, diary management, those sorts of things that we currently don't have. It is very expensive to maintain our current computer systems because they are written in a very old language. We have dual problems in that there's not many people around who actually have the skills to do that work...
>
> We will have a diary system that we don't have at the moment for listing cases that will tell us what the available time is and when we take a case out allow us to list another matter. We will have a system for managing our exhibits and subpoenaed documents that we can't currently have. We will also have a system that will allow a case to go from the Local Court to the Supreme Court without having to go through three steps of re-data entry and it will be the same case going all the way through...

---

[279] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry*, loc cit.

[280] Anderson, Anita, Director, Local Court of NSW, Transcript of Hearing, 7 December 2001, p 22.

> We would hope that the Court Administration System would be rolled out to Local Courts. The requirements that we have developed for that system meet the vast majority of our needs in relation to the management of the court. It will also replace a number of systems we have in place now.
>
> At the moment for those matters that we do not have on the computer system, we use a number of Lotus notes databases to manage court workloads. I think currently we have currently four or five different Lotus notes databases. That will replace those and give us one system, so without making it the Holy Grail it will solve a lot of our problems. [281]

Project Cost

Of the $14.8 million allocated in for CAS in the 1997-8 Budget, $2.5 million has been drawn down to fund project activity, tender processes and interim solutions such as the Criminal Histories Project.[282]

Phase 1 of the CAS Project will cost $14.6 million and is made up of:

- an overall architecture review of the technology to ensure the Department has appropriate hardware, software and communications for all CAS applications – both current and planned;
- development of an overarching design to suit implementation in all jurisdictions (Supreme, District and Local Courts and the Sheriff's Office);
- modification and customisation of the system to meet the needs of the Supreme Court;
- implementation in the Supreme Court; and
- project planning, detailed requirements analysis and high level scheduling for the District and Local Courts.[283]

A business case was submitted to NSW Treasury for CAS Phase 2. The 2002-03 Budget provided total capital funding of $15.7 million for implementation in the District and Local Courts.[284] This gives a total project cost of $30.3 million – more than double the 1997-8 estimate.

---

[281] ibid, p 24-25.

[282] Attorney General's Department of NSW, 2001, "Business Case for Phase 2 of the Courts Administration System", September, p 7, Appendix Three, *Response to Supplementary Questions.*

The Criminal Histories Project allows court results to the transmitted to the NSW Police Service electronically (24-hour turnaround). This system ensures judges, magistrates and authorised justices have access to more accurate criminal histories when determining bail and other matters. It will continue to operate until CAS is fully implemented.

[283] Johnston, Nerida, "Supreme Court of NSW Response to Supplementary Questions", *Attorney General's Department of NSW Response to Supplementary Questions.*

[284] NSW Treasury, *Budget Paper No. 4, 2002-03, State Asset Acquisition Program*, p 45.

Cost/Benefit Analysis

A summary of the cost/benefit analysis for the first five years (implementation and initial operation) is shown in Table 7.2. This analysis applies to Phase 2 (Local and District Courts) only.

Table 7.2: Cost/Benefit Analysis of CAS Phase 2

	Net Present Value @ 7%	Internal Rate of Return
Base Case	$10.5 million	28%
Costs increase by 10% or Benefits are 10% lower	$1.1 million	9%
Costs increase by 20% or Benefits are 20% lower	$0.4 million	8%

Source: NSW Attorney General's Department, 2001, "Business Case for Phase 2 of the Courts Administration System", September, p 61-62, Appendix Three, *Response to Supplementary Questions*. Net returns are discounted at 7 per cent per annum.

Five years is a short period for a cost/benefit analysis but is probably appropriate for an IT project given the rapid rate of obsolescence in this field. Other points of interest:

- this analysis does not include costs and benefits in the Supreme Court;
- the benefit estimates are conservative – particularly with regard to the potential productivity gains in the District Court (three per cent for civil matters and five per cent for criminal matters after three years of operation) and the Local Court (three per cent in both civil and criminal matters after three years of operation).[285] These gains refer to registry savings only and do not include savings in judge and court time resulting from improved case management;
- the sensitivity of the project to cost increases or benefit reductions highlights the importance of rigorous project management to ensure expenditure forecasts are not exceeded and process improvements are fully implemented;
- the majority of forecast benefits are expected to be enjoyed by practitioners and litigants rather than the justice sector agencies.[286]

The Attorney General's Department will report CAS progress to OIT annually and is required to agree and report against a Benefits Realisation Plan with the Office. In addition, it is standard practice for the Department to undertake formal post-evaluation reviews of major projects. In the case of the CAS, extension to the

[285] Attorney General's Department of NSW, 2001, "Business Case for Phase 2 of the Courts Administration System", September, p 57, Appendix Three, *Response to Supplementary Questions*.

[286] ibid, p 61.

District and Local Courts will depend on a satisfactory post implementation review of the system's implementation in the Supreme Court.[287]

Finding

The cost of full CAS implementation is double the Attorney General's Department's 1997-8 estimate. This result, combined with the long delays experienced in implementing the system, is not satisfactory. Given similar delays and cost overruns in similar interstate and overseas projects, however, it is not unique.

Replacement of existing court information systems is essential to support further improvements in case processing efficiency and enable the courts to better identify demand trends and their associated resource implications. Additionally, existing systems are reaching obsolescence and cannot be effectively enhanced or expanded due to design limitations.

Recommendation

16. Given the importance of the CAS and its history, the Office of Information Technology should oversee the conduct of an independent post implementation review in addition to its standard monitoring procedures.

Teleconferencing

The Attorney General's Department has some 35 teleconferencing units. The Land and Environment Court (LEC) offers teleconferencing to all clients and call-overs for country matters are managed under this system. The District Court deals with some country matters by teleconference and will trial a teleconferencing motions list for country matters.

The Supreme Court is also exploring the application of this technology:

> **Mrs JOHNSTON:** The court is also investigating a number of technology initiatives that will enable us to respond better to the broad range of people that we serve. We are investigating teleconferencing, and that has been introduced for case management conferences, but a more friendly system is presently being investigated that will accommodate multi parties, that will allow us to involve practitioners in the country in a way that they cannot be involved at the moment without the involvement of a city agent, for case management of cases until hearing time. [288]

---

[287] Feneley, John, *Attorney General's Department of NSW Further Responses to Supplementary Questions.*

[288] Chief Executive Officer and Principal Registrar, Supreme Court of NSW, Transcript of Hearing, 7 December 2001, p 50.

Videoconferencing

The Supreme Court in Sydney was video-linked to Long Bay Correctional Centre in 1996 and to the Metropolitan Remand Centre at Silverwater in 1997.

The Cross Justice Agency Video Conferencing System received $4.3 million in the 2000-01 Budget and provides facilities for connecting adult and juvenile correctional centres, the court system, police locations, forensic services, the Legal Aid Commission, the DPP, interpreter services and court reporting services. The project is overseen by a Steering Committee responsible for policy, inter-agency operational protocols and issue resolution.[289]

As at mid January 2002, facilities were in operation at the following courts: Bankstown, Bidura, Burwood, Campbelltown, Central, Downing Centre, Dubbo, LEC Court 12, Lidcombe, Lismore, Liverpool, Newcastle, Parramatta, Penrith, the Supreme Bail Court, and the Supreme Court in Woy Woy.[290]

> **Ms ANDERSON:** One of the innovations that we have just introduced, which is proving itself to be very valuable, is video conferencing...
>
> That allows the courts to deal with the pre-hearing type matters, particularly for people in custody. Quite often service of briefs and such like, we can do those without bringing the defendant before the court in custody...
>
> That is proving itself to be very valuable for us. It also allows us, with remote witnesses, to be able to take evidence from those witnesses remotely, without having to bring them to Sydney for a hearing, or to another location.[291]

Videoconferencing facilities for civil matters in the District Court are provided by a private company. In civil cases, this technology is generally used to provide easier, cheaper access to interstate and overseas witnesses. The service has not, however, been widely used (12 times in 12 months):

> **Mr FENELEY:** It has been a bit surprising that the actual utilisation has been less than expected.
>
> **Mr COLLIER:** Is that due to the cost?
>
> **Mr FENELEY:** It could be partly the cost...it may be partly to do with whether the profession appreciates the potential of it.
>
> **Mr COLLIER:** You have to educate them.
>
> **Mr FORNITO:** That is exactly right. [292]

---

[289] The Committee comprises: Attorney General's Department; each court jurisdiction; Corrective Services; Juvenile Justice; Legal Aid Commission; Office of the Director of Public Prosecutions; and NSW Police.

[290] Feneley, John, "Status of Government Interagency Bail Video Projects as at January 2002, Appendix Six, *Attorney General's Department of NSW Response to Supplementary Questions.*

[291] Anderson, Anita, Director, Local Courts, Transcript of Hearing, 7 December 2001, p 25.

Technology Courts

> **Mrs JOHNSTON**: We have available to us two technology courts and they are used for cases which involve a massive amount of documentation, large commercial cases where thousands of documents are in evidence from hundreds of witnesses that need to be effectively marshalled. Those documents are moved around the court electronically. They are available to the parties who can have resource teams back at their offices researching what is said. It is quite a highly geared operation, designed to accommodate complex commercial matters. The court has been using that facility over the last twelve months for particularly large commercial matters.[293]

A recent commercial case heard in one of these courts involved three sets of proceedings being heard together resulting in: more than 170 statements; more than 550 documents submitted to the court (with some individual documents consisting of sets of folders); more than 400 folders of courtbook materials; more than 50 interlocutory injunctions; hundreds of notices of motion, submissions and ancillary materials; extensive pre-hearing transcript and more than 11,000 pages of final hearing transcript.[294]

The technology courts include:

- an electronic, online database which provides centralised storage of most of the documents associated with the proceedings. It is available to all participants (inside and outside the courtroom) and is password protected. The database allows any document to be accessed instantaneously and also provides a Boolean search function and hypertext linking. Users may also place personal, confidential bookmarks and notes at specific points of the transcript ;
- documents not on the database may be accessed via CD ROM or email;
- networked computers and laptops in the courtroom allow participants to access the database, email, the Internet, Microsoft Office and other software during court time;
- real time feed of transcript running simultaneously with actual proceedings;
- electronic corporate messaging between the Judge and his or her staff both within the courtroom and between the Judge's chambers and the courtroom; and

---

[292] Feneley, John, Acting Deputy Director General, Attorney General's Department of NSW and Fornito, Robert, Manager, Case Management and Listing, District Court of NSW, Transcript of Hearing, 7 December 2001, p 67.

[293] Johnston, Nerida, Chief Executive Officer and Principal Registrar, Supreme Court of NSW, Transcript of Hearing, 7 December 2001, p 50.

[294] Einstein, Justice Clifford, 2001, *Technology in the Courtroom – 2001 – Friend or Foe?,* Address delivered 15 August. The case referred to is Idoport v National Australian Bank and Ors which was presided over by Justice Einstein. This case was dismissed on 29 January 2002 when, after 220 sitting days, the plaintiff ran out of funds. The Glenbrook Inquiry was heard in the other technology court.

- videolinking and telephone conferencing.

> The Technology Court has given huge benefits in terms of an overall increase in the efficiency and organisational techniques presumably enjoyed both by the parties as well as by the Court. A paradigm shift takes place when the parties and the judge have immediate access to a database which includes the enormous amount of information needed by the parties and the court in the everyday administration of the proceedings. The simplicity of being able at a second's notice to access any pleading, any statement, any page of the transcript, any judgment, many of the documents marked for identification, as well as the hundreds of thousands of documents reposing in the courtbook itself provides elegant testimony to the efficiencies achieved.[295]

The District Court also has a technology court for use in criminal cases at the Downing Centre.

E-Callovers and E-Lodgment

In 2001, the Land and Environment Court (LEC) established e-Callover which allows litigants and their representatives to lodge procedural applications with the Court online via a secure Internet service. This system has eliminated the need for practitioners to attend court for routine matters and has been well supported by the profession.[296]

The LEC has also successfully trialed an electronic lodgment system that provides online lodgment of court documents via the World Wide Web:

> **Mr FENELEY**: [We] are trialing things in the Land and Environment Court at the moment. It is very convenient to do it because the Land and Environment Court is a very small jurisdiction. It means you can do things there and work out how they work. We will then want to apply those things to the other jurisdictions.[297]

Electronic Transcripts

Court proceedings are currently recorded by Court Reporters, through machine assisted or manual shorthand, or Sound Reporters, using recording devices. In recent years, the proportion of sound recording has increased due to improvements in this technology and the difficulty of maintaining sufficient numbers of Court Reporters.[298]

---

[295] loc cit.

[296] Attorney General's Department of NSW, 2001, *Annual Report 2000-2001,* p 42.

[297] Feneley, John, Acting Deputy Director General, Attorney General's Department of NSW, Transcript of Hearing, 7 December 2001, p 73.

[298] Attorney General's Department of NSW Reporting Services Branch, 2001, "Draft Strategic Blueprint for the Provision of Reporting Services", November, p 6, Appendix Four, *Response to Supplementary Questions.*

Proceedings in all NSW courts are recorded. Transcripts, however, are not always required. The Local Court, for example, has very low levels of demand for transcript while the Supreme and District Courts have a high level of demand for daily transcripts.[299]

In criminal trials, daily transcript is provided by 6pm on the day of the hearing and is provided to hearings in the higher courts which are given priority by that court. For example, the District Court gives priority to criminal matters running for more than five days.[300]

Access to daily transcripts can make a significant contribution to the efficient and effective conduct of a criminal trial. While the Trial Judge and Crown Prosecutor are provided with daily transcripts free of charge, the same is usually not true for defence counsel.

In criminal trials, examinations-in-chief and cross examinations can be long and complex. Given that the liberty of the accused is usually at stake, the need for defence counsel to have open, free – or, at least, reasonably priced – and ready access to daily transcripts in criminal trials is desirable. Indeed, the interests of justice demand that such access is available as of right.

A similar service could be provided in long running and complex civil matters. Currently, from the perspective of practitioners, civil transcript availability is also inadequate:

> **Mr MEAGHER:** Transcripts are a major problem for us. I mean 10 years ago in District Court civil/criminal and Supreme Court civil/criminal you had a transcript as of right.
>
> In the District Court...when you are talking about moneys up to $750,000 or, alternatively...motor accident [cases which involve] unlimited amounts of money, you really do need a transcript.[301]

In the short to medium term the Attorney General's Department is seeking to manage its reporting resources more efficiently via measures including more flexible staff deployment and the introduction of remote and digital sound recording.[302]

In the longer term, electronic transcripts are being considered:

> There is a continuing trend away from the use of paper-based information, particularly among court users.

---

[299] ibid, p 13. Daily transcripts are provided for 43 per cent of Supreme Court sittings and 24 per cent of District Court sittings.

[300] loc cit.

[301] Meagher, Nicholas, President of the Law Society of NSW, Transcript of Hearing, 6 December 2001, p 9.

[302] Attorney General's Department of NSW Reporting Services Branch, 2001, op cit, p 8.

> This means that in the medium to long term, paper transcripts may not be the most useful or appropriate means of providing a record of court proceedings. For example, emerging digital recording facilities (audio and visual), improvements in voice recognition software and other currently identified technologies may render the use of hard copy text-based transcripts largely obsolete.[303]

Computer voice recognition for dictation is currently being used by a number of Judges in the Supreme and District Courts and by 25 Magistrates in the Local Court. A dedicated trial of the costs and benefits of voice recognition systems is being undertaken in the LEC.[304]

Finding

Barristers and their instructing solicitors have, over the years, become increasingly computer-literate. Improvements in IT and the increasing use of computers in the District and Supreme Courts clearly permit, even now, access to transcripts on a daily basis.

The provision of daily transcripts to criminal defence counsel on disc is one obvious method. The disc could be supplied by the legal practitioners themselves. In the longer term, transcripts could be supplied electronically at low cost.

Recommendation

17. The Attorney General's Department and the Courts should consider, as a matter of urgency, the provision of daily transcript to defence counsel in criminal trials.

    In the short term, this could be as simple as the provision of a computer disc containing the transcript. The disc could be supplied by the legal practitioners themselves.

    In the longer term, the provision of daily transcript by other electronic means - in appropriate civil and criminal cases in the higher courts - should be considered.

Note too that the Department of Courts Administration has been rolled back into the Attorney General's Department – this is why the recommendation above simply refers to the Courts.

A Concluding Comment

NSW Courts are introducing a range of technological innovations to increase the efficiency and effectiveness of the administration of justice including cross-agency projects such as JSIS and videoconferencing. The Inquiry has received information regarding the anticipated benefits of some of these developments and

---

[303] ibid, p 11.

[304] Attorney General's Department of NSW, 2001, *Annual Report 2000-2001,* p 76.

is keen to see these forecasts achieved. Anecdotal feedback to date is very positive but is not a substitute for formal assessment.

Recommendation

18. New technologies introduced in the Attorney General's Department, and other justice agencies, should be subject to formal evaluation when fully implemented to determine whether projected business case benefits have been delivered.

    Where forecast benefits have not been achieved, the reasons for this failure should be analysed to determine generic risks and risk management strategies to assist in the successful implementation of future technology projects.

Chapter Eight

Waiting Times in the Supreme Court

Business of the Supreme Court

The jurisdictional limits of the Court were described in Chapter Three. This commentary summarises the types of cases dealt with in the Supreme Court.

Common Law Division

Table 8.1: Common Law Lists

List	Filings (Disposals) in 2000	Comments
Administrative Law	83 (96)	Reviews decisions of government, public officials and administrative tribunals.
Defamation	72 (107)	
Possession	2,151 (1,292)	Commenced 1 February 2000 and was developed to improve the management and disposition of matters involving the possession of land. Of the 1,292 disposals, only 62 were defended cases.
Professional Negligence	127 (423)	Commenced 1 April 1999.
Differential Case Management (all other matters)	1,744 (3,995)	Includes all civil matters not included in the specialist lists. DCM will be discussed in greater detail under Case Management in the Supreme Court.
Total Civil Cases	4,177 (5913)	
Criminal List	123 (144)	Consists of the most serious offences including murder and manslaughter, attempted murder, major conspiracy, drug-related charges and Commonwealth prosecutions for the more serious breaches of the Corporations Law.
Bails List	2,257 (2,306)	Applications for bail or to review bail determinations can be made to the Court even if the accused is not on trial in the Supreme Court.

Source: Supreme Court of NSW, 2001, *Annual Review 2000,* p 17-21.

Equity Division

This Division deals with civil cases in which claims are made for remedies other than the recovery of debts or damages.

Table 8.2: Equity Lists

List	Filings (Disposals) in 2000	Comments
Admiralty	9 (18)	Maritime and shipping disputes.
Adoptions	150 (152)	Applications for adoption orders and declarations regarding the validity of foreign adoptions.
Commercial	174 (139)	Disputes relating to transactions in trade or commerce.
Technology and Construction	45 (38)	Prior to 1 January 2002 this was the Construction List.
Corporations	2,316 (NA)	Cases under Corporations Law and related legislation. This is the busiest jurisdiction of its type in Australia.
Probate	20,672 (21,967)	Most matters are non contentious and are determined by registrars. In 2000, 129 contentious matters were completed.
Protective	107(104)	Cases relating to the management of the affairs of people who are incapable of looking after their own property or themselves.
Other	1,799 (3,197)	Property (Relationships) Act; Family Provision Act and matters dealt with by the making of final orders. Most of these matters are dealt with by registrars. Note, the disposals total includes cases in the Corporations List.

Source: Supreme Court of NSW, 2001, *Annual Review 2000,* p 34-37.

Court of Appeal

This Court determines civil appeals from most State courts and applications for judicial review in relation to specified tribunals (Dust Diseases, Medical and Administrative Decisions Tribunals). During calendar 2000, 483 new filings were made and 517 cases were finalised.[305]

Court of Criminal Appeal

This Court largely deals with appeals against convictions and sentences from the District and Supreme Courts. During calendar 2000, 867 new filings were made and 907 cases were finalised.[306]

Resources and Caseload

Over the past six years there have been a number of changes to the way the Supreme Court measures its caseload and also in its jurisdiction. Underlying trends, however, appear to indicate the Court's caseload is growing more rapidly than its net cost of services, indicating improving efficiency (Refer Table 8.3).

---

[305] Supreme Court of NSW, 2001, *Annual Review 2000,* p 44-45.

[306] ibid, p 48-49.

Information on the average cost per case will be available following the introduction of the CAS.

Table 8.3 Net Cost of Services versus Caseload

Net Cost of Services ($ million)						
	2000-01	1999-2000	1998-9	1997-8	1996-7	1995-6
Expenses	45.09	42.06	51.38	48.78	45.39	38.73
Revenue	29.61	26.50	21.89	20.43	22.01	19.47
Other	-0.01	0.02	0.01	0.06	-0.06	0.01
Net Cost of Services	*15.47*	*15.57*	*29.50*	*28.41*	*23.31*	*19.26*
Estimated Supreme Court Share of Justice Support Services (1)	17.35	16.72	NA	NA	NA	NA
Adjusted Net Cost of Services	*32.82*	*32.30*	*29.50*	*28.41*	*23.31*	*19.26*
Compound Rate of Change Since 1995-96	*11.3%*					
Caseload						
Criminal Cases Finalised	147	152	138	110	88	83
Compound Rate of Change(2)	*12.1%*					
Civil Cases Finalised (3)	4,937	4,432	1,532	4,552	2,247	2,264
Compound Rate of Change (4)	*16.9%*					
Equity Cases Finalised (5)	4,941	2,918	2,460	2,410	2,043	1,573
Compound Rate of Change (6)	*25.7%*					
Criminal Appeal Cases Finalised	940	827	653	709	812	818
Compound Rate of Change (7)	*2.8%*					
Court of Appeal Cases Finalised (8)	543	714	816	795	917	1,121
Compound Rate of Change (9)	*-13.5%*					

1. Justice Support Services was created as a separate program in 1999-2000. In Chapter 5, 85% of its cost was assumed to be attributable to the Supreme, District and Local Courts. This table assumes the Supreme Court is responsible for 35% of the three court total.
2. Matters on hand declined 3.3% pa (from 117 in 1995-6 to 99 in 2000-01) over the same period. This indicates that the Court is finalising cases more rapidly than they are being filed.
3. Changes in court jurisdiction and data collection limit the value of these statistics for trend analysis. Prior to 2000-01, finalised cases do not include class actions, cases where files were held at regional registries, or matters were disposed of by default judgment. Prior to 1999-2000, administrative law finalisations do not include settlements achieved before the allocation of a hearing date. Finalisations in 1997-98 include 3,077 cases transferred to the District Court following an increase in its jurisdiction. Finalisations in 1999-2000 include a cull of inactive proceedings.
4. Matters on hand declined 4.7% pa (from 6,233 in 1995-6 to 4,895 in 2000-01) over the same period. Changes in court jurisdiction and data collection, however, limit the value of these statistics.
5. Before 1999-2000, settlements achieved before the allocation of a hearing date were not included in all lists. Prior to 2000-01, finalisations excluded disposals by judges and masters in the Equity List.
6. Matters on hand increased by 33.7% pa (from 813 in 1995-96 to 3,455 in 2000-01) over the same period. Before 2000-01, however, Equity List matters were not included unless they had been case managed by the registrar and were ready to be heard.
7. Matters on hand increased by 6.24% pa (from 526 in 1995-6 to 712 in 2000-01) over the same period.
8. For 2000-01, finalisations excludes appeals where all parties chose not to progress to filing.
9. Matters on hand decreased 14.6% pa (from 924 in 1995-6 to 421 in 2000-01 in 2000-01) over the same period.

Source: Annual Reports of the Attorney General's Department , 1995-6 to 2000-01.

In evidence to the inquiry, Supreme Court administrators advised that the Court of Criminal Appeal currently represents the most significant area of case growth. Filings in calendar 1998 increased by 18 per cent and were maintained at this level until 2001 when a further increase of 8 per cent was experienced. This is mirrored in the increased disposals shown in the previous table – from 653 in 1998-9 to 940 in 2000-01. As highlighted in Chapter Three, this represents a "downstream" effect on increasing case finalisations in the District Court.

First instance civil filings have also increased, both in Equity (notably in the Corporations List) and in Common Law (most notably the possession and professional negligence lists).[307]

Time Standards in the Supreme Court

At the beginning of 2000, the Chief Justice announced time standards for 2000 and 2001 for Supreme Court criminal cases and cases in the Court of Criminal Appeal and Court of Appeal. These standards were determined after a review of the Court's current caseload, likely trends in the short term, and standards used in other courts in Australia, New Zealand and the United Kingdom.[308]

Supreme Court Criminal List

Table 8.4: Actual Performance versus Initial Criminal List Time Standards

Time to finalisation	Actual Disposals During 2000	Time Standard for Disposals During 2000
Within 9 months	40%	75%
Within 12 months	62%	85%
Within 15 months	78%	100%

Source: Supreme Court of NSW, 2001, *Annual Review 2000,* p 24. The starting date is the date of committal while finalisation is defined as the "date of sentence or other final disposition" (Supreme Court of NSW, 2000, *Supreme Court of NSW Time Standards,* 1 February).

This significant shortfall led to the revision of the standards in 2001:

> The time standards adopted by the Court for 2000 and 2001 have proven to be unrealistic. It has not been possible to shorten the delays as quickly as was hoped. Nevertheless, delays have been reduced and the Court plans further reductions.[309]

---

[307] Johnston, Nerida, Chief Executive Officer and Principal Registrar, Supreme Court of NSW, Transcript of hearing, 7 December 2001, p 43 and 47.

[308] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry*, p 7.

[309] Supreme Court of NSW, 2001, *Annual Review 2000,* p 24.

Table 8.5: Revised Time Standards for the Criminal List

Time to finalisation	Time Standard for Disposals During 2001	Time Standard for Disposals During 2002
Within 9 months	50%	50%
Within 12 months	70%	75%
Within 15 months	90%	95%
Within 18 months	100%	100%

Source: Supreme Court of NSW, 2001, *Annual Review 2000,* p 25.

Court of Criminal Appeal

Table 8.6: Actual Performance versus Initial Time Standards in the Court of Criminal Appeal

Time to finalisation	Actual Disposals During 2000	Time Standard for Disposals During 2000
Within 6 months	32%	40%
Within 12 months	74%	80%
Within 18 months	91%	100%

Source: Supreme Court of NSW, 2001, *Time Standards 2000-2002,* 14 May. Case time commences with the filing of initiating process and ends with the date of judgment or abandonment.

The Court came close to achieving its standards in 2000. Accordingly, the original standards set in 2000 were retained for 2001 and 2002.

Table 8.7: Time Standards for the Court of Criminal Appeal

Time to finalisation	Time Standard for Disposals During 2001	Time Standard for Disposals During 2002
Within 6 months	50%	50%
Within 12 months	90%	90%
Within 18 months	100%	100%

Source: Supreme Court of NSW, 2001, *Time Standards 2000-2002,* 14 May.

The Court of Criminal Appeal has highlighted how the interlinked nature of the criminal justice system makes the achievement of its time standards more difficult:

> The ability of the Court to achieve its time standards is adversely affected by delays in other parts of the criminal justice system. Criminal appeals are generally filed immediately after the first instance trial...Few cases are ready to take hearing dates when the appeal is filed. Most appeals require legal aid. An assessment of merits is made before legal aid is granted. Before that assessment can occur, the

transcript must be prepared and the summing up to the jury and/or remarks on sentence settled by the trial judge. It sometimes takes months for this to occur. Thereafter the assessment process may often result in an amended notice of appeal being filed. The measurement of time taken to dispose of criminal appeals starts from the filing of the original notice of appeal, even though for many months the Court would not have been able to set down the matter for hearing, for the reasons given above.[310]

Court of Appeal

Table 8.8: Actual Performance versus Initial Time Standards in the Court of Appeal

Time to finalisation	Actual Disposals During 2000	Time Standard for Disposals During 2000
Within 6 months	32%	50%
Within 12 months	62%	80%
Within 18 months	85%	90%
Within 24 months	98%	100%

Source: Supreme Court of NSW, 2001, *Time Standards 2000-2002,* 14 May. Case time commences with the filing of the notice of appeal or summons and ends with the date of judgment, settlement, discontinuance, striking out, deemed discontinuance or other final disposition.

Although actual performance in 2000 was below the standards set, standards for 2001 were not revised significantly.

Table 8.9: Time Standards for the Court of Appeal

Time to finalisation	Time Standard for Disposals During 2001	Time Standard for Disposals During 2002
Within 6 months	50%	50%
Within 12 months	80%	85%
Within 18 months	90%	100%
Within 24 months	100%	NA

Source: Supreme Court of NSW, 2001, *Time Standards 2000-2002,* 14 May.

The Chief Justice will announce time standards for civil first instance work (approximately 9,000 new cases each year) when CAS is implemented.[311] Median delay is reported for cases in each of the Common Law Division civil specialist lists and Equity Division specialist lists (see Table 8.10). The Equity Division specialist lists also report on the proportion of cases disposed of: within

[310] Supreme Court of NSW, 2001, *Annual Review 2000,* p 50-51.

[311] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry*, loc cit.

six months, between six and twelve months, between twelve and eighteen months, and more than eighteen months.[312]

Case Management in the Supreme Court

Specialist Lists

In the Court's civil first instance work (common law and equity) specialist lists are used to provide case management procedures best suited to particular types of cases. These lists are supported by tailored management information developed by registry staff and are administered by nominated judges. Judicial case management in the specialist lists seeks to focus the parties on the real issues at an early stage and ensure timely exchange of witness statements.

Practice notes were issued to establish the Professional Negligence List (December 1998), Possession List (December 1999), and Corporations List (February 2001) and provide judicial case management for these cases. Notes were also issued to streamline proceedings in the Defamation List (July 2001) and Differential Case Management List (July 2001).[313]

Differential Case Management (DCM)

All common law civil matters that are not included on a specialist list are subject to DCM. DCM was introduced in 1994 and was amended to increase its flexibility in July 2001.

As a first step, both the plaintiff and the defendant file DCM documents including:

- a brief statement of facts the plaintiff/defendant intends to prove indicating the specific matters of fact on which liability is likely to depend;
- a solicitor's statement detailing: whether discovery will be required, the likely extent of interrogatories, whether expert evidence will be required, any special features of the claim that might affect the complexity/length of the trial, and whether the exchange of witness statements or affidavits would be likely to lead to an early resolution; and
- other details including previous proceedings.[314]

Proceedings are managed by status conferences with the first held approximately three months after proceedings are entered into the List. Prior to the status conference, it is expected that the parties' legal representatives will have narrowed the issues under consideration, agreed on interlocutory orders, prepared a draft timetable for proceedings and discussed the possibility of settlement through ADR.

---

[312] Supreme Court of NSW, *Annual Review 2000,* p 35-6.

[313] ibid, p 11.

[314] Supreme Court of NSW, 2001, *Practice Note 120: Common Law Division - Differential Case Management,* 3 July.

The first status conference is conducted by a registrar and seeks to resolve the case as quickly as possible by: defining the matters in issue, considering whether ADR is suitable, making orders for the completion of interlocutory steps as soon as possible, giving directions to ensure proceedings will be prepared by the Final Conference, and setting a date for the Final Conference. The Final Conference date is, therefore, set on a case by case basis.

All parties are required to attend the Final Conference. Once again, the prospect of settlement or disposal via ADR is explored and the Court may direct all parties to complete a clear, joint statement of the specific matters of fact and law that are in dispute. If proceedings are not capable of being settled, the Court will consider the state of preparation of the case and give any final directions necessary. When ready for trial, proceedings will be listed for hearing or stood-over for a call up when a hearing date will be allocated.

Supreme Court Rules

In January 2000, the Court adopted a new statement of overriding purpose which was inserted at the commencement of its Rules.

Box 8.1: Part One, Rule Three - Overriding Purpose

(1) The overriding purpose of these rules, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in such proceedings.

(2) The Court must seek to give effect to the overriding purpose when it exercises any power given to it by the rules or when interpreting any rule.

(3) A party to civil proceedings is under a duty to assist the Court to further the overriding purpose and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.

(4) A solicitor or barrister shall not, by his or her conduct, cause his or her client to be put in breach of the duty identified in (3).

(5) The Court may take into account any failure to comply with (3) or (4) in exercising a discretion with respect to costs.

Significant amendments have been made to the Rules, often accompanied by Practice Notes, to further this overriding purpose. These include Rules to:

- oblige all parties to refrain from making allegations, or maintaining issues, unless it is reasonable to do so;
- identify a range of specific directions which the Court may make in managing cases, including the imposition of time limits on the evidence of witnesses, or on submissions, or on the whole, or part, of a case;
- empower the Court to direct a legal practitioner to provide a party with a memorandum estimating: the length of the trial, the costs and disbursements of

that practitioner, and the costs that would be payable to the other litigant/s, if the party were unsuccessful;

- empower the Court to specify the maximum costs that may be recovered by one party from another, to avoid the injustices that can occur when one party has "deep pockets";
- empower the Court to order that costs be payable in any case in which a party has been subject to unreasonable delay or default, or the proceedings are unreasonably protracted, or justice otherwise demands such an order;
- expressly empower the Court to order a person to pay the costs occasioned by the failure of that person to comply with a direction of the Court;
- identify circumstances in which a legal practitioner can be ordered to pay costs (Practice Note 108 - Refer Box below);[315] and
- develop a Code of Conduct for expert witnesses which specifies that an expert witness's paramount duty is to the Court and that he or she is not an advocate for a party to the proceedings. Experts are required to make full disclosure of relevant matters in their reports and, upon direction by the Court, confer with other expert witnesses to attempt to reach agreement on material matters.[316]

Box 8.2: Practice Note 108 – Cost Orders Against Practitioners

Practitioners should facilitate the just, quick and cheap disposal of proceedings. Practitioners should identify the issues genuinely in dispute. Practitioners should be satisfied that there is a reasonable basis for alleging, denying, or not admitting facts in pleadings. The Court relies on practitioners, either directly or by giving appropriate advice to a client, to observe listing procedures, rules and Court directions, to ensure readiness for trial, to provide reasonable estimates of the length of hearings, to present written submissions on time and to give the earliest practicable notice of an adjournment application. Failure in any of these respects may be taken into account in exercising the jurisdiction to order costs against practitioners personally.

31 January 2000

Other Recent Practice Notes

Early Arraignment in Criminal Trials

Practice Note 103 (October 1998) introduced arraignment in criminal trials approximately four months after committal to:

- encourage the early entry of guilty pleas;

---

[315] Such orders are, however, rarely made. Source: Feneley, John, *Attorney General's Department Response to Supplementary Questions,* p 20.

[316] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry*, p 11.

- identify cases that should be transferred to the District Court at an early stage; and
- to allow case management to commence for cases going to trial.

Previously, criminal cases were not brought before the Court until a hearing date could be allocated, which may have been 10 months or more after committal.

*Practice Note 112 (*March 2000) reduced the period before arraignment to one month.

Early Listing

Under *Practice Note 116* (October 2000), every case is listed in the Court within six months of filing. This provides relatively early assessment for cases which are defended but allows enough time for undefended cases, which do not require judicial court supervision, to proceed to judgment by default.

Since the beginning of 2001, Common Law Division civil cases that are ready for hearing are allocated a hearing date immediately or are given a callover date to establish a time for hearing. Previously, cases waited on "holding lists" to receive hearing dates and could remain there for up to two years.[317]

Alternative Dispute Resolution

Part 7B of the Supreme Court Act 1970 was amended in 2000 to permit the Court to refer appropriate cases to mediation[318] whether or not the parties consent.[319]

> The new power will have to be exercised with care. I do not anticipate that it will be exercised frequently. In its exercise Judges will, I have no doubt, seek to ensure that no party is disadvantaged by the mediation process.[320]

In reality, cases are rarely referred to mediation without the consent of the parties. Judicial officers may, however, remind parties that the Court has this power.[321]

---

[317] ibid, p 12. Holding periods of up to two years were experienced in 1997.

[318] Mediation is assisted negotiation by an impartial facilitator. No decision is made by the mediator as to the issues in dispute and no decision, award or judgment is imposed on the parties. The Act also gives the Court the power to refer parties to neutral evaluation. In neutral evaluation an impartial evaluator assists the parties to identify the issues in dispute and exchange key information on those issues. The evaluator may assess the strengths and weaknesses of each party's case and give an opinion as to the likely decision of the Court. Early neutral evaluation has not been a successful form of ADR in the NSW Supreme Court and is not used in practice. (Source: Highet, Jeannie, Policy and Research Officer, Supreme Court of NSW, 5 April 2002). This is because litigants generally have legal representation and so have received advice regarding their prospects of success. Additionally, identifying the key issues of the case and exchanging information on them represent standard case management procedures.

[319] Supreme Court of NSW, 2001, *Practice Note 118: Mediation,* 8 February.

[320] Spigelman, JJ, 2001, "Mediation and the Court", *Law Society Journal,* March, p 64.

[321] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry*, p 20.

The Supreme Courts of South Australia, Victoria and Western Australia have similar powers and evidence from Victoria suggests there is little difference in success rates and user satisfaction for compulsory and non-compulsory mediation.[322] Evidence regarding compulsory mediation is not, however, uniformly positive.[323]

Mediation may be carried out by qualified court registrars or external mediators. There is no charge for court-based mediation. The Inquiry was advised that 241 cases (165 equity, 70 probate and 6 common law) were involved in court-based mediation in 2001:

Cases Settled by Mediation	60%
Cases Seeking Hearing	31%
Cases Continuing in Mediation and/or Undertaking Negotiation	9%[324]

The Court does not measure the proportion of cases referred to mediation for its entire civil caseload. Detailed reporting is, however, available for the Professional Negligence List and the Possession (Defended Cases) List. Most mediations in these lists are conducted by external mediators:

- of 549 Professional Negligence cases on hand as at 1 January 2002, 11.3 per cent had been referred to mediation. These cases were either still in mediation or had returned to case management;
- of 92 Possession List cases on hand as at 1 January 2002, one had been referred to mediation and returned to case management.[325]

Note: Arbitration is not widely used in the Supreme Court as most of the Court's personal injury caseload – which was the focus of arbitration – was transferred to the District Court in 1997. Arbirtration referrals have declined from 664 in 1997 to 44 in 2000.[326]

Finding

Mediation has the potential to reduce court waiting times in the Supreme Court but more information is needed on the extent of its application and the "success rates" of both court-based and external mediators.

---

[322] Spigelman, JJ, 2001, "Mediation and the Court", *Law Society Journal,* March, p 65.

[323] See Spencer, David, 2000, "Court given power to order ADR in Civil Actions", *Law Society Journal,* October, p 72.

[324] Highet, Jeannie, "Supreme Court Response to Supplementary Questions", *Attorney General's Department of NSW Response to Supplementary Questions.*

[325] Highet, Jeannie, "Supreme Court Response to Supplementary Questions", *Attorney General's Department of NSW Response to Supplementary Questions.*

[326] Supreme Court of NSW, 2001, *Annual Review 2000,* p 21.

Recommendation

19. The Supreme Court should include mediation statistics as part of the dataset to be collected by the CAS.

Acting Judges

The Supreme Court started using Acting Judges in 1997-98. Under the Court's stated policy, only former Judges are to be appointed as Acting Judges[327] and the Inquiry was advised that no legal practitioners are serving as Acting Judges in the Supreme Court.[328] Acting Judges:

- remove the necessity to adjourn matters which are part heard but have overrun their allotted time. In this instance, the trial Judge can continue to hear the case while an Acting Judge presides over the next matter; and
- allow cases that are at risk of being "not reached" to commence as scheduled.

The significant increase in criminal case disposals in 2000 was attributed to the use of back up trials (which depends on the availability of Acting Judges – see Chapter Five) and the new arraignment procedure introduced in November 1998.[329]

For further discussion, see Appendix Nine: Delay Reduction in the Supreme Court – A Six Year Summary.

Trends in Waiting Times in the Supreme Court

Table 8.10 shows trial delay is being reduced in first instance criminal cases and the Court of Appeal. Trends in the Equity Division are less clear cut while data on median delay in Common Law civil cases and the Court of Criminal Appeal is only available for 2000-01. With regard to Common Law civil cases, however, the median disposal times for defamation and professional negligence cases, despite the context of the complexity of the matters involved, seem high.

---

[327] ibid, p 3.

[328] John Feneley, *Attorney General's Department's Response to Supplementary Questions,* p 14. The Supreme Court advised that all Acting Judge appointments since 1999 had been experienced Judges who had retired or were sitting in other jurisdictions. For example, some District Court Judges acted in the Supreme Court during 2001. (Johnston, Nerida, Chief Executive Officer and Principal Registrar, Supreme Court of NSW, Transcript of hearing, 7 December 2001, p 55). The appointment of practitioners as Acting Judges has attracted criticism in the past due to issues of potential conflict of interest.

[329] Supreme Court of NSW, 2001, *Annual Review 2000,* p 21.

Table 8.10: Court Waiting Times from 1995-6 to 2000-01

Waiting Time (months)	2000-01	1999-2000	1998-9	1997-8	1996-7	1995-6
Criminal (1)						
Defendant in Custody	9	13	13	16	17	18
Defendant on Bail	9	21	21	24	23	21
Civil (2)						
Administrative Law List	6	8	7-8	5-6	<12	<12
Defamation List	29					
Possession (Defended Cases) List	7.7	Comparative information is not available for these lists				
Possession (Default Cases) List	7.3					
Professional Negligence List (3)	34.9					
Equity Division (4)						
Admiralty List (5)	12-15	9	6-9	6-9	6-9	<12
Commercial List	9-12	9	6-9	6-9	6-9	6-9
Construction List (6)	9-12	9	6-9	6-9	6-9	6-9
Equity List	15-18	<11	<15	<13	<17	<13
Court of Criminal Appeal (7)	9	Comparative information is not available.				
Court of Appeal (8)						
General List	10	14	21-22	23-24	23.7	33.2
Other Lists	10	6	7-8	10-16	...	...

1. Median time from commencement to plea, verdict or other finalisation.
2. Median time from commencement to finalisation. Prior to 2000-01, management reporting for separate lists was not available. Reporting for the DCM and Summons Lists started on 1 September 2001.
3. Given the nature of matters in this list, cases will take a relatively long time to finalise. See Appendix Ten. Even in this context, the median time to disposal appears high. In the United States, the median time from filing to verdict in 75 of the largest counties was 24.5 months for professional malpractice cases and 29 months for medical malpractice cases in 1996. (Source: National Centre for State Courts, *Examining the Work of the State Courts 1999-2000.)*

   The rate of disposal has, however, increased since the Professional Negligence List commenced on 1 April 1999. During calendar 2000, 423 matters were finalised compared to 61 matters from 1 April to 31 December 1999.
4. Median time from commencement to finalisation except for Equity List cases prior to 2000-01 where waiting time is the time from establishment of readiness for hearing to the hearing date. This change in timeframe is the reason for the increase in Equity List waiting times in 2000-01.
5. The low number of matters in this list (24 disposals in calendar 2000) means performance can be skewed significantly by one or two cases.
6. Case numbers in this list are also low (38 disposals in calendar 2000).
7. Median time from commencement to finalisation.
8. Before 1997-8 the figure represents the median time from establishment of readiness for hearing to finalisation. From 1997-8, the figure represents the median time from lodgment to finalisation. Waiting times have, therefore, improved more significantly than the figures suggest as the statistic now used represents the entire period to finalisation rather than a portion of it.

Source: Attorney General's Department of NSW, *Annual Report 2000-2001,* p 169-170

Concern is often expressed regarding delays in regional and rural NSW, which

tend to be longer than those experienced in metropolitan areas. With regard to this issue, the Supreme Court advised the Inquiry:

- a very small proportion of its civil caseload is sourced in the country (200 out of a current 4,000 matters in the Common Law Division);[330]
- once a regional list is reduced to the small numbers that are typical now, the cases on it receive individual attention when ready for hearing and may be listed outside circuit sitting times or be offered alternative venues;
- cases in regional lists are monitored from commencement using the same case management principles that apply to Sydney matters. This type of case management was not available prior to 2000;
- special arrangements are made for cases that need long hearings which would, if heard as ordinary circuit cases, increase delay for other matters. For example, the three Wingecarribee fire fighter cases are being heard in a 7-week fixture before an acting judge at Goulburn;[331]
- with regard to criminal matters, the Court heard cases in 13 regional centres in 2000 (24 cases out of the 144 finalised);[332]and
- the Chief Justice also reviews the lists from a "high level" perspective each year to adjust circuit sittings to reflect shifts in case load. For example, the case load in the Riverina has recently increased and an extra sitting week has been allocated to the area.[333]

Model Key Performance Indicators

These indicators[334] are being implemented although there is some uncertainty regarding their usefulness when applied to the varied caseload of the Court:

> **Ms HIGHET:** The KPIs are extremely broad. The clearance ratio looks at four areas of the court, and the civil case load is a mix of both the Common Law Division and the Equity Division, and there are specialist lists within those divisions that behave quite differently. While we do look at the clearance ratio, in order to understand better what is happening with the case load we have to get down to the particular types of cases because they do behave so differently.[335]

---

[330] Johnston, Nerida, Chief Executive Officer and Principal Registrar, Supreme Court of NSW, Transcript of hearing, 7 December 2001, p 51.

[331] Johnston Nerida, "Supreme Court Response to Supplementary Questions", At*torney General's Department Response to Supplementary Questions,* Supreme Court Attachment.

[332] Supreme Court of NSW, 2001, *Annual Review 2000,* p 20. Locations were: Albury, Broken Hill, Coffs Harbour, Dubbo, Forbes, Gosford, Goulburn, Griffith, Katoomba, Lismore, Newcastle, Tamworth and Wollongong.

[333] Johnston, Nerida, Chief Executive Officer and Principal Registrar, Supreme Court of NSW, Transcript of hearing, 7 December 2001, p 51.

[334] Refer Chapter 2, page 9.

[335] Highet, Jeannie, Policy and Research Officer, Supreme Court of NSW, Transcript of hearing, 7 December 2001, p 49.

Despite these caveats, the Court is currently reporting:

- clearance ratio for criminal, civil, criminal appeals and civil appeals; and
- backlog and overload for criminal and criminal appeals. These measures will be available for civil matters following the implementation of the CAS.[336]

Implementation of the attendance index is more problematic:

> **Mrs JOHNSTON:** If it is a measurement of pre-hearing attendance, it may not be particularly useful...because it goes to judicial discretion in terms of managing a particular kind of case. It may be a complex commercial case, so it may not tell a lot about the way the court is managing its case load. If it is talking about attendance that has been required unnecessarily because a court cannot provide a hearing, notwithstanding the listing of the matter, that is different and I think there needs to be some further clarification of precisely what is a meaningful measure.[337]

Note that the Court already monitors adjournments on the first day of hearing to determine the proportion of cases that are not reached.

Table 8.11: Adjournments as a proportion of total hearings (per cent)

	2000-01	1999-2000	1998-9
Criminal			
Requested by Parties	7.1	8	7
Court Initiated (not reached matters)	1.7	2	1
Civil			
Requested by Parties	6.4	5	5
Court Initiated (not reached matters)	0.9	1	1

Source: Steering Committee for the Review of Commonwealth/State Service Provision, *Report on Government Services: 2002* (Table 9A.25), *2001* (Table 9A.15), *2000* (Table 8A.17).

[336] loc cit.

[337] Johnston, Nerida, Chief Executive Officer and Principal Registrar, Supreme Court of NSW, Transcript of hearing, 7 December 2001, p 49.

Findings

Civil case management, which has focussed on creating specialist lists to provide procedures best suited to particular types of matters, appears appropriate given the varied and complex nature of cases before the Supreme Court. To date, however, court waiting times in the Equity Division have been relatively static and lack of data means trends in performance in civil cases in the Common Law Division cannot be assessed.

First instance criminal case management has recently focused on a combination of early arraignment and the use of Acting Judges to boost disposals and has achieved good results in reducing trial delay.

With regard to the Appeal Courts, the Court of Appeal has achieved substantial improvements in waiting times. Current performance in the Court of Criminal Appeal is on par with first instance criminal matters and this also represents a good result.

The establishment of time standards in 2000 for first instance criminal and appeal cases (civil and criminal) has now provided court-determined benchmarks against which performance can be assessed. Performance against these standards was clearly and fully reported in the Court's *Annual Review* for 2000. First instance civil time standards have still to be developed, however, and this process is dependent on the implementation of the CAS.

In short, the Supreme Court has now assembled many of the elements required to improve the efficiency and effectiveness of case processing. The major outstanding issue is the availability of management information. As CAS is the "catch all" solution to this problem, it is essential this system is appropriately tailored to the needs of the Court and implemented in a timely way.

Recommendations

In addition to the previous recommendations regarding CAS:

20. The Supreme Court should establish civil time standards as soon as data availability permits. These standards should reflect comparable best practice in other states and countries.

21. The Supreme Court adapt the proposed KPIs to its circumstances. The Inquiry recognises the implementation of the proposed KPIs will be more difficult for the Supreme Court given the varied nature of its civil case load. However, these indicators will assist in the active management of divisional and list caseloads by providing an insight into the pending caseload. Measurement of delay, by comparison, can only demonstrate what has happened.

Chapter Nine

Waiting Times in the District Court

Business of the District Court

The jurisdiction of the Court was described in Chapter Three (see pages 35 and 47).

Resources and Caseload

Table 9.1 Net Cost of Services versus Caseload

	2000-01	1999-2000	1998-9	1997-8	1996-7	1995-6
Net Cost of Services ($ million)						
Expenses	44.00	40.45	61.95	57.20	52.25	49.71
Revenue	16.61	13.93	15.06	14.01	14.38	10.31
Other	...	0.02	...	0.06	-0.07	0.01
Net Cost of Services	*27.38*	*26.54*	*46.89*	*43.26*	*37.80*	*39.40*
Estimated Supreme Court Share of Justice Support Services (1)	22.31	21.50	...	...	...	...
Adjusted Net Cost of Services	*49.69*	*48.04*	*46.89*	*43.26*	*37.80*	*39.40*
Compound Rate of Change Since 1995-96	*4.75%*					
Caseload						
Criminal Trials						
Registered	1,996	2,215	2,644	3,180	2,889	2,775
Compound Rate of Change	*-6.38%*					
Finalised	2,468	2,853	3,265	2,896	2,536	2,678
Compound Rate of Change	*-1.62%*					
Pending	1,030	1,502	2,140	2,761	2,467	1,994
Compound Rate of Change	*-12.38%*					
Civil Matters						
Registered	17,410	14,726	14,603	14,047	10,866	14,732
Compound Rate of Change	*3.40%*					
Finalised	12,954	13,022	12,783	13,403	17,386	14,654
Compound Rate of Change	*-2.44%*					
Pending	20,281	15,620	13,371	11,975	12,447	21,748
Compound Rate of Change	*-1.39%*					

Justice Support Services was created as a separate program in 1999-2000. In Chapter 5, 85% of its cost was assumed to be attributable to the Supreme, District and Local Courts. This table assumes the District Court accounts for 45% of the three court total. Source: Annual Reports of the Attorney General's Department , 1995-6 to 2000-01.

Criminal Caseload

Trials represent the bulk of court sitting time but they are only part of the caseload (23 per cent of case registrations in 2000). The other elements are:

- committals for sentence – 14 per cent of registrations in 2000;[338] and
- appeals from decisions of the Local Court - 63 per cent of registrations in 2000.

Trends in Trials

Registrations have declined by 37 per cent since 1997-98. This is the result of:

- DPP policy to use the Local Court to finalise cases, wherever possible;[339] and
- the success of the centralised committals scheme, which commenced as a pilot in Sydney in April 1998 and expanded statewide in 1999-2000.[340]

Table 9.2: Criminal Registrations – Metropolitan and Country

	Calendar 1998	Calendar 2001	Change
Total Country	1,213	736	-39.3%
Sydney West	1,054	690	-34.5%
Sydney	705	776	+10.1%
Total Metropolitan	1,759	1,466	-16.7%
NSW	2,972	2,202	-25.9%

Source: Feneley, John, "District Court Response to Supplementary Questions", p 2, *Attorney General's Department of NSW Response to Supplementary Questions.*

Table 9.2 demonstrates that the decline in criminal registrations has been even more dramatic in country NSW. Matters that do go to trial in the District Court, however, tend to be more serious and complex than before. Trial lengths have, therefore, increased from 4.5 days in 1996 to 5.7 days in 2000. Trial duration in Sydney has increased from 6.9 days to 8.4 days over the same period.[341] This, and the reduction in registrations, has reduced finalisations.

The pending criminal caseload has also been significantly reduced. Pending matters in country NSW fell by 59.5 per cent between 1998 and 2001 (429 cases as at 31 December 2001). There was a 47 per cent decline in metropolitan Sydney over the same period (697 cases as at 31 December 2001).[342]

---

[338] District Court of NSW, 2001, *Annual Review 2000,* p 54-56.

[339] See page 12 of this Report.

[340] See page 39 of this Report.

[341] District Court of NSW, 2001, op cit, p 41.

[342] Feneley, John, "District Court Response to Supplementary Questions", p 2, *Attorney General's Department of NSW Response to Supplementary Questions.*

Trends in Committals for Sentence

Committals increased by 15 per cent to 1,216 in 2000. This followed a 19 per cent increase in 1999 which was the first significant rise since 1991.[343] This trend reflects the success of the centralised committals scheme in generating earlier guilty pleas. Disposals have kept pace with registrations and the pending caseload is small.

Trends in Appeals from Decisions of the Local Court

Registrations declined by 19 per cent to 5,445 in 2000. This was the first substantial fall since 1994 and it is difficult to determine if this represents the start of an ongoing trend. The number of pending appeals on hand at the end of the year fell by 40 per cent to 943.[344]

Civil Caseload

Registrations

Changes to Motor Accident legislation relating to compensation for non economic loss led to a significant fall in registrations in 1996.[345]

In 1997, registrations rose strongly when the Court's jurisdiction was increased from $250,000 to $750,000 for general cases with no limit on personal injury claims from motor vehicle accidents. The Court was also given a jurisdiction in Family Provision Act cases and De Facto Relationship Act cases to $250,000.[346]

Registrations rose in 2000-01 because of proposed reductions in common law rights in medical negligence and workers' compensation cases. In response, potential litigants rushed to file their claims before the legislation took effect last November. Table 9.3 provides a sample comparison.

Table 9.3: Impact of Legislative Change on Case Registrations in 2000-01

	June 2000	June 2001
Medical Negligence Registrations for the Month	3	139
Industrial Personal Injury Registrations for the Month	76	419
Proportion of Total Registrations Represented by These Classes	11%	45%

Source: Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry*, p 36.

The Court estimates around 5,000 cases from these two classes were filed in calendar 2001.[347] Country NSW has also seen a significant increase in

---

[343] District Court of NSW, 2001, op cit, p 43.

[344] ibid, p 45.

[345] Eyland, Ann, *Law and Justice Foundation Submission to the Inquiry,* p 3.

[346] District Court of NSW, 1998, *Annual Review 1997,* p 1.

[347] District Court of NSW, 2002, *Practice Note No 61,* 20 February.

registrations in recent years, although growth has not been as strong as that seen in the metropolitan area. Interestingly, growth in the country has outstripped that seen in Sydney West.

Table 9.4: Civil Lodgments – Metropolitan and Country

	Calendar 1998	Calendar 2001	Change
Rural Country	2,387	3,200	+34.1%
Major Country	1,648	2,424	+47.1%
Total Country	4,035	5,624	+39.3%
Sydney	7,182	12,916	+79.8%
Sydney West	1,812	2,244	+23.8%
Total Metropolitan	8,994	15,160	+68.6%
NSW	13,029	20,784	+59.5%

Rural Country is all regional venues excluding Gosford, Wollongong and Newcastle.

Source: Feneley, John, "District Court Response to Supplementary Questions", p 2, *Attorney General's Department of NSW Response to Supplementary Questions.*

Note that relatively few civil matters registered are actually settled by a court judgment. For example, in calendar year 2000, only 12 per cent of cases in Sydney were finalised by judgment.[348] This means that the increase in civil lodgments in country NSW has not been significant enough to offset the reduction in criminal registrations.[349] This net reduction in caseload has seen sittings suspended at some country venues. [350]

Finalisations

Case management commenced on 1 January 1996. This increased finalisations in 1996-7 and 1997-8 as additional resources were provided to clear the backlog of "old system" cases (over 23,000 in January 1996).[351] By December 1997, only 2,000 pre-1996 cases remained. In addition, the increase in the District Court's jurisdiction in 1997-98 led to the transfer of 3,077 cases from the Supreme Court.

---

[348] District Court of NSW, 2001, *Annual Review 2000,* p 30.

[349] Table 9.2 indicated a 477 reduction in criminal registrations from 1998 to 2000. This compares to a 1,589 increase in civil lodgments. If, however, only 12 per cent of these proceed to judgment, the increase in terms of court trials is estimated at 191.

[350] Additionally, regions with increases in civil registrations will not necessarily coincide with regions experiencing the greatest decline in criminal caseload. In 2000, the Court did not sit at Braidwood, Casino, Cessnock, Cobar, Condoblin, Cooma, Corowa, Cowra, Glen Innes, Gundagai, Gunnedah, Hay, Kempsey, Leeton, Moruya, Moss Vale, Murwillumbah, Narrandera, Nyngan, Quirindi, Scone, Singleton, Tumut, Walgett, Wellington, Wyalong or Yass. This does not mean that these venues are permanently closed – sittings can be re-established if local caseloads increase. Source: District Court of NSW, 2001, *Annual Review 2000,* p 8-9.

[351] These measures included: recision of the mid year judicial vacation and the conduct of some sittings during the summer vacation; an additional 179 Judge sitting weeks in 1996 via the Acting Judge Scheme; and culling of inactive cases. Source: NSW District Court, 1997, *Annual Review 1996,* p 18.

The relative decline in finalisations in 1998-9 reflects a return to more "normal" conditions, although the transferred Supreme Court cases were still being cleared.

Pending Matters

The large decline in 1996-7 is the result of the introduction of case management. The increase in registrations resulting from the 1997-8 jurisdictional change has, however, resulted in a steady increase in pending matters. The significant increase in 2000-01 represents a combination of this trend and pre-legislation filing of medical negligence and workers' compensation claims.

Time Standards in the District Court

The Court introduced time standards in its inaugural Strategic Plan issued in 1995.

Civil

The court adopted the standards of the American Bar Association:

- 90 per cent of cases disposed of within 12 months of commencement; and
- 100 per cent of cases disposed of within two years of commencement.[352]

Table 9.3: Compliance with Civil Trial Time Standards

Region	12 months			18 months			24 months			> 24 months		
	98-99	99-00	00-01	98-99	99-00	00-01	98-99	99-00	00-01	98-99	99-00	00-01
Sydney	44%	54%	51%	62%	79%	78%	68%	89%	89%	32%	11%	11%
Sydney West	58%	62%	73%	79%	85%	92%	86%	94%	98%	14%	6%	2%
Country	54%	54%	46%	77%	82%	80%	85%	91%	91%	15%	9%	9%
NSW	49%	56%	53%	69%	81%	81%	77%	90%	91%	23%	10%	9%

Source: Attorney General's Department, *Annual Report 2000-2001,* p 165.

While the Court is close to meeting the two year standard, the results for 12 months are disappointing.

The differences in performance between metropolitan and rural NSW will be discussed under *Trends in Waiting Times in the District Court.*

Criminal

The standards used in England and Wales were adopted by the District Court in its inaugural Strategic Plan:

---

[352] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry*, p 8.

Trials and All Ground Appeals

- 90 per cent to commence within four months of committal or lodgment of appeal; and
- 100 per cent to commence within twelve months of committal or lodgment of appeal.

Sentence Committals and Sentence Appeals

- 90 per cent to commence within two months of committal or lodgment of appeal; and
- 100 per cent to commence within six months of committal or lodgment of appeal.

From July 2000, the 90 per cent standard for sentence appeals was increased from two to three months.[353]

Table 9.4: Compliance with Criminal Trial Time Standards

Region	4 months			6 months			12 months		
	98-99	99-00	00-01	98-99	99-00	00-01	98-99	99-00	00-01
Sydney									
Custody	52%	63%	66%	85%	89%	87%	98%	100	99%
Bail	12%	17%	40%	26%	36%	56%	55%	67%	75%
Sydney West									
Custody	45%	49%	75%	74%	87%	89%	98%	99%	99%
Bail	14%	17%	41%	30%	37%	58%	64%	67%	81%
Country									
Custody	52%	54%	51%	81%	80%	75%	98%	98%	99%
Bail	14%	13%	14%	27%	25%	28%	59%	54%	59%
NSW									
Custody	50%	55%	63%	80%	84%	83%	98%	99%	99%
Bail (1)	13%	16%	28%	28%	34%	42%	60%	62%	68%

The accused was in custody in approximately 26 per cent of all matters finalised in 1998, 23 per cent in 1999, 24 per cent in 2000 and 28 per cent in 2001. Source: Feneley, John, "District Court Response to Supplementary Questions", p 7, *Attorney General's Department of NSW Response to Supplementary Questions.*

Source: Attorney General's Department, *Annual Report 2000-2001,* p 164-5.

[353] loc cit.

Where the accused was in custody, the 12 month standard was reached. Where the accused was on bail, however, results were relatively poor. Results were poor in both instances for the four month target.

In the last six months, the results for defendants on bail have improved significantly, particularly for country NSW:

Table 9.5: Criminal Trial Time Standards – Compliance for Defendants on Bail

	Trials commenced within 6 months		Trials commenced within 12 months	
	2000-01	July-Dec 2001	2000-01	July-Dec 2001
Country	28%	55%	59%	79%
All NSW	42%	70%	68%	89%

Source: Feneley, John, "District Court Response to Supplementary Questions", p 1, *Attorney General's Department of NSW Response to Supplementary Questions.*

Case Management in the District Court

Civil

Practice Note No 33

This Practice Note introduced civil case management in the Court and included the establishment of four lists:

- Commercial – cases subject to direct Judge management;
- Construction – cases subject to direct Judge management;
- Motor Accidents – management under standard timetable;[354] and
- General – management under standard timetable.

A "not ready" list was established to accommodate cases which must commence because of legislative time limits but which cannot be concluded because the final effect of injuries experienced has not been resolved.

The standard timetable lists the maximum periods allowed for the completion of different steps in case preparation. It introduced a review date, five months after the statement of claim is filed, when the progress of the matter is assessed by a registrar. Two months later, a status conference is held to ensure the case is ready to go to trial and a hearing date is provided.

The registrar could, at either meeting, issue orders to ensure the matter proceeds to trial as scheduled.

[354] Timetable-based case management may also be described as "rule driven".

In cases of serious default, the matter could be referred to a directions hearing with a Judge:

> Where the registrar on the review date or at a status conference is not satisfied as to the preparations for trial the action will (if not struck out) be listed before a Judge for directions...Judge-management involves detailed directions, with compliance compelled, and a plaintiff whose action is referred by the registrar for directions is generally facing a last opportunity to avoid the action being struck out (or worse).[355]

Over time, however, compliance with Practice Note 33 has declined:

> **Mr FENELEY:** As the time has gone on, the case mix has changed and as people get more used to the system we see more creep. We have discovered that the major case management mechanisms we had in place in terms of calling the parties in for a review at five months and a status conference at seven months, too many cases were getting through that system and ending up before a judge to be managed and blowing out their time.[356]

In response, the Practice Note was revised (effective 1 January 2002). The review date has been abolished and replaced by a pre-trial conference three months after the filing of the statement of claim. At this conference, each party must file a certificate setting out details of all documents served, the dates they were served and any future matters to be attended to. Unless orders are made at the status conference, the Court will not permit the service of any further documents.[357]

The revised Note also creates two new specialist lists for direct Judge management – the Defamation List and the Family Relationships List. The Motor Accidents List is included within the General List. The Note is also much more specific regarding sanctions for non compliance:

> The Court will impose strict cost penalties on any party or the party's legal representatives who do not comply strictly with time standards, timetables and Court orders.[358]

And provides clear advice regarding adjournments:

> Cases are not to be fixed for hearing unless they are ready for hearing.
>
> It is the responsibility of the legal advisers of the parties to ascertain the availability of their clients and witnesses before the hearing date is taken. Cases will not be adjourned except for very good reason...

---

[355] District Court of NSW, 1995, *Practice Note No 33,* 12 December, Clause 12.7.

[356] Feneley, John, Acting Deputy Director General, Attorney General's Department, Transcript of hearing, 7 December 2001, p 64.

[357] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry*, p 15.

[358] District Court of NSW, 2001, *Practice Note No 33,* 4 October, Clause 3.3.2.

> If a case is not ready to proceed on the allocated hearing date, the party in default will be called upon to show cause why the Statement of Claim, cross claim or defence should not be dismissed or struck out.
>
> Where appropriate, cost orders will be made in a sum of money...and legal practitioners may be called upon to show cause whey they should not personally pay the costs of any adjournment.[359]

The Law and Justice Foundation has conducted research comparing the results of civil case management in the District Court of NSW and the County Court of Victoria.

The County Court implemented a rule-driven system in 1988. After five successful years, however, delays started to increase and it was found that some 60 per cent of cases were not ready to proceed at the time of the pre-trial conference. This "slippage" is similar to that recently experienced in NSW. In response, the 1996 Civil Initiative introduced Judge-controlled case management for all Country Court cases:

- each case attends a directions hearing within 45 days of the service of the statement of claim. The hearing is conducted by the Judge in charge of the list. The lists are: Damages (General, Defamation and Medical Divisions), Business (Commercial, Building Cases and Miscellaneous Divisions), WorkCover and Long Cases;
- mediation is encouraged in the great majority of cases and may be ordered without the consent of the parties. If mediation is not pursued, a trial date will be set at the directions hearing; and
- discovery and interrogation is allowed only by leave of the Judge in charge and the scope is specified.[360]

The Foundation found that there had been a reduction in Victorian waiting times following the introduction of the new system although a shortage of courtrooms had begun to compromise the integrity of the new regime by 1998.[361] The Foundation suggested there could be something to be learnt from the Victorian experience:

> **Dr EYLAND:** The present system in which the New South Wales District Court manages cases, draws on the [previous] Victorian system. So it is very interesting that the Victorians have given up their system and have moved on to a fully judge managed system. The reasons for dissatisfaction are complex and are not necessarily applicable in New South Wales but, nevertheless, they need some consideration.[362]

---

[359] ibid, Clauses 6.1, 6.2, 6.5 and 6.6.

[360] Eyland, Ann, *Law and Justice Foundation of NSW – Submission to the Inquiry,* p 5 and 12.

[361] ibid, p 5.

[362] Eyland, Ann Dr, Principal Researcher, Law and Justice Foundation of NSW, Transcript of hearing, 6 December 2001, p 67.

The *Annual Report 1999-2000* of the County Court of Victoria provides insights from the period following the Foundation's study. As at 30 June 2000, the median time from the directions hearing to trial in Judge-alone civil cases was five months while the median time between the hearing and a civil jury trial was six months. [363] Given the median time from commencement to finalisation in the District Court of NSW is 12.2 months (all civil cases), this is an excellent result. Even with this performance, however, the County Court has not yet reached its target of 90 per cent case disposal within 12 months and is being hampered by low levels of practitioner preparation:

> It however remains as a matter of concern that a significant proportion of the profession do not comply with directions orders, or are under the misapprehension that the Court will allow them to adjourn a fixed trial date simply because of lack of trial preparation. To overcome this problem in Melbourne, a trial callover was instituted during the year. By this procedure, each trial listed in Melbourne is called over approximately 4 to 6 weeks before the trial date to ensure that it is in fact ready for trial and that all directions have been complied with. It is a matter of great concern to the Judges that a significant proportion of cases called over are not in fact adequately prepared, or that practitioners profess to be prepared for trial and then later seek last minute adjournments on the basis of inadequate preparation. [364]

Given these comments, it appears Judge-driven case management offers no guarantees in terms of encouraging practitioner compliance. Another option is the enforcement of sanctions:

> **Mr GLACHAN:** What about striking out cases where they continually fail to meet key milestones?
>
> **Mr FENELEY:** Once again, I think it is fair to say the law on this is not entirely clear. The incidence of cases being struck out or dismissed is likely to increase if we do not get compliance with Practice Note 33. That message has been sent clearly to the profession. That is a necessary consequence of failure to comply...
>
> **Mr GLACHAN:** How many cost orders have been made against practitioners who have failed to ensure the speedy and efficient administration of justice?
>
> **Mr FENELEY:** I do not know.
>
> **CHAIR:** Is it commonly used or rarely used?
>
> **Mr GLACHAN:** Has it ever been used?
>
> **Mr FENELEY:** I think it has been used. I do not think it is commonly been used. I cannot say that.[365]

---

[363] County Court of Victoria, 2000, *Annual Report 1999-2000,* p 11.

[364] ibid, p 12-13.

[365] Feneley, John, Acting Deputy Director General, Attorney General's Department, Transcript of Hearing, 7 December 2001, p 65.

Finding

The issue of lack of practitioner compliance with civil case management directions is not unique to the rule-driven case management system used in the General List of the District Court of NSW. It also exists in the judge-driven system of the County Court of Victoria.

Sanctions – including cost orders against practitioners – are available but are rarely used.

Other Practice Notes

Other Practice Notes and the *Business Plan* of the Court's Civil Business Committee include the following additional case management procedures.

- any case not allocated a hearing date within 18 months of commencement is to be listed before a Judge to show cause why the action or defence should not be dismissed;
- any case not allocated a hearing date within two years of commencement, can expect to be dismissed unless a Judge has extended the time for allocation of a hearing date before the expiration of the two year period;
- long motions not fixed for hearing within six months of filing can expect to be dismissed unless a Judge has extended the time for hearing;
- the re-hearing of arbitrated actions must be fixed within six months or be dismissed, unless a Judge has extended the time for re-hearing;
- matters which are not ready to be listed for hearing at a status conference may have one call-over. If they are still not ready to take a hearing date they are to be referred to the List Judge to show cause why the action should not be dismissed;
- cases will not be adjourned, except in exceptional circumstances;
- applications for adjournment will generally not be heard on the day of hearing; and
- where appropriate, cost orders will be made in a sum of money payable within a nominated time and legal practitioners may be called upon to show cause why they should not personally pay these costs.[366]

Practice Note 33 does not apply to matters commenced outside Sydney, Newcastle, Gosford and Wollongong. Country matters are subject to separate guidelines which reflect the differences in rural and metropolitan caseloads.[367]

Practice Note 61 (20 February 2002) is specifically concerned with the additional medical negligence and workers' compensation cases filed prior to the November

---

[366] District Court of NSW Civil Business Committee, 2001, *Business Plan,* p 2-3.

[367] Refer District Court of NSW, 2001, *Country Circuits – Civil Directions,* August 2.

2001 change in legislation. As most of these matters were filed early to avoid the new legislation, the Practice Note states they may be placed in the Not Ready List, for 6 to12 months, provided this is done within five months of filing.

Alternative Dispute Resolution (ADR)

> During the course of [2000] the Court has adopted a more vigorous approach to alternative dispute resolution. It has been made clear to the profession that there is an expectation cases will go to either arbitration, mediation or early neutral evaluation unless there is a reason for that not to occur. In a system where 15,000 actions are commenced in a year, it is clear that all cases cannot be determined by a judgment of the Court. At the end of 1994 when I assumed this office, the average number of courts sitting in Sydney to hear civil cases was seven. It is now 18. It is perfectly apparent that if the increase in litigation continues, there will either have to be a significant increase in the size of the Court or a significant increase in alternative dispute resolution. We feel it is best to address this problem in the first instance by looking at an increase in alternative dispute resolution. [368]
>
> The Hon Justice R O Blanch
> Chief Judge

Arbitration[369] is the main form of ADR undertaken in the District Court. During calendar year 2001 its use was further promoted by:

- the issue of guidelines listing the types of cases which may not be suitable for arbitration and indicating that, apart from these, cases will generally be referred to arbitration before being listed for hearing; and
- 10 regional centres were allocated two separate weeks of arbitration each during 2001.[370]

Table 9.6: Referrals to Arbitration

Calendar Year	1999	2000	2001
Sydney	3,074	3,198	4,604
Others	866	466	1,287
Total	3,940	3,664	5,891
Total Registrations	14,261	15,070	20,784
Proportion of Total Registrations	27.6%	24.3%	28.3%

Source: Feneley, John, "District Court Response to Supplementary Questions", p 6, *Attorney General's Department of NSW Response to Supplementary Questions.* Note these figures are based on "manual back capturing" and so may be subject to error.

The proportion for 2001, however, should be adjusted to exclude the workers' compensation and medical negligence cases filed prior to legislative change as

---

[368] District Court of NSW, 2001, *Annual Review 2000,* p 2.

[369] In arbitration, a neutral third party hears the evidence of the parties and makes an award on the basis of the law. If a party to arbitration is not satisfied, they may proceed to a hearing.

[370] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry,* p 21.

most of these matters are not ready to be heard or arbitrated. On this basis, the proportion of matters referred to arbitration in 2001 is 37 per cent.

This is still well short of the Chief Judge's 60 to 70 per cent target.[371] The Committee notes, however, that the District Court now has the power to compulsorily refer cases to mediation where appropriate[372] which should assist in diverting matters to ADR.

In terms of the success of ADR in achieving case finalisation, 40 per cent of matters were "settled at arbitration" in 2001 (47 per cent in 2000). These figures, however, understate the outcomes of arbitration as they do not include matters which are settled prior to re-hearing on the basis of the issues identified at arbitration. A study of all matters referred to arbitration in 1999-2000 found that 89.2 per cent were disposed of at arbitration or by settlement.[373]

Registry Accountability

The District Court Registry is being restructured to provide clearer management responsibility for case management issues. In the civil jurisdiction, this involves creating a new management position responsible for civil case management and listing.[374]

Criminal

Centralised Committals Scheme

This has helped to encourage early pleas and has also led to a greater proportion of cases being finalised in the Local Court (see page 39).

It should be noted, however, that a significant proportion of the cases that proceed to trial in the District Court still plead guilty on the trial date:

Table 9.7: Proportion of Cases Resulting in Guilty Pleas on Trial Date

Calendar Year	1999	2000	2001
Sydney	16%	18%	21%
Sydney West	23%	24%	24%
Country NSW	20%	27%	21%

Source: Fornito, Robert, "District Court Response to Supplementary Questions", p 23, *Attorney General's Department of NSW Response to Supplementary Questions.*

---

[371] "Arbitration to Trim Court Lists", 2001, *The Daily Telegraph,* 17 March, p 9.

[372] Feneley, John, "District Court Response to Supplementary Questions", p 6, *Attorney General's Department of NSW Response to Supplementary Questions.*

[373] loc cit.

[374] ibid, p 5.

Adjournments

The *Business Plan* of the Criminal Business Committee provides some guidance on granting adjournments. The Plan states that if time standards are to be met, adjournments must be the exception and absent witnesses, late briefings and consideration of no bill applications do not represent "good reasons" for adjourning a matter.[375]

Table 9.8: Proportion of Cases Adjourning on Trial Date

Calendar Year	1999	2000	2001
Sydney	24%	17%	16%
Sydney West	21%	19%	22%
Country NSW	36%	36%	17%

Source: Fornito, Robert, "District Court Responses to Supplementary Questions", p 23, *Attorney General's Department of NSW Response to Supplementary Questions.*

Finding

The proportion of cases resulting in guilty pleas on trial date remains high and is trending up in Sydney. In addition, Sydney West has failed to reduce the proportion of cases adjourning on the first day of trial.

Recommendation

22. While it is accepted that some proportion of accused persons will plead guilty on the trial date, further investigation is needed to identify factors that may be increasing the proportion of late guilty pleas and adjournments. These factors could include:

- the timeliness of applications for Legal Aid;
- the proportion of cases with privately funded defence counsel;
- the timing of involvement of senior Crown prosecutors;
- the timing of plea (or charge) bargaining;
- the timing of changes to indictments;
- the completeness and timeliness of Police briefs;
- the availability of witnesses; and
- the availability of physical exhibits and expert evidence.

Not Reached Matters

Not reached matters have been largely eliminated in Sydney and Sydney West. Where a case is at risk of not being reached in Sydney, the registry can seek to

[375] District Court of NSW Criminal Business Committee, 2001, *Business Plan,* p 7.

take advantage of any spare capacity that may be available at Sydney West, and vice versa.

This issue is more difficult to manage in the country as cases cannot usually be transferred to another circuit. Practice Notes 51 and 55 provide specific listing instructions for circuit courts.

Table 9.9: Proportion of Matters Not Reached on Trial Date

Calendar Year	1998	1999	2000	2001
Sydney	8%	5%	0%	0%
Sydney West	13%	6%	2.5%	5.5%
Country NSW	22%	21%	23%	14.2%

Source: Fornito, Robert, "District Court Responses to Supplementary Questions", p 23, *Attorney General's Department of NSW Response to Supplementary Questions.*

Other Listing Reforms

- cases committed to the Downing Centre are listed for mention before the permanent List Judge on the last sitting day of the following week. This ensures the accused receives early representation and supports the Centre's target of arraignment within 8 weeks;
- cases committed to Sydney West are listed for mention on the last sitting day of the second week following committal; and
- before the end of the week, the committing Local Court provides the District Court with a list of all cases committed during that week.[376]

Finally, in response to the fixed indictment requirement of the Criminal Procedure (Pre Trial Disclosure) Act 2001,[377] Practice Note Number 59 seeks to preserve the advantages gained in the District Court by the presentation of draft indictments within 1-2 weeks of committal. Under this Practice Note, the Court will allow the prosecution to amend indictments that are presented within four weeks of committal where the variation is also sought within the four week period.[378]

Criminal case management in the District Court of NSW is, therefore, much less structured than the system now in use in Victoria which uses pre trial conferences in a similar manner to Practice Note 33.[379] Although Victoria has reported excellent results to date, the NSW regime has also had significant success in reducing trial delay. Despite this, however, the District Court remains a

---

[376] Debus, RJ, Attorney General, op cit, p 16.

[377] Namely, that a fixed indictment is presented four weeks after committal.

[378] District Court of NSW, 2001, *Practice Note Number 59,* 17 October.

[379] Refer page 135 of this report.

considerable distance from meeting its time standards and, on this basis, the ongoing results of Victorian approach should be closely observed.

Acting Judges

The Court has created a panel of Acting Judges to replace permanent Judges during their absence on vacation or on circuit.

In 2000-01, the Scheme provided an additional 308.7 judicial sitting weeks, which is equivalent to 7.3 full-time Judges. For the past three completed calendar years, the equivalent of 8.5 extra Judges have been provided each year.[380]

The Acting Judges of the District Court do not include any practitioners.[381]

Trends in Waiting Times in the District Court

Civil

Table 9.10: Median Time from Commencement to Finalisation (months)

	1998-9	1999-2000	2000-01
Sydney	13.4	11.4	11.9
Sydney West	10.9	10.4	9.3
Country	11.3	11.6	12.7
NSW	12.2	11.3	11.6

Source: Attorney General's Department, *Annual Report 2000-01,* p 165.

Given the rapid growth in civil caseload, this is a creditable result. As there is no indication that recent growth will abate it is, however, essential that further improvements in case management are achieved.

Criminal

Table 9.11: Median Time from Committal to Trial (months)

	1997-98	1998-99	1999-2000	2000-01
Accused in Custody	5.6	6.9	7.0	6.2
Accused on Bail	11.5	13.4	12.2	10.0

Source: BOCSAR Statistics provided to the Inquiry by the District Court of NSW, 26 October 2001.

Given recent improvements in performance versus the Court's criminal time standards, further reductions in median delay are anticipated.

---

[380] Debus, RJ, Attorney General, op cit, p 19.

[381] Feneley, John, *Attorney General's Department of NSW Response to Supplementary Questions,* p 14. Acting Judge schemes have previously been criticised for using practitioners given the potential for conflicts of interest to arise.

Model Key Performance Indicators

The District Court has fully implemented the KPIs.[382] Clearance ratio and backlog for criminal cases for the first six months of calendar 2001 were included in the Attorney General's Department *Annual Report 2000-01.*[383] In addition, as already noted, the court monitors other indicators such as late pleas, adjournment rates and matters not reached in its criminal jurisdiction.[384]

Finding

The District Court has demonstrated a strong, strategic commitment to the effective and efficient use of court resources and this is reflected by the significant reduction of trial delay in criminal cases. The Court's civil jurisdiction is, however, more problematic given the rapid growth in its caseload and the apparent reluctance of some practitioners to comply with case management requirements.

Recommendations

23. If practitioners continue to resist the case management of civil cases under Practice Note 33, cost orders should be applied. This remedy is preferable to dismissing matters as this latter course of action will injure the litigant who may not be at fault.

    In instances where it is clear the litigant is responsible for non compliance, the party in default should be required to show cause why their Statement of Claim, cross claim or defence should not be dismissed.

24. The greater use of ADR must be promoted. Compulsory mediation should be ordered in appropriate cases. With regard to arbitration, specialist arbitrators should be considered for use in matters on the specialist lists and greater regional access should be provided.

---

[382] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry*, p 6. The KPIs are covered on page 9 of this report.

[383] See page 24 of the *Annual Report.*

[384] Refer page 133-6 of this Report.

Chapter Ten

Waiting Times in the Local Court

Business of the Local Court

The criminal and civil jurisdictions of the Court, which are the focus of this Inquiry, were described in Chapter Three (refer pages 35 and 47). The Local Court also hears Family Law, Children's Court and Coroner's Court matters.

Family Law

The Court can hear general family law matters, including custody and property settlements. Cases are transferred to the Federal Family Court when parties do not consent to final orders relating to parenting or when parties to certain property matters wish to be heard in the Federal jurisdiction.

Urgent matters are heard and determined as they arise. The waiting list for non urgent matters was less than 12 weeks after being set down for trial in calendar 2000.[385] During 2000-01, 9,975 cases were registered and 9,961 were finalised. As at 30 June 2001 the pending caseload was 1,132.[386]

Children's Court

In its criminal jurisdiction, the Court deals with allegations against children and young people aged between ten and eighteen years. This work represents about 80 per cent of matters before the Court and has been reduced by 30 per cent by the introduction of the Young Offenders Act 1997. The Act diverts juvenile offenders from the court system via warnings, cautions and conferencing.[387] The Court also has a care jurisdiction in which it determines whether children are in need of care and protection.

In 2000-01, 21,296 cases were registered in the Children's Court and 19,373 were finalised.[388] The average delay at 30 September 2001 was 12 weeks for criminal matters and 7 weeks for care applications.[389]

Coroner's Court

The State Coroner is responsible for ensuring all examinable deaths, fires and explosions are properly investigated and that Inquests or Inquiries are held when appropriate. During calendar year 2000, 202 inquests were heard.[390]

---

[385] Local Court of NSW, 2001, *Annual Review 2000,* p 18.

[386] Attorney General's Department of NSW, 2001, *Annual Report 2000-01,* p 168.

[387] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry,* p 46.

[388] Attorney General's Department, 2001, op cit, p 168.

[389] Anderson, Anita, Director, Local Court of NSW, Transcript of Hearing, 7 December 2001, p 40.

Resources and Caseload

Table 10.1 Net Cost of Services versus Caseload

	2000-01	1999-2000	1998-9	1997-8	1996-7	1995-6
Net Cost of Services ($ million)						
Expenses	122.16	113.97	133.95	126.50	133.97	122.16
Revenue	26.20	27.78	32.78	35.14	44.18	30.73
Other	-0.01	0.09	0.01	0.22	0.05	0.24
Net Cost of Services	*95.95*	*86.28*	*101.18*	*91.59*	*81.23*	*83.45*
Estimated Supreme Court Share of Justice Support Services (1)	18.66	17.99	...	...	...	...
Adjusted Net Cost of Services	*114.61*	*104.27*	*101.18*	*91.59*	*81.23*	*83.45*
Compound Rate of Change Since 1995-96	*6.55%*					
Caseload						
Criminal Trials						
Registered	257,020	244,988	242,222	230,825	228,671	211,490
Compound Rate of Change	*3.98%*					
Finalised	243,967	244,300	242,513	232,303	229,528	210,783
Compound Rate of Change	*2.97%*					
Pending	39,235	27,423	25,141	24,378	22,309	20,496
Compound Rate of Change	*13.87%*					
Civil Matters						
Registered (2)	14,680	11,931	12,205	12,667	13,516	13,925
Compound Rate of Change	*1.06%*					
Finalised	9,714	10,020	10,519	11,739	12,572	13,606
Compound Rate of Change	*-6.52%*					
Pending	12,893	8,255	6,700	5,146	4,146	2,327
Compound Rate of Change	*40.84%*					
Apprehended Violence Matters						
Applications Issued						
Personal Violence	14,043	14,021	13,526	13,847	11,250	10,227
Compound Rate of Change	6.54%					
Domestic Violence	33,295	22,392	23,555	25,821	27,707	23,879
Compound Rate of Change	6.87%					
Final Orders Made						
Personal Violence	6,726	7,402	...	...	...	...
Orders as a % of Applications	*47.90%*	*52.79%*				
Domestic Violence (3)	18,105	16,322	18,710	20,735	19,131	16,159
Orders as a % of Applications	*54.38%*	*72.89%*	*79.43%*	*80.30%*	*69.05%*	*67.67%*

(1) Justice Support services was created as a separate program in 1999-2000. In Chapter 5, 85 per cent of this cost was assumed to be attributable to the Supreme, District and Local Courts. This table assumes the Local Court accounts for 20% of the three court total.

(2) Registrations represent contested matters only. This is a much smaller figure than the total files issued which was 165,863 in calendar 2000 (Local Court of NSW, Annual Review 2000, p 11).

(3) From 1995-6 to 1997-8, Final Orders included conditional bail orders and final orders made by court.

Source: Annual Reports of the Attorney General's Department , 1995-6 to 2000-01.

[390] Local Court of NSW, 2001, op cit, p 25.

Criminal Caseload

With a compound rate of growth of 4 per cent over the past six years, registration of criminal matters has increased by a total of 21.5 per cent over the same period.

The issues which have resulted in a significant decline in the criminal workload of the District Court have increased matters determined by the Local Court. These factors are:

- a policy decision by the DPP to use the Local Court to finalise cases wherever possible;[391] and
- the success of the centralised committals scheme, which commenced as a pilot in Sydney in April 1998 and expanded statewide in 1999-2000.[392]

In addition, the matters before the Court have become more complex:

> **Mr COLLIER:** How has [the DPP's policy] impacted on the court?
>
> **Ms ANDERSON:** It has impacted on the court in a number of ways. Obviously it has increased the workload, but it has also increased the complexity of the cases that are dealt with by the court. You are obviously dealing with more serious cases than previously.
>
> In the cases where there are police briefs, the hearings tend to be longer, if they are defended hearings, and the issues are quite often more complex. There is evidence in forms of forensic evidence and things the court has to proceed with.[393]

Note that although applications for Personal and Domestic Violence Orders have also grown strongly, this has not impacted on court waiting times.[394]

Civil Caseload

Although case registrations declined from 1995-96 to 1999-2000, a 23 per cent rise in 2000-01 led to an overall increase of 5.4 per cent from 1995-96 to 2000-01. Finalisations declined by 28.6 per cent over the same period but only reflect 11 months of operation in 2000-01 as the Court did not sit during the Olympic month of September 2000. If 2000-01 is excluded, finalisations declined by 26.4 per cent between 1995-96 and 1999-2000 while registrations fell by 14.3 per cent leading to a 255 per cent increase in pending caseload. By the end of 2000-01, pending cases had increased by a further 56 per cent to 12,893 matters.

---

[391] See page 12 of this Report. In 1999, 68 per cent of all briefs referred by the DPP for trial election were concluded by Magistrates rather than being sent to the District Court for trial. Source: Anderson, Anita, "Local Court Response to Supplementary Questions", p 8, *Attorney General's Department Response to Supplementary Questions*.

[392] See page 39 of this Report.

[393] Anderson, Anita, Director, Local Court of NSW, Transcript of Hearing, 7 December 2001, p 33.

[394] ibid, p 36.

The Court has a Small Claims Division with a jurisdictional limit of $10,000 and a General Division with a limit of $40,000. Case trends within these divisions are shown in Table 10.2.

Table 10.2: Trends in Case Registrations and Finalisations in the General and Small Claims Divisions

	General			Small Claims		
	1995-1996	1999-2000	Change	1995-1996	1999-2000	Change
Registrations	5,222	4,729	-9.44%	8,703	7,202	-17.25%
Finalised Matters	6,322	4,473	-29.25%	7,284	5,547	-23.85%
Pending Matters (1)	1,217	2,584	+112.33%	1,110	5,673	+411.08%

Pending Matters in the General Division increased to 2,064 in 1996-97. Source: Attorney General's Department, *Annual Report 2000-2001,* p 168.

The jurisdiction of the Small Claims Division was increased from $3,000 to $10,000 in September 2000. This impacted the case shares of the Divisions:

Table 10.3: Caseload Split between the Small Claims and General Divisions

	Proportion of Civil Case Registrations	
	1999-2000	2000-01
Small Claims	60.4%	74.3%
General	39.6%	25.7%

Source: Attorney General's Department of NSW, 2001, *Annual Report 2000-01,* p 168.

This increase in jurisdiction was largely responsible for a 51 per cent rise in new matters in the Small Claims Division in 2000-01 to 10,904 while the pending caseload increased by 85 per cent to 10,509.[395] Case registrations and settlement rates were also affected by a "one off" relating to car insurance:

> **Mr COLLIER:** It seems that the number of cases in the Small Claims Division has increased dramatically following the increase in the quantum of the jurisdiction from $3,000 to $10,000...What factors have caused a significant increase in civil cases in 2000-01?
>
> **Ms ANDERSON:** Apart from the increase in the jurisdiction, matters going from General to Small Claims, there is one major reason and it relates to the insurance companies.
>
> Insurance companies, particularly the NRMA, have in the last 12 to 18 months lodged a large number of cases for demurrage, relating to when you have a motor vehicle accident and you have to hire another car. Previously the NRMA and other

[395] By comparison, registrations in the General Division fell by 20.2 per cent to 3,776 and pending matters fell by 7.7 per cent to 2,384 in 2000-01.

insurance companies never pursued...that claim. The NRMA have filed thousands upon thousands of claims for demurrage with the Downing Centre Court.

CHAIR: Can you explain demurrage a bit more?

Ms ANDERSON: It is a strange term. If you have a motor vehicle accident and your car is off the road and you have to go and hire another car...

Demurrage is the cost of getting that other car, the cost of getting around while your car is off the road. What we are seeing is the insurance companies, particularly the NRMA, pursuing [the people responsible for the accidents] for that, to compensate for that, whereas before we did not see them suing for that.[396]

The reason for the delay is that it is a new area of the law. It has been subjected to test cases and appeals to the higher jurisdictions to get a precedent and a decision. While that is happening those cases are sitting in the Court, waiting for the precedent to be set before they can be dealt with. That has been the single one reason for an increase in the jurisdiction.

Mr COLLIER: So the floodgates could actually open with a favourable decision, a decision which favours the insurance company, is that what you are saying?

Ms ANDERSON: Yes...[but] the decision has actually been the other way. It has been not favourable in terms of the [plaintiff] insurance companies...

Mr COLLIER: Given there are over 10,500 pending matters in the small claims division as at 30 June 2001, are any additional case management strategies being employed?

Ms ANDERSON: We are putting more resources towards that case management strategy. The Small Claims Division allows for matters to be finalised before a Magistrate or an Assessor. We've had one Assessor appointed at the Downing Centre. I would say that the Downing Centre in Sydney is the major civil claims court for the State, it deals with the vast majority of cases and indeed the vast majority of that workload is at the Downing Centre. Given the NRMA issue I just outlined, we have sought funding to put on additional Assessors so that we can deal with that case load, so we expect that case load to be under control by the end of the financial year.[397]

Finding

While the Inquiry recognises most civil cases are resolved in the Local Court within 12 months and that 2000-01 included a significant "one off" in terms of Small Claims case registrations the increase in, and quantum of, pending matters in the Small Claims Division is a matter of concern.

---

[396] The people being pursued by the insurers for demurrage are generally represented by other insurance companies so these matters are largely being fought by plaintiffs and defendants with significant resources.

[397] Anderson, Anita,Director, Local Court of NSW, Transcript of hearing, 7 December 2001, p 37-8.

Recommendation

25. The Court should further investigate the nature of pending matters in the Small Claims Division in terms of their median age and to determine whether any particular type of action is over-represented. Further increases in resources, beyond that proposed to manage the demurrage cases, may be necessary.

Time Standards in the Local Court

A Guide to Best Practice Standards in Court and Case Management in the Local Court was released in 2001 and provided time standards effective from 1 January 2002.

Civil

- 90 per cent of cases should be disposed[398] of within six months of the initiation of proceedings[399] in the Court;
- 100 per cent of cases should be disposed of within 12 months of the initiation of proceedings in the Court;
- all cases will be offered a hearing date within six months of the initiation of the proceedings in the court;
- motions will be offered a hearing date within two months of filing; and
- re-hearings from arbitration will be offered the next available hearing date and must accept a date within 12 weeks of filing the re-hearing application.[400]

Although these standards have only just come into effect, the *Report on Government Services 2002* shows that, in 2000-01, Local Court performance was close to these standards.

Table 10.4: Performance versus Time Standards in 2000-01

Time to Finalisation	Proportion of Matters
Less than Six Months	85.4 per cent
Less than 12 Months	94.6 per cent

Source: SCRCSSP, op cit, p 481.

[398] Disposal includes: referral to arbitration; settlement; discontinued cases; cases which are struck out; and hearings to judgement.

[399] Initiation of proceedings is the first listed appearance after the defence is filed.

[400] Local Court of NSW, 2001, *A Guide to Best Practice Standards in Court and Case Management in the Local Court,* p 57.

Criminal

Summary Criminal Trials

- 95 per cent of summary criminal trials should be finalised[401] within six months of commencement;[402] and
- 100 per cent of cases should be disposed of within six months of the initiation of proceedings in the Court.

Cases where the Defendant Pleads Guilty

- 95 per cent of cases where the defendant pleads guilty should be finalised within three months of commencement; and
- 100 per cent of cases where the defendant pleads guilty should be finalised within six months of commencement.

Indictable Matters Discharged or Committed for Trial to the Supreme or District Court

- 95 per cent of indictable matters discharged or committed for trial should be finalised within six months of commencement; and
- 100 per cent of indictable matters discharged or committed for trial should be finalised within nine months of commencement.

Indictable Matters Committed for Sentence to the Supreme or District Court

- 95 per cent of indictable matters committed for sentence should be finalised within three months of commencement; and
- 100 per cent of indictable matters committed for sentence should be finalised within six months of commencement.

Complaint Summonses

- 95 per cent of complaint summonses should be finalised within three months of commencement; and
- 100 per cent of complaint summonses should be finalised within six months of commencement.[403]

---

[401] Finalisation includes: information dismissed after hearing; offence proved after hearing; plea of guilty; committed for trial or sentence; matter dealt with ex parte; matter withdrawn or dismissed; orders made in complaint summons; and bench warrant issued.

[402] Commencement is the first listed appearance date. Police matters usually have their first appearance 21 days after charge or summons where bail is granted. Where the accused is in custody, the Bail Act 1978 requires that their first appearance occurs as soon as practicable.

[403] Local Court of NSW, 2001, *A Guide to Best Practice Standards in Court and Case Management in the Local Court,* p 54.

The *Report on Government Services 2002* also provides information on the Local Court's criminal case performance in 2000-01. The Report treats criminal matters as a homogenous group, however, rather than splitting them into separate classes as the Local Court standards do. On this basis, the Productivity Commission data does not provide enough detail to allow performance versus the new standards to be meaningfully assessed. Table 10.5 summarises the available data for information. Note that, as highlighted in Chapter Four, the Local Court of NSW has the fastest criminal case finalisation times in Australia.

Table 10.5: Performance in 2000-01

Time to Finalisation	Proportion of Matters
Less than Six Months	93.7 per cent
Less than 12 Months	98.6 per cent

Source: SCRCSSP, ibid, p 478.

Case Management in the Local Court

General measures include:

- the appointment of a panel of Acting Magistrates to conduct all Magistrate Inquiries under the Mental Health Act 1990 in the Sydney metropolitan area. This measure has provided the equivalent of eight sittings days each week to be reallocated to general sittings since 2000;
- allocation of additional Magistrates to areas of high demand such as Liverpool, Campbelltown and Penrith; and
- relocation of Commonwealth matters to the Downing Centre. This has allowed the Court to better utilise available judicial resources between Commonwealth prosecutions and the work of the Court at the Downing Centre. The Industrial Magistrate has also been moved to the Downing Centre from a separate single court complex.[404]

A Guide to Best Practice Standards in Court and Case Management in the Local Court provides general guidelines regarding adjournments. The only type of adjournment to be granted "as a matter of course" on a list day is one sought by an unrepresented defendant on their first appearance.[405] In any other case, the Guide advises:

> **Never** simply adjourn a matter routinely, or because a practitioner asks for it, or to get it out of your list for the day. Otherwise, the Court is not acting judicially and it is simply turning over paper.[406]

---

[404] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry,* p 17.

[405] Local Court of NSW, 2001, *A Guide to Best Practice Standards in Court and Case Management in the Local Court,* p 15.

[406] ibid, p 16. Bold font as per original.

If a party wishes to vacate a hearing date they must show "good and sufficient cause" and must apply to do so at least 21 days before the allocated date.[407]

Civil

In 1999 the Court created a specialist panel of Magistrates to determine civil cases in the Sydney CBD. This initiative concentrated civil cases into identified weeks, with Magistrates sitting in adjoining court rooms dealing with a large number of cases. This maximised the utilisation of both the Magistrates and the courtrooms as a case listed for one Magistrate could be transferred to the list of another if it was at risk of not being reached.

The Court has also issued a number of practice directions to improve the management of cases dealt in both the Small Claims and the General Division.

The procedures of the Small Claims Division are designed to meet the needs of unrepresented litigants. Practice Note No 3 of 2000 provides:

- each matter is subject to a pre-trial review where the Magistrate, Registrar or Assessor will direct the parties to exchange written statements of the intended evidence of each witness and supporting documentation. The review also determines whether nominated witnesses should attend the hearing to be examined. This decision depends on the amount involved, issues of credibility and whether there is significant conflict in the evidence;

- if the pre-trial review determines witnesses should not attend the hearing, the action will be decided on the basis of written witness statements and supporting documentation. Parties are, however, entitled to make comments, present arguments and make final submissions on the evidence; and

- the option of a "formal hearing"[408] is no longer available in the Small Claims Division and is described as being "repugnant" to the Division's objective of "fast, cheap, informal but final" dispute resolution. Matters may, however, be transferred to the General Division if the Court determines their complexity or importance warrants a formal hearing.[409]

Parties in the General Division have been subject to the requirements of Practice Note 2 of 2001 since 1 January 2002. The Practice Note introduces calendar-driven case management similar to that used in the District Court.

---

[407] Local Court of NSW, 2001, *Practice Note No 1 of 2001 – Vacating Hearing Dates and Applications for Adjournment.*

[408] This is defined as "the normal adversarial hearing, evidence being taken on oath, cross examination and addresses".

[409] Local Court of NSW, 2001, *Practice Note No 3 of 2001 – Procedure for Hearing of Actions in the Small Claims Division of the Local Court.*

Table 10.6: Civil Case Management in the General Division

Event	Timing	Objective
Call Over	6 weeks after commencement	The Registrar or Magistrate may refer the matter to arbitration. If it is to proceed to a hearing, they may make any orders necessary to achieve the "just, efficient, effective and timely management" of the proceedings. The review date is also set.
Review	4 months after commencement	The review is conducted by a Magistrate. Its purpose is to determine whether the matter is ready for hearing. Where the Court's directions have not been complied with the matter may be struck out or may be the subject of specific, detailed directions. If a review is adjourned, costs may be awarded against the defaulting party.
Hearing	Within 6 months of commencement	

Source: Local Court of NSW, *Practice Note No 2 of 2001: Case Management of Civil Actions.*

Finding

The introduction of overarching civil case management procedures in the Local Court is welcomed by the Inquiry. In view of the experience of the District Court in achieving full practitioner acceptance, however, a more aggressive approach may be required.

Recommendation

26. Where appropriate the Local Court should impose available sanctions on litigants and/or practitioners.

Criminal

Practice Note No 2 of 2000[410] was introduced to ensure defendants receive comprehensive legal advice before the Court sets the matter down for hearing and to avoid, wherever possible, the loss of Court time through late pleas of guilty. The Court is beginning to see benefits from requiring defendants and their representatives to focus on issues at a much earlier stage of proceedings.[411]

Further guidelines have been provided to Magistrates pursuant to the new criminal time standards:

- where possible, persons in custody should be given priority in finalising their cases;

[410] Also refer page 13 of this Report.

[411] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry,* p 18.

- while an adjournment will usually be granted to allow a defendant to obtain legal advice, this is not a reason for constant adjournments. Change of counsel or the last minute unavailability of counsel is not of itself a reason to adjourn;

- wherever possible, matters should be heard to finality; and

- where the delay in finalising a matter has exceeded twice the time standard, it is to be the subject of specific case management by the Magistrate in a country circuit or by a designated Magistrate in a court complex. [412]

In December 2001, the NSW Parliament repealed the Justices Act 1902 which had previously prescribed the procedures to be followed for criminal cases in the Local Court. The Act has been replaced by:

Justices Legislation Repeal and Amendment Act 2001

This Act sets out the structure of the Local Court and defines the duties of Magistrates and Registrars. It also provides simplified processes for commencing non-criminal applications and clarifies the law relating to representation, evidence, costs, rules, enforcement, contempt of court and judicial immunity.[413]

Criminal Procedure Amendment (Justices and Local Courts) Act 2001

This Act provides simplified processes for commencing, serving and hearing summary criminal matters. The Act amends the Criminal Procedure Act 1986 which means all provisions relating to criminal cases across NSW jurisdictions are now in one piece of legislation. It also includes the provisions of the Supreme Court (Summary Jurisdiction) Act 1967 to ensure summary offences are dealt with consistently.[414]

Crimes (Local Courts Appeal and Review) Act 2001

This Act consolidates and simplifies the appeal provisions of the Justices Act.[415]

These legislative reforms have been developed through extensive consultation with justice system stakeholders[416] and are expected to improve the efficiency and effectiveness of criminal case processing in the Local Court.

---

[412] Local Court of NSW, 2001, *A Guide to Best Practice Standards in Court and Case Management in the Local Court,* p 53-6.

[413] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry,* p 42.

[414] ibid, p 43.

[415] loc cit.

[416] Refer the Second Reading Speech of the Attorney General on 4 December 2001 for a detailed description of the reform process.

Alternative Dispute Resolution

During 2000-01, almost two thirds of new matters in the General Division of the Local Court were referred to arbitration. Only 18 per cent of these matters lodged applications for re-hearing.[417] Arbitration is a very effective option in the Local Court, although it is not available in the Small Claims Division.

Mediation is used in the Small Claims Division and is also available to parties to Apprehended Personal Violence Orders where there is no allegation of physical violence. Mediation services are provided by Community Justice Centres (CJCs) – 45 per cent of the workload of CJCs arises from primary referrals from the Local Court.[418] The CJCs have a mediation success rate of 80 per cent.[419]

Finding

Mediation and arbitration work extremely well in the Local Court. Usage in the General Division is particularly high.

Recommendation

27. Given the build up of pending matters in the Small Claims Division, mediation should be further encouraged.

Acting Magistrates

The Local Court also uses Acting Magistrates. Only one Acting Magistrate is a practitioner.[420]

Other Issues

Indigenous Defendants

The Coalition of Aboriginal Legal Services of NSW (COALS) made a submission regarding the particular difficulties faced by indigenous defendants.

BOCSAR statistics for 2001 on the status of persons convicted in the Local Court show 3.8 per cent of offenders in metropolitan areas were of Aboriginal or Torres

---

[417] Anderson, Anita, Director, Local Court of NSW, Transcript of hearing, 7 December 2001, p 39-40.

[418] Olischlager, Peter, Policy Officer, Local Court of NSW, Transcript of hearing, 7 December 2001, p 36.

[419] Anderson, Anita, Director, Local Court of NSW, Transcript of hearing, 7 December 2001, p 36.

[420] Feneley, John, *Attorney General's Department Response to Supplementary Questions,* p 14. The use of practitioners as Acting Judges and Magistrates has been criticised in the past due to the potential for conflicts of interest.

Strait Island (ATSI) origin compared to 15.3 per cent in country NSW.[421] Beyond these aggregates, data is limited and it is difficult to determine whether areas with relatively high ATSI populations and, therefore, relatively large numbers of ATSI defendants, experience longer Court delays.

COALS' clients often first seek legal representation on the day of their court appearance which makes it very difficult for their solicitor to act effectively. Additionally, indigenous defendants are often late for Court[422] which exacerbates this issue. In response, the Coalition suggested the Courts should take a more flexible approach to listing so solicitors have sufficient time to be fully briefed.

With regard to unrepresented defendants, it was previously noted that adjournments will generally be granted to allow a defendant to obtain legal advice.[423] This does not, however, represent an appropriate solution for a defendant who lives a long distance from the Court. Through its recent Best Practice Guide, the Court is also seeking to encourage Magistrates to stand matters down in the list, where appropriate, rather than adjourning them.[424] This practice would give practitioners the opportunity to prepare more fully while ensuring matters proceed on the day they are listed.

The Aboriginal Justice Advisory Council (AJAC) is coordinating the development of an Aboriginal Justice Plan which will seek to address the underlying causes of the over representation of Aboriginal people in the criminal justice system by:

- ensuring a greater degree of interagency cooperation to provide full services to Indigenous communities;
- providing a vehicle for interagency coordination and cooperation between government agencies and Indigenous communities;
- providing support to Indigenous communities to develop their own solutions to local problems; and
- targeting resources more effectively.[425]

AJAC is trialing circle sentencing at Nowra. Circle sentencing broadens the sentencing process to allow the participation of Aboriginal communities and other

---

[421] Feneley, John, *Attorney General's Department Response to Supplementary Questions,* 6 February 2002, p 3. Note that the race status of 19.3 per cent of metropolitan offenders and 18 per cent of country offenders was not known.

[422] "There are significant social and historical reasons why this occurs. In most instances it unfortunately results from an all too familiar sense of the process." Source: Boersig, John, *Coalition of Aboriginal Legal Services of NSW Submission to the Inquiry,* p 2.

[423] Local Court of NSW, 2001, *A Guide to Best Practice Standards in Court and Case Management in the Local Court,* p 53.

[424] When a matter is stood down it is heard later in the day. Local Court of NSW, 2001, *A Guide to Best Practice Standards in Court and Case Management in the Local Court,* p 30.

[425] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry*, p 45.

stakeholders in determining how the needs of the victim, the offender and the community should be met:

- offenders apply to have their matter dealt with by circle sentencing after pleading guilty or having been found guilty by the Local Court. Such applications must be supported by the local Aboriginal community;
- the "circle court" includes the Magistrate, the offender and their counsel, the offender's family and support people, the victim, the victim's family and support people, and community elders;
- the court hears the facts of the case and all members of the circle discuss issues including: the extent of similar crimes in the community, the impact of these crimes on their victims and the community, what needs to be done to heal the victim, what needs to be done to heal the offender, what measures should be included in the sentence plan, who will support the offender to ensure the sentence plan is completed, and how the victim can be supported;
- the resulting "sentence" may include the observation of a curfew, work programs, abstention from alcohol and participation in rehabilitation programs such as anger management. These items are set as bail conditions; and
- the circle will reconvene several months later to discuss the offender's progress. If the offender has complied with their "sentence" the conditions set down by the first hearing may be extended or modified as probation conditions. If the offender has shown no willingness to comply with their sentence the circle may be abandoned and the offender sentenced in a "regular" court.[426]

The project, therefore, seeks to help Aboriginal defendants by developing sentences that address the causes of their offending behaviours. It also helps Aboriginal victims by involving them directly in sentencing and specifically examining their needs as victims of crime.[427] The trial is now being expanded to Dubbo, Walgett and Brewarrina.[428]

The Public Defenders Office negotiated a Service Level Agreement with COALS in September 2001 and recently identified an additional 70 regional sitting weeks per year where Public Defenders could appear for Legal Aid and COALS clients.[429] The experience of Public Defenders who are principally engaged in representing Aboriginal defendants indicates the following specific needs:

---

[426] Aboriginal Justice Advisory Council, 2001, *Circle Sentencing Factsheet,* p 2. Circle sentencing started in Canada in 1992 when a judge of the Supreme Court of the Yukon consulted the local Indian community to assist in the determination of an appropriate sentence. Circle courts have been adopted by a number of traditionally oriented First Nations people in Canada and have also been used in Canadian urban settings and in the United States of America.

[427] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry,* p 45.

[428] Aboriginal Justice Advisory Council, 2002, *Enews,* February.

[429] Craigie, C B, *Public Defenders Response to Supplementary Questions,* p 9. The Public Defenders appear for accused persons in the District and Supreme Courts. In 2000-01, they accepted 142 briefs from Aboriginal Legal Services (Source: Attorney General's Department of NSW, 2001, *Annual Report, 2000-01*, p 60).

- more Aboriginal faces among court staff and around courts in general;[430]
- more judicial training to develop awareness of Aboriginal cultural and social issues, particularly as they vary between urban and regional communities;[431]
- more awareness of such issues and more training directed towards understanding them within the Probation Services and other rehabilitative services and agencies; and
- greater availability of psychiatrists and psychologists with experience in Aboriginal issues. Aboriginal defendants and their families often complain that specialists assisting with court reports lack specialist knowledge of and empathy with Indigenous people. This problem is particularly apparent in rural NSW and discourages recourse to specialist help, even when it is available.[432]

Finding

People of ATSI origin experience particular difficulties in a traditional courtroom setting. While the Inquiry supports the pilot of measures such as circle sentencing, more information is needed to assess the full impact of ATSI cultural and social differences on both individual hearings and the effectiveness and efficiency of the justice system as a whole.

Recommendation

28. The courts should collect and analyse data on ATSI litigants as part of their standard dataset. The extent and effect of current judicial training programs in ATSI cultural and social issues should also be reviewed.

Mental Health

Nearly a third of people appearing before Local Courts for criminal matters have an underlying mental illness.[433]

During 2000, the Local Court, NSW Health and the Corrections Health Service commenced a trial locating mental health professionals at Newcastle, Central and Parramatta Local Courts. These mental health court liaison officers allow

---

[430] The Local Court employs 15 Aboriginal Client Service Specialists at: Bourke, Broken Hill, Dubbo, Walgett, Penrith, Mt Druitt, Campbelltown, Taree, Lismore, Toronto, Moree, Batemans Bay, Nowra, Wagga Wagga and Condobolin. The positions at Condobolin, Nowra and Walgett are currently subject to recruitment action. In addition, a co-ordinator has been appointed to manage the Aboriginal Client Service Specialist program. Source: Feneley, John, *Attorney General's Department of NSW Further Responses to Supplementary Questions.*

[431] For example, Aboriginal society values the use of silence in conversation. This can lead to misunderstandings when assessing the reliability of Aboriginal witnesses as silence can be incorrectly interpreted as guilt, ignorance or evidence of a communication breakdown. Further, Aboriginal people tend to avoid sustained eye contact which may be misinterpreted as defiance or dishonesty. Source: NSW Law Reform Commission, 2000, *Sentencing: Aboriginal Offenders,* 7.5.

[432] Craigie, C B, *Public Defenders Response to Supplementary Questions,* p 10-11.

[433] Jacobsen, Geesche, 2001, op cit.

defendants who may be mentally ill to be identified quickly and professionally assessed. The service has now been expanded to Wollongong, Penrith, Burwood, Sutherland, Liverpool and Lismore.[434]

The skills of the liaison officers are of great assistance to Magistrates who can, under section 33 of the Mental Health (Criminal Procedure) Act 1990, order that a defendant be taken to hospital for psychiatric assessment. If the defendant is found to be mentally ill the Magistrate may discharge them, with or without conditions, into the care of a responsible person. If the defendant is not brought back before the Court to answer the original charge within six months, the charge is taken to have been dismissed.

The Act is currently being reviewed by an interdepartmental committee chaired by the Attorney General's Department and including the Local Court, NSW Health, Corrective Services and other relevant agencies. The committee will make recommendations regarding the need for legislative change in this area.

Regional and Rural Access

A number of witnesses expressed concern regarding court closures in rural and regional NSW. Most regional NSW courthouses, however, were built before 1925:

- they were built, therefore, to match the demographics of NSW more than 75 years ago;
- many of them are in poor condition; and
- very few satisfy the functional requirements of modern technology and the expectations of the community. [435]

These characteristics have led to the closure of some Local Courts. One example discussed with the Committee was the Manilla Local Court which ceased operation on 13 March 2001. The Court sat one day each month and operated as a Registry for two days a week. When the Court was in session, the Magistrate, court staff, parties for both the prosecution and the defence and all members of the public seeking registry services were required to use one room. There were no interview rooms for lawyers or other agencies to speak privately to their clients and there was one toilet. The cost of the extensive modifications needed to meet security, Occupational Health and Safety and Fire Safety Standards could not be justified by the caseload of the town[436] and, on this basis, the Court was closed. All matters are now heard at Tamworth (35 kilometres from Manilla).[437]

---

[434] Feneley, John, *Attorney General's Department Response to Supplementary Questions,* 6 February 2002, Attachment Five.

[435] Attorney General's Department, 2000, *Capital Investment Strategic Plan,* p 24.

[436] New matters totalled 131 in calendar 2000. Source: Local Court of NSW, 2001, *Annual Review 2000,* p 41.

[437] Anderson, Anita, "Local Court Response to Supplementary Questions", p 2, *Attorney General's Department Response to Supplementary Questions.*

While the loss of services from small individual communities is regrettable, the Committee believes the improvement of court performance for rural and regional NSW as a whole is the critical issue to be addressed. Table 10.7 provides average waiting times for each region in NSW in 2000-01. This information should be reviewed with care as averages are skewed by outliers and this problem will be exacerbated in regions with low case numbers.

Despite this caveat, it is not acceptable that the waiting time in some regions in rural NSW is 50 per cent higher than the waiting time in Sydney.

There is no easy solution to this problem. Resources, and therefore the physical presence of magistrates and "bricks and mortar" courthouses, are limited and must be channelled into the areas of greatest demand. Within this environment, case management will increase the effectiveness of existing regional resources but technology will be the key element in increasing access to the court system. As discussed in Chapter Seven, teleconferencing, videoconferencing, eLodgment and eCallover all provide court clients with access to remote judicial resources – something that is essential when the clients are remotely located.

Table 10.7: Average Waiting Times for 2000-01 for All Cases

Region	Average Waiting Time (weeks)
Sydney	12
North	10
Far North	15
Central West	13
South East	18
South West	18
Far West	16

Source: Anderson, Anita, "Local Court Response to Supplementary Questions", p 6, *Attorney General's Department Response to Supplementary Questions.* Note that these are average times and are not strictly comparable to the median times in Table 10.8.

Finding

The Committee accepts that changing patterns in case demand mean that physical court resources will, from time to time, need to be reorganised. Within this context, however, the court system must still seek to provide "just, quick and cheap" justice in rural and regional NSW.

Recommendation

29. The Local, District and Supreme Courts should explore, as a matter of priority, ways in which technology can be used to provide cost effective justice to court users in rural and regional NSW.

Trends in Waiting Times in the Local Court

Waiting times in the Local Court are currently reported without distinction between civil and criminal matters.

Table 10.8: Waiting Times in the Local Court

	2000-01	1999-2000	1998-9	1997-8	1996-7	1995-6
Median (weeks)	14	14	13	13	13	11

Source: Attorney General's Department, 2001, *Annual Report 2000-01,* p 168.

Median waiting times have, therefore, increased by some three weeks (or 27.3 per cent) since 1995-96. As previously discussed, this increase has occurred in the context of:

- a 21.5 per cent increase in criminal case registrations; and
- declining civil case registrations from 1995-96 to 1999-2000 followed by a 23 per cent increase in 2000-01.

The reasons underlying trends in waiting times will be easier to assess in the future with the Court collecting performance information in terms of its specific civil and criminal time standards from 1 January 2002.

Model Key Performance Indicators

The clearance ratio is reported on the total caseload and the Court is determining how data for the other indicators can be extracted from its existing computer systems.[438]

[438] Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry,* p 7. The indicators are discussed on page nine of this Report.

Findings

Although waiting times in the Local Court compare very favourably to the results achieved in similar jurisdictions in other States and Territories, case finalisation times have increased by nearly 30 per cent since 1995-96. This has occurred in an environment of strong criminal case growth although, until 2000-01, civil caseload was in decline. Given this environment, it is essential the Court seeks to understand and manage its caseload strategically and proactively.

A Guide to Best Practice Standards in Court and Case Management in the Local Court was released last year and provides the Court's first statewide time standards plus general court and case management guidelines. These guidelines were developed by the Chief Magistrate in consultation with Magistrates across the State and are presented in the *Guide* as a reference for both the magistracy and court administrators. The *Guide,* therefore, represents a significant step toward the implementation of consistent case management practices across the Local Court.[439]

Implementation of the *Guide* will also improve the quality of management information available to Magistrates and administrators as separate statistics will now be collected on civil and criminal matters. This task and the collection of data to determine the Court's Key Performance Indicators will, however, be relatively difficult using existing information systems.

As for the Supreme Court, therefore, the Local Court has assembled most of the elements necessary to improve the efficiency and effectiveness of case processing. The major outstanding issue is, once again, the availability of management information. The timely implementation of an appropriately tailored CAS in the Local Court is of critical importance.

[439] Prior to 2002, case management in the Local Court was achieved by a combination of courtwide Practice Notes addressing particular issues and practice directions issued by individual Magistrates governing procedures in their individual courts.

Bibliography

Aboriginal Justice Advisory Council, 2001, *Circle Sentencing Factsheet.*

Aboriginal Justice Advisory Council, 2002, *Enews,* February.

"Arbitration to Trim Court Lists", 2001, *The Daily Telegraph,* 17 March, p 9.

Attorney General's Department of NSW, 2001, *Annual Report 2000-2001.*

Attorney General's Department of NSW, 2000, *Annual Report 1999-2000.*

Attorney General's Department of NSW, 1999, *Annual Report 1998-99.*

Attorney General's Department of NSW, 1998, *Annual Report 1997-98.*

Attorney General's Department of NSW, 1997, *Annual Report 1996-97.*

Attorney General's Department of NSW, 1996, *Annual Report 1995-96.*

Attorney General's Department of NSW, 2001, *Business Case for Phase 2 of the Courts Administration System.*

Attorney General's Department, 2000, *Capital Investment Strategic Plan.*

Attorney General's Department of NSW Reporting Services Branch, 2001, *"Draft Strategic Blueprint for the Provision of Reporting Services.*

Audit Office of NSW, 2001, *Follow Up of Performance Audits: The School Accountability and Improvement Model; The Management of Court Waiting Times.*

Audit Office of NSW, 1999, *Performance Audit Report: Management of Court Waiting Times.*

Audit Office of NSW, 1995, *Performance Audit Report: Department of Courts Administration – Management of the Courts (A Preliminary Report).*

Australian Law Reform Commission, 1996, *Judicial and Case Management.*

Balter, Bruce M and Simone, Michael J, 1998, "Sanctions for Frivolous Conduct during Civil Litigation", *New York State Bar Journal,* Sept/Oct, Vol 70, No 6 (www.nysba.org).

Bureau of Justice Assistance, 1997, *Trial Court Performance Standards with Commentary – Monograph,* USA.

Bureau of Justice Assistance, 1997, *Trial Court Performance Standards and Measurement System – Program Brief,* USA.

Cachia v Hanes (1994) 179 CLR 403.

Chief Administrative Judge of the Court, 1998, *Report of The Chief Administrative Judge of the Courts For the Calendar Year January 1, 1997 - December 31, 1997,* New York.

Chief Justice of New Zealand, 2001, *Annual Report of the New Zealand Judiciary 1999.*

County Court of Victoria, 2000, *Annual Report – 1 July 1999 to 30 June 2000,* Melbourne.

Chulov, Martin, 2002, "Shake-up puts all police on the beat" *The Australian,* 13 February.

Cockburn & Ors v GIO Finance Limited [2001] NSWCA 155.

Coopers & Lybrand, WD Scott, 1989, *Report on a Review of the New South Wales Court System.*

Cossey, Bill, 1999, "The Use of Modern Technology in Making Court and Operational Procedures More Effective", *Justice Delivery: Meeting New Challenges - 17th Australian Institute of Judicial Administration Conference,* August.

Council on the Cost of Government, 1998, *Review of the Office of the Director of Public Prosecutions.*

County Court of Victoria, 2000, *Annual Report 1999-2000.*

Courts Administration Authority, 2001, *Annual Report 2000-2001,* South Australia.

Court Service (An Executive Agency of the Lord Chancellor's Department), 2001, *The Court Service Annual Report and Accounts 2000-2001: For the period April 2000 to March 2001,* London.

Crawford, Christopher, 2001, "Court Technology Projects: What Goes Wrong and Lessons Learned", *Justice Served Newsletter,* 17 August (www.justiceserved.com).

Deed of Agreement between the Commissioner of Police and the Western Sydney Area Health Service to Deliver DNA Analysis Service and the Establishment of a DNA Profile Database.

de Jersey, Paul, 2001, *The Judiciary: The People's Indispensable though Non-Elected Government,* Dr David Williams Lecture at the University of Queensland.

Denham, S, 2000, "The Diamond in a Democracy: An Independent, Accountable Judiciary", *18th Australian Institute of Judicial Administration Conference.*

District Court of NSW, 1999, *Annual Review 1998.*

District Court of NSW, 2000, *Annual Review 1999.*

District Court of NSW, 2001, *Annual Review 2000.*

District Court of NSW, 2001, *Country Circuits – Civil Directions,* August 2.

District Court of NSW, 2001, *Practice Notes No 33* and *No 59.*

District Court of NSW, 1995, *Strategic Plan.*

District Court of NSW, 2001, *Strategic Plan.*

District Court of NSW Civil Business Committee, 2001, *Business Plan.*

District Court of NSW Criminal Business Committee, 2001, *Business Plan.*

District Court of NSW Resources Committee, 2001, *Business Plan.*

Doak, Peter, 2001, "Recent Trends in Criminal Court Delay", *Crime and Justice Statistics Bureau Brief,* NSW Bureau of Crime Statistics and Research, September.

Du Pont de Nemours & Co v Commissioner of Patents (1987) 16 FCR 423.

Einstein, Justice Clifford, 2001, *Technology in the Courtroom – 2001 – Friend or Foe?,* Address delivered 15 August.

Eyland, Ann, Nheu, Natalina, and Wright, Ted, 2001, *Legal Aid for Committals: An Evaluation of the Impact of the Centralised Committals Scheme,* Law and Justice Foundation of New South Wales.

Forde, Michael, "What Model of Court Governance Would Optimise the Expeditious Delivery of Justice, Judicial Independence and the Accountability of Queensland's Court System", 2001, *Governance and Justice Conference*, 10 July. Griffith University.

Gamble, Helen and Mohr, Richard, 1998, "Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal: A Research Note", *16th Australian Institute of Judicial Administration Annual Conference*, September.

Glanfield, Laurie, 2000, "Governing the Courts – Issues of Governance Beyond Structure", *18th Australian Institute of Judicial Administration Conference,* July.

Glanfield, Laurie, 2000, "Transformation and Technology in the NSW Attorney General's Department", *Information Technology and Telecommunications Industry Seminar,* June.

Glanfield, L and Wright, E, 2000, *Model Key Performance Indicators for NSW Courts,* Justice Research Centre, Sydney.

Jacobsen, Geesche, 2001, "Courts and jails clogged with the mentally ill", *The*

Sydney Morning Herald, 4 June, p 8.

Judicial Council of California, 2001, *2001 Annual Report,* Administrative Office of the Courts, San Francisco.

Legal Aid Commission of NSW, 2001, *Annual Report 2000-01.*

Local Court of NSW, 2001, *A Guide to Best Practice Standards in Court and Case Management in the Local Court.*

Local Court of NSW, 2000, *Annual Review 1999.*

Local Court of NSW, 2001, *Annual Review 2000.*

Local Court of NSW, 2000, *Practice Note No 2 of 2000 – Service of Briefs of Evidence in Prescribed Summary Offences; Practice Note No 1 of 2001 – Vacating Hearing Dates and Applications for Adjournment; Practice Note No 2 of 2001: Case Management of Civil Actions; Practice Note No 3 of 2001 – Procedure for Hearing of Actions in the Small Claims Division of the Local Court.*

Local Court of NSW, 1998, *Extended Hours Service Pilot – Evaluation Report.*

McMahon, Robert, 1994, *Courts Administration Models in Victoria and South Australia: Lessons for NSW,* NSW Premier's Department.

Magistrates' Court of Victoria, 1997, *Annual Report 1996-97.*

Marshall, Kate, 2001, "Traditional summer holiday in the dock", *The Australian Financial Review,* 14 December, p 53.

Merritt, Chris, 2002, "Judge attacks court comparisons", *The Australian Financial Review,* 1 February, p 56.

Ministry of Justice, 2001, *2000-01 Annual Report,* Western Australia.

Morris, Rachel, 2001, "How Ally is Choking our Court System", *The Daily Telegraph,* 25 May, p 2.

Moynihan, Martin, 1999, "Uniform Civil Procedure Rules", *The Queensland Lawyer,* Vol 20, No 3, December, pp 75-6.

National Audit Office, 1999, *Criminal Justice: Working Together,* The Stationery Office, London.

NSW Bureau of Crime Statistics and Research, 2001, *New South Wales Criminal Courts Statistics 2000* .

NSW Law Reform Commission, 2000, *Sentencing: Aboriginal Offenders,* Report 96.

NSW Parliament Legislative Council Select Committee on the Increase in Prisoner

Population, 2001, *Final Report.*

NSW Police, *Press Release: More Police for Local Areas – Restructure Stage Two*, 12 February 2002.

NSW Premier's Department, 1997, *Prosecuting Summary Offences: Options and Implications.*

Office of Court Administration and the Texas Judicial Council, 2001, *Texas Judicial System Annual Report Fiscal Year 2001.*

Office of the Auditor General, 1996, *Order in the Court: Management of the Magistrates' Court,* Perth.

Office of the Director of Public Prosecutions, NSW Police, Legal Aid Commission of NSW, Attorney General's Department of NSW, 2001, *e-Briefs Project Business Case.*

Office of the Director of Public Prosecutions, 1987, *Prosecution Guidelines.*

Office of the Director of Public Prosecutions, 1987, *Prosecution Policy.*

O'Ryan, Stephen, and Lansdell, Tony, 2000, "Benchmarking and Productivity for the Judiciary", *Journal of Judicial Administration,* August, Volume 10, Number 1, pp 25-51.

Ostrom, Brian J and Hanson, Roger A, 2000, "Efficiency, Timeliness and Quality: A New Perspective from Nine State Criminal Trial Courts", *Research In Brief,* National Institute of Justice, USA.

Ostrom, Brian J, Kauder, Neal B, and LaFountain, Robert C (eds), 2001, *Examining the Work of State Courts, 1999-2000: A National Perspective from the Court Statistics Project,* USA.

Parliament of the Commonwealth of Australia, Joint Select Committee on Certain Family Law Issues, 1995, *Funding and Administration of the Family Court of Australia,* AGPS, Canberra.

Parliament of Victoria Law Reform Committee, 1999, *Technology and the Law.*

Public Defenders, 2001, *Annual Review 2000-2001,* Sydney, NSW.

R v Thomson; R v Houlton [2000] NSWCCA 309.

Raine, John W, 2000, "Modernising Courts or Courting Modernisation", *International Journal of Public Sector Management*, Vol 13, No 5, pp 390-416.

Robertson, Robin, 2001, "Backlog no bar to a six-week holiday", *The Australian Financial Review,* 7 December, p 50.

Royal Commission into the NSW Police Service, 1997, *Final Report.*

Sallmann, Peter, 1998, "Courts' Governance: Whither Queensland?", *Journal of Judicial Administration,* Volume 8, Number 1, August , pp 23-35.

Sallmann, Peter, 1994, "Where are we heading with Court Governance", *Journal of Judicial Administration,* Volume 4, No 1, August, pp 5-17.

Seifman, Robert D, 1996, "Night Court – Dispensing Justice After Dark or Time to Turn Off the Lights?", *Journal of Judicial Administration,* Volume 5, Number 4, May, pp 221-235.

South Australian Auditor-General, "Courts Administration Authority", *1998-99 Annual Report of the Auditor-General.*

South Australian Auditor-General, "Courts Administration Authority", *1999-2000 Annual Report of the Auditor-General.*

Spencer, David, 2000, "Court given power to order ADR in Civil Actions", *Law Society Journal,* 38 (9) LSJ 71.

Spigelman, JJ, 2001, "Mediation and the Court", *Law Society Journal,* March, 39 (2) LSJ 63.

Spigelman, JJ, 2001, *Quality in an Age of Measurement: The Limitations of Performance Indicators,* Address to the Benevolent Society, Sydney.

Spigelman, JJ, 2001, "The New Public Management and the Courts", *Family Court of Australia 25th Anniversary Conference,* Sydney.

Spigelman, JJ, 2002, *Opening of the Law Term Dinner,* Address to the Law Society of NSW, 29 January, Sydney.

Steering Committee for the Review of Commonwealth/State Service Provision, 2002, *Report on Government Services 2002*, AusInfo, Canberra.

Supreme Court of NSW, 1997, *Annual Review 1996.*

Supreme Court of NSW, 1998, *Annual Review 1997.*

Supreme Court of NSW, 1999, *Annual Review 1998.*

Supreme Court of NSW, 2000, *Annual Review 1999.*

Supreme Court of NSW, 2001, *Annual Review 2000.*

Supreme Court of NSW, 2000, *Practice Note 108: Cost Orders Against Practitioners,* January.

Supreme Court of NSW, 2001: *Practice Note 118: Mediation; Practice Note 120: Common Law Division - Differential Case Management; Practice Note 122:*

Amendment to Practice Note 98 pursuant to s52 of the Criminal Procedure Act 1986.

Travis, Alan 2001, "GBP5m Night Court Test Projects Shelved" *Guardian Unlimited* (www.societyGuardian.co.uk), 3 November.

US Conference of State Court Administrators, 2000, *Position Paper on Self-Represented Litigation.*

US District Court, 2001, *Judicial Caseload Profile 2000.*

Weatherburn, Don, and Baker, Joanne, 2000, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court,* NSW Bureau of Crime Statistics and Research.

Weatherburn, Don, 1993, "Strategic Issues in Criminal Justice System Management", *Criminal Justice Planning and Coordination Conference Papers*, Australian Institute of Criminology, April.

World Bank, 1999, "Reducing Court Delays: Five Lessons from the United States", *PREM Notes Public Sector,* December, Number 34.

Appendix One

Advertisement Calling for Submissions

LEGISLATIVE ASSEMBLY

Public Accounts Committee

Inquiry into Court Waiting Times

Pursuant to reports released by the Audit Office of NSW in 1999 and 2001, the Public Accounts Committee is to inquire into and report on court waiting times in New South Wales.

Individuals and organisations are invited to make submissions (in writing, typed or on disc) to assist the inquiry. Submissions should be addressed to:

The Committee Manager
Public Accounts Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Alternatively, they can be sent by fax to (02) 9230 2831 or emailed to **pac@parliament.nsw.gov.au**

Closing date for submissions is Friday 9 November 2001.

For further information and copies of the full terms of reference, either contact the Committee Manager, David Monk or the Advisor, Belinda Archer on (02) 9230 2631 or refer to the Committee's homepage at the website of the Parliament of New South Wales (**www.parliament.nsw.gov.au**)

Joseph Tripodi MP
Chairman

Appendix Two

Submissions to the Inquiry

Attorney General's Department of New South Wales

Coalition of Aboriginal Legal Services

Mr Ian Hughes

Institute of Clinical Pathology and Medical Research

Law and Justice Foundation of New South Wales

Law Society of New South Wales

Legal Aid Commission of New South Wales

New South Wales Bar Association

New South Wales Police

Mr Brian Noad

Office of the Director of Public Prosecutions

Office of the Public Defender

Mr and Mrs R Wood

Dr Mansoor Zaidi

The Committee received correspondence related to the Inquiry from:

Australian Institute of Judicial Administration

District Court of NSW

Local Court of NSW

Minister for Corrective Services

Supreme Court of NSW

Treasurer of NSW

Appendix Three

Witnesses Before the Committee

Thursday 6 December 2001

Nicholas Kevin Meagher QC	President Law Society of New South Wales
Peter Lyn Johnstone	Councillor and Chairman, Litigation Law and Practice Committee Law Society of New South Wales
Nicholas Richard Cowdery QC	Director of Public Prosecutions for NSW
Craig Kieron Smith SC	Deputy Solicitor for Public Prosecutions
William (Bill) Grant	Chief Executive Officer Legal Aid Commission of NSW
Douglas John Humphreys	Director, Criminal Law Branch Legal Aid Commission of NSW
Dr Ross Frank William Vining	Deputy Director Institute of Clinical Pathology and Medical Research, Westmead Hospital and
Dr John Charles West	Deputy Director Drug Laboratory Division of Analytical Laboratories
Robert John Goetz	Forensic Biologist Forensic Biology Laboratory Division of Analytical Laboratories
Paul Augustus Donkin	Principal Analyst Drug Laboratory Division of Analytical Laboratories
Michael North Holmes	General Manager, Court and Legal Services and Service Solicitor for NSW Police
Christopher Bruce Craigie SC	Acting Deputy Senior Public Defender Office of the Public Defender
Dr Evelyn Ann Eyland	Principal Researcher Law and Justice Foundation of NSW

Friday 7 December 2001

Robert John Sendt	NSW Auditor-General
Thomas Bela Jambrich	Assistant Auditor-General Audit Office of NSW
Christopher John Giumelli	Senior Audit Manager Audit Office of NSW
Ian Gordon Harrison SC	Senior Vice President NSW Bar Association
Anita Lesley Anderson	Director, Local Court of NSW
Stephen Peter Olischlager	Policy Officer, Director's Office Local Court of NSW
Nerida Johnston	Chief Executive Officer and Principal Registrar Supreme Court of NSW
Jeannie Highet	Policy and Research Officer Supreme Court of NSW
John Gerard Feneley	Acting Deputy Director General Attorney General's Department of NSW
Robert Peter Fornito	Manager, Case Management and Listing District Court of NSW
Gregory Keith Curry	Director Executive and Strategic Services Attorney General's Department of NSW

Appendix Four

US Bureau of Justice Assistance – Trial Court Performance Standards and Measurement

Summary of Measures Associated with the Trial Court Performance Standards			
1. Access to Justice			
Measure	**Primary Data Collection Method**	**Primary Evaluators**	**Subject/Source of Data**
Standard 1.1 Public Proceedings			
1.1.1 Access to Open Hearings	Observation/simulation	Volunteer observers	Record of access for selected court proceedings.
1.1.2 Tracking Court Proceedings	Observation/simulation	Volunteer observers	Selected court proceedings.
1.1.3 Audibility of Participants During Open Court Proceedings	Observation/simulation	Volunteer observers	Selected court proceedings.
Standard 1.2 Safety, Accessibility and Convenience			
1.2.1 Courthouse Security Audit	Observation/simulation	Security consultant	Security checklist of courthouse facilities.
1.2.2 Law Enforcement Officer Test of Courthouse Security	Observation/simulation	Law enforcement officials	Security tests of courthouse facilities.
1.2.3 Perceptions of Courthouse Security	Survey	Skilled survey methodologist	Perceptions of regular users of the court.
1.2.4 Court Employees' Knowledge of Emergency Procedures	Interviews	Skilled interviewers	Court employee interviews.
1.2.5 Access to Information by Telephone	Observation/simulation	Volunteer observers	Phone calls to court about specific cases.

Summary of Measures Associated with the Trial Court Performance Standards			
Measure	**Primary Data Collection Method**	**Primary Evaluators**	**Subject/Source of Data**
Standard 1.2 Safety, Accessibility and Convenience (continued)			
1.2.6 Evaluation of Accessibility and Convenience by Court Users	Survey	Skilled survey methodologist	Perceptions of regular users of the court.
1.2.7 Evaluation of Accessibility and Convenience by Observers	Survey	Skilled survey methodologist	Perceptions of volunteer observers.
Standard 1.3 Effective Participation			
1.3.1 Effective Legal Representation of Children in Child Abuse and Neglect Proceedings	Record review and survey.	Court staff	Case file documents; information from judges, guardians ad litem, and caseworkers
1.3.2 Evaluation of Interpreted Events by Experts	Observation/simulation	Court interpretation consultants	Court proceedings involving interpreters
1.3.3 Test of Basic Knowledge Required of Interpreters	Written test	Court staff knowledgeable about interpretation issues	Skills of court interpreters
1.3.4 Assessing Non English Language Proficiency Through Back Interpretation	Oral test	Court staff or consultant with highly developed English language skills	Skills of court interpreters
1.3.5 Participation by Persons with Disabilities	Observation/simulation	Volunteer observers	Court facilities and services
Standard 1.4 Courtesy, Responsiveness and Respect			
1.4.1 Court Users' Assessment of Court Personnel's Courtesy and Responsiveness	Survey	Skilled survey methodologist	Perceptions of regular users of the court

Summary of Measures Associated with the Trial Court Performance Standards			
Measure	**Primary Data Collection Method**	**Primary Evaluators**	**Subject/Source of Data**
Standard 1.4 Courtesy, Responsiveness and Respect (continued)			
1.4.2 Observers' Assessment of Court Personnel's Courtesy and Responsiveness	Survey	Skilled survey methodologist and volunteer observers	Perceptions of court personnel
1.4.3 Treatment of Litigants in Court	Observation/simulation	Volunteer observers	Selected court proceedings
Standard 1.5 Affordable Costs of Access			
1.5.1 Inventory of Assistance Alternatives for the Financially Disadvantaged	Record, review, observation/simulation and interviews.	Data collection team	Administrative documents, court facilities and interviews with court staff
1.5.2 Access to Affordable Civil Legal Assistance	Observation/simulation	Volunteer observers	Court operations and services
1.5.3 Barriers to Accessing Needed Court Services	Survey	Survey research organisation	Perceptions of the general public
2. Expedition and Timeliness			
Standard 2.1 Case Processing			
2.1.1 Time to Disposition	Record Review	Court staff and statistical analyst	Case file documents
2.1.2 Ratio of Case Dispositions to Case Filings	Record Review	Court staff and statistical analyst	Case management records
2.1.3 Age of Pending Caseload	Record Review	Court staff and statistical analyst	Case file documents
2.1.4 Certainty of Trial Dates	Record Review	Court staff and statistical analyst	Case file documents

Summary of Measures Associated with the Trial Court Performance Standards			
Measure	**Primary Data Collection Method**	**Primary Evaluators**	**Subject/Source of Data**
Standard 2.2 Compliance with Schedules			
2.2.1 Prompt Payment of Monies	Record Review	Court staff	Court financial records
2.2.2 Provision of Services	Record Review	Court staff	Case file documents
2.2.3 Provision of Information	Observation/simulation	Volunteer observers	Court operations and services
2.2.4 Compliance with Reporting Schedules	Record Review	Court staff	Administrative documents
Standard 2.3 Prompt Implementation of Law and Procedure			
2.3.1 Implementation of Changes in Substantive and Procedural Laws	Record review	Court staff	Administrative documents
2.3.2 Implementation of Changes in Administrative Procedures	Record review	Court staff	Administrative documents
3. Equality, Fairness and Integrity			
Standard 3.1 Fair and Reliable Judicial Process			
3.1.1 Performance in Selected Areas of Law	Structured group techniques, record review, observation/simulation and interviews	Panels of practitioners in basic areas of law and court staff	Case file documents, court proceedings, and perceptions of judges, court employees and attorneys
3.1.2 Assessment of Court Performance in Applying the Law	Survey	Skilled survey methodologist	Perceptions of court employees and attorneys

Summary of Measures Associated with the Trial Court Performance Standards			
Measure	**Primary Data Collection Method**	**Primary Evaluators**	**Subject/Source of Data**
Standard 3.2 Juries			
3.2.1 Inclusiveness of Jury Source List	Record review	Court staff	Juror source list
3.2.2 Random Jury Selection Procedures	Record review	Court staff	Juror source list
3.2.3 Representativeness of Final Juror Pool	Survey	Expert in demographic studies	Demographics of jurors
Standard 3.3 Court Decisions and Actions			
3.3.1 Evaluation of Equality and Fairness by the Practicing Bar	Survey	Skilled survey methodologist	Perceptions of attorneys
3.3.2 Evaluation of Equality and Fairness by Court Users	Survey	Skilled survey methodologist	Perceptions of regular court users
3.3.3 Equality and Fairness in Sentencing	Record review	Expert statistical consultant	Case file documents
3.3.4 Equality and Fairness in Bail Decisions	Record review	Expert statistical consultant	Case file documents
3.3.5 Integrity of Trial Court Outcomes	Record review	Court staff	Appellate case files
Standard 3.4 Clarity			
3.4.1 Clarity of Judgment and Sentence	Record review	Court staff	Criminal case file documents
3.4.2 Clarity of Civil Judgments	Record review	Court staff	Civil case file documents
3.4.3 Experience in Interpreting Orders and Judgments	Survey	Court staff	Perceptions of judges, attorneys, probation officers and clerks

Summary of Measures Associated with the Trial Court Performance Standards			
Measure	**Primary Data Collection Method**	**Primary Evaluators**	**Subject/Source of Data**
Standard 3.5 Responsibility for Enforcement			
3.5.1 Payment of Fines, Costs, Restitutions and Other Orders by Practitioners	Record review	Court staff	Court probationary orders and bookkeeping records
3.5.2 Child Support Enforcement	Record review	Court staff	Child support orders and bookkeeping records
3.5.3 Civil Judgment Orders	Record review	Court staff	Civil judgment docket
3.5.4 Enforcement of Case Processing Rules and Orders	Record review	Court staff	Case file documents
Standard 3.6 Production and Preservation of Records			
3.6.1 Reliability of File Control System	Record review	Court staff	Case files
3.6.2 Adequate Storage and Preservation of Physical Records	Record review	Court staff	Case file documents
3.6.3 Accuracy, consistency and utility of the case docket system	Record review	Court staff	Case docket system
3.6.4 Case File Integrity	Record review	Court staff	Case files
3.6.5 Reliability of Document Processing	Record review	Court staff	Legal documents
3.6.6 Verbatim Records of Proceedings	Survey	Court staff	Perceptions of attorneys

Summary of Measures Associated with the Trial Court Performance Standards			
Measure	**Primary Data Collection Method**	**Primary Evaluators**	**Subject/Source of Data**
4. Independence and Accountability			
Standard 4.1 Independence and Comity			
4.1.1 Perceptions of the Court's Independence and Comity	Survey	Court research staff and steering committee	Perceptions of regular users of the court
Standard 4.2 Accountability for Public Resources			
4.2.1 Adequacy of Statistical Reporting Categories for Resource Allocation	Structured group techniques	Judges, clerks, court operations personnel and steering committee	Statistical case types classification
4.2.2 Evaluation of Personnel Resource Allocation	Structured group techniques	Judges, court operations personnel and steering committee	Case filings and staffing patterns
4.2.3 Evaluation of the Court's Financial Auditing Practices	Structured group techniques	Financial consultant (optional) and steering committee	Administrative audit reports
Standard 4.3 Personnel Practices and Decisions			
4.3.1 Assessment of Fairness in Working Conditions	Survey	Non court employees to administer survey and steering committee	Perceptions of court employees
4.3.2 Personnel Practices and Employee Morale	Survey	Skilled survey methodologist and steering committee	Perceptions of court employees
4.3.3 Equal Employment Opportunity	Record review	Steering committee and court personnel	Court personnel records

Summary of Measures Associated with the Trial Court Performance Standards			
Measure	**Primary Data Collection Method**	**Primary Evaluators**	**Subject/Source of Data**
Standard 4.4 Public Education			
4.4.1 Court and Media Relations	Record review	Trial court manager and steering committee	Court policies and practices
4.4.2 Assessment of Court's Media Policies and Practices	Interviews	Court staff, skilled interviewers and steering committee	Perceptions of court employees and media representatives
4.4.3 Community Outreach Efforts	Record review and interviews	Public information specialist, court employees and steering committee	Public education documents and court employees' outreach efforts
Standard 4.5 Response to Change			
4.5.1 Response to Past Issues	Structured group techniques and interviews	Group facilitator and steering committee	Opinions of representatives of the justice system or other related organisations
5. Public Trust and Confidence			
Standard 5.1 Accessibility			
5.1.1 Court Employees' Perceptions of Court Performance	Survey	Skilled survey methodologist	Perceptions of court employees
5.1.2 Justice System Representatives' Perceptions of Court Performance	Structured group techniques	Group facilitator	Perceptions of representatives of the other components of the justice system and other related agencies
5.1.3 General Public's Perceptions of Court Performance	Survey	Survey research organisation	Perceptions of the general public
See also measures 1.2.3, 1.2.6, 1.2.7, 1.4.1 and 1.4.2			

Summary of Measures Associated with the Trial Court Performance Standards			
Measure	**Primary Data Collection Method**	**Primary Evaluators**	**Subject/Source of Data**
Standard 5.2 Expeditious, Fair and Reliable Court Functions			
See measures 3.3.1, 3.3.2, 5.1.1, 5.1.2 and 5.1.3.			
Standard 5.3 Judicial Independence and Accountability			
See measures 4.1.1, 4.3.1, 4.3.2, 4.4.2, 5.1.1, 5.1.2 and 5.1.3.			

Source: Bureau of Justice Assistance, 1997, *Trial Court Performance Standards with Commentary – Monograph,* p 41-50, USA.

Appendix Five

Background to the Criminal Justice System

Glossary

Accused

A person who has been charged with an offence but is yet to be found guilty/innocent by a court.

Adjournment

A court order by which proceedings are postponed, interrupted or continued at a different time or place before the same court.

Appellate Court

A court that hears cases on appeal – Court of Appeal, Supreme Court or District Court. The Local Court cannot hear appeals.

Apprehended Domestic Violence Order (ADVO) and Apprehended Personal Violence Order (APVO)

An order issued by the Local Court to prevent a person from harassing, molesting or acting in a violent manner towards:

- a specific member of his or her family (relative, spouse, defacto, any other person in a close personal relationship with accused) – this is an ADVO; OR
- a person outside his or her family (for example, a neighbour or workmate) – this is an APVO.

Arraignment

Procedure by which the accused is formally placed on trial for an indictable offence (District or Supreme Court). The accused is called by name and the indictment is read to them. They are then asked to plead guilty or not guilty and their plea is entered in the case record.

Bail

Bail is an agreement by the defendant to return to the court at a set time and date. If the charge is a serious one then the defendant may need a surety as a condition of release on bail.

Bench Warrant

Warrant for arrest issued by a court.

Breach

A term used to describe the offender's failure to comply with the requirements of an order.

Brief

The set of papers containing all relevant documents on a particular court case. The brief is served by the informant (usually the police in criminal cases) on the accused in the mention system. Also known as a Brief of Evidence.

Circuit Court

Periodic sittings of a court in a regional centre.

Committal Proceeding

A hearing to determine whether there is sufficient evidence to require the person charged with a criminal offence to stand trial or be sentenced in a higher court. The hearing may be determined by the evidence of witnesses and/or written statements. The Local Court conducts committal proceedings to determine whether persons charged with indictable (serious) crimes should be tried in the District or Supreme Courts.

Common Law

Legal principles based on the interpretation of cases and decisions made; also used in a more narrow sense to refer to such principles announced by Courts other than equity Courts.

Counsel

A party's legal representative in court.

Criminal Proceedings

Proceedings usually brought by the Crown (often the Police) where there has been a breach of the law which attracts a statutory penalty. The "law" involved is usually the Criminal code which deals with the common crimes including murder, manslaughter, robbery, stealing and assault (including sexual assault).

Defendant

A person against whom a civil action has been brought or who has been charged with a criminal offence in a lower court.

Duty Solicitor

Solicitor rostered to attend court in order to advise/represent people who are due to appear but do not have legal representation.

Evidence

The oral statements of witnesses in court, documents or objects.

Examination

Interrogation of a person on oath.

Exhibits

Documents, items of clothing, equipment, etc tendered to the court as evidence by either of the parties to a case, and which are admitted as evidence by the judge or magistrate.

File

(noun) The collection of documents which constitute the court record of proceedings;

(verb) To lodge a document at the court registry so that it may be placed on the record.

Hearing

Examination of a case in a court of summary jurisdiction (the Local Court) or the presentation of a dispute before a tribunal.

Indictable Offence

An offence that is sent to trial before a judge and jury of the Supreme or District Court. Some less serious indictable offences can be dealt with "summarily" by a magistrate.

Indictment

Information presented to the Court by the Crown alleging that a specific office or offences were committed at a certain time and place contrary to statute law.

Matter

A proceeding in the court.

Parties

The people directly involved in a case.

Plea

The answer given by one party in legal proceedings in response to the allegations of the other. In criminal cases this will be "guilty" or "not guilty".

Plea Bargaining

The prosecution and defence negotiate the defendant's plea of "guilty" on the understanding that either the original charge will be substitute for a lesser charge or that the defendant will receive a much shorter sentence than they would have if they had pleaded "not guilty". Also known as charge bargaining.

Plea in Mitigation

A defendant pleads guilty and submits to the Court the circumstances of the commission of the offence to enable the Court to consider reducing the penalty that it will impose.

Police Prosecutor

Legal representative for police informant who is responsible for prosecuting criminal cases in the Local Court.

Registrar

Chief administrative officer of an intermediate, superior or federal court.

Service

The formal delivery of a court document (or process) to a party or witness (eg summons). Service may be personal (given to the actual person) or substituted (via a third party, by post or by advertisement).

Summary Offence

Minor criminal offence which is heard and decided in a court of summary jurisdiction (the Local Court in NSW) without a jury.

Witness

A person called to give evidence on behalf of the prosecution or the defence.

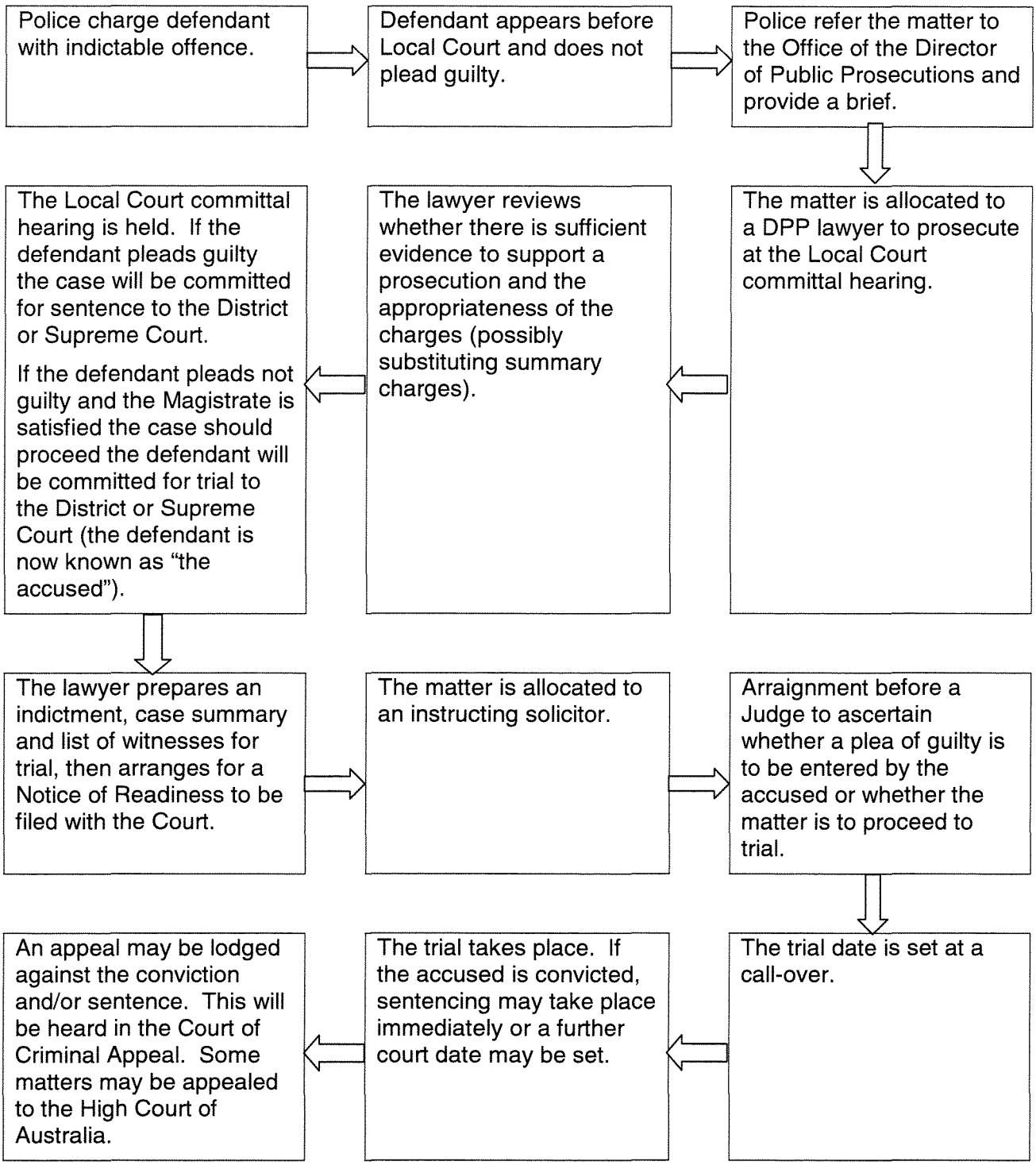
Sources:

Jerram, Mary S, 2000, "A day in a City Local Court", *Reform,* Issue 77, p 29-32.

Ponting, Jane, 1998, *Oxford Legal Studies Study Dictionary,* Oxford University Press.

Western Australian Department of Justice, *Glossary,* Available on www.justice.wa.gov.au.

Outline of a Typical Defended Indictable Matter



Adapted from: Office of the Director of Public Prosecutions, 2001, *Annual Report 2000-01,* p 24.

Appendix Six

Indictable Offences Dealt with Summarily

Division 3 of the Criminal Procedure Act 1986 deals with the summary disposal of indictable offences by Local Courts. Section 20 of the Act provides:

> (1) An indictable offence listed in Table 1 to Schedule 1 is to be dealt with summarily by a Local Court unless the prosecuting authority or the person charged with the offence elects in accordance with this Division to have the offence dealt with on indictment.
>
> (2) An indictable offence listed in Table 2 to Schedule 1 is to be dealt with summarily by a Local Court unless the prosecuting authority elects in accordance with this Division to have the offence dealt with on indictment.

Table 1 offences include:

- various offences against the person under the Crimes Act 1900 – for example, malicious delivery of documents containing threats of violence (s 31), malicious wounding or infliction of grievous bodily harm (s 35) and bigamy (s 92);
- various offences relating to property and exceeding $5,000;
- offences taken to be, or punishable, as larceny or stealing;
- entering with intent to steal, or stealing, from a house and breaking out (value does not exceed $15,000);
- entering a house at night or breaking and entering any building with intent to steal;
- breaking and entering, or being in, any building and stealing (value does not exceed $15,000); and
- offences under the Drug Misuse and Trafficking Act 1985 – some offences involving a small quantity but not more than an indictable quantity and other offences involving cannabis which involve more than an indictable quantity and less than a commercial quantity.

Table 2 offences include:

- various offences against the person under the Crimes Act 1900 including assault occasioning actual bodily harm (s 59), stalking and intimidation (s562AB) and publication of child pornography (s578C(2A));
- various offences relating to property not exceeding $5,000;
- possession of implement of housebreaking; and
- offences under the Drug Misuse and Trafficking Act 1985 relating to small quantities.

Source: Bartley, Reg, 2000, *The Court is Open: A Guide to the Local Court,* 5th Edition, Redfern Legal Centre Publishing, p247-253.

Appendix Seven

Simulating the New South Wales Criminal Justice System: A Stock and Flow Approach

(Summary of a paper by Bronwyn Lind, Marilyn Chilvers and Don Weatherburn, NSW Bureau of Crime Statistics and Research, 2001)

Introduction

The model seeks to provide a means to assess the potential effects of:

- an increase in arrest rates;
- changes to bail policy;
- changes in court backlogs;
- diversion from court or prison; and
- changes in sentencing practice;

on the stocks of people in and the flows between:

- Local Court custody – persons in custody waiting for a Local Court determination or committal to the District Court;
- Local Court bail – persons on bail waiting for a Local Court determination or committal to the District Court;
- District Court custody – persons in custody waiting for a District Court determination;
- District Court bail – persons on bail waiting for a District Court determination; and
- Prison – sentenced prisoners.

The model does not, therefore, include the Supreme and Children's Courts.

Characteristics of the Model

The model uses 21 variables and five equations to describe the stocks and flows from police charge to imprisonment.

Definition of Variables

A(t) number of persons charged in month t

S(t) number of persons issued a Court Attendance Notice or summons in month t

L1(t) number of persons in Local Court custody in month t

L2(t)	number of persons in Local Court bail in month t
D1(t)	number of persons in District Court custody in month t
D2(t)	number of persons in District Court bail in month t
P(t)	Number of sentenced prisoners in prison in month t
Q1(t)	number of persons in Local Court custody whose cases are finalised in month t
	number of persons in Local Court bail whose cases are finalised in month t
	number of persons in District Court custody whose cases are finalised in month t
	number of persons in District Court bail whose cases are finalised in month t
a	proportion of persons charged who are placed in custody
b	proportion of persons in custody given a prison sentence by the Local Court
c	proportion of persons charged who are placed in custody and are committed to the District Court
d	proportion of persons charged who are placed on bail and are committed to the District Court
e	proportion of persons on bail given a prison sentence by the Local Court
f	proportion of persons in custody given a prison sentence by the District Court
g	proportion of persons on bail given a prison sentence by the District Court
h	proportion of persons charged who move from Local Court custody to Local court bail
j	adjustment factor applied to the numbers of persons sentenced to prison to determine the number of new entrants to the sentenced prisoner population
p	proportion of the sentenced prisoner population who are discharged from prison each month

Equation to Determine Persons in Local Court Custody in Month t

$$L1(t) = L1(t-1) - Q1(t) + aA(t) - cA(t-2) - hA(t-1)$$

Note: (t-1) is the level from the previous month, (t-2) is the level from the month before that.

Equation to Determine Persons in Local Court Bail in Month t

$$L2(t) = L2(t-1) - Q2(t) + (1-a)A(t) + S(t) - dA(T-3) + hA(t-1)$$

Equation to Determine Persons in District Court Custody in Month t

$$D1(t) = D1(t-1) - Q3(t) + cA(t-2)$$

Equation to Determine Persons in District Court Bail in Month t

$$D2(t) = D2(t-1) - Q4(t) + dA(t-3)$$

Equation to Determine Sentenced Prisoners in Month t

$$P(t) = P(t-1) + j\,[\,bQ1(t) + eQ2(t) + fQ3(t) + gQ4(t)\,] - pP(t-1)$$

Limitations of the Model

Data Availability

Some of the data needed for parameter estimation is not available in NSW.

> The greatest deficiency in the available court data for NSW is the lack of information on the custody status of persons registered and awaiting case determination in the NSW criminal courts. Information on custody status is not available either at the time of registration or at any time thereafter, until the case is finalised. For NSW Local Courts the problem is greater, because it is not possible to disaggregate either registration or stock data by whether the case was initiated by a charge, a summons , a Court Attendance Notice or some other means.[440]

Predictive Ability for Some Measures

- although the total prison population for the two year validation period was close to modelled levels, the mix between remand and sentenced prisoners was not;
- the results predicted for Local Court stock are unlikely to be correct (no observed data for comparison); and
- it is not possible to predict the amount of time a case spends in the criminal justice system.

Conclusion

> ...the model is by no means a perfect representation of the criminal justice system [but], used with care and judgment, it could be a useful tool in policy impact analysis. Further development of the model is possible but is probably only desirable if the present model proves to be useful and if the quality and range of data on criminal justice functioning can be improved. [441]

---

[440] Lind, Bronwyn, Chilvers, Marilyn, and Weatherburn, Don, 2001, *Simulating the NSW Criminal Justice System: A Stock and Flow Approach,* p 17.

[441] ibid, p v.

Appendix Eight

Background to the Civil Justice System

Glossary

Action

A legal proceeding in the courts to establish a claim.

Adjournment

A court order by which proceedings are postponed, interrupted or continued at a different time or place before the same court.

Affidavit

A formal statement in writing about the facts of a case. It must be sworn by oath or affirmation before a Justice of Peace, Commissioner for Oaths or a solicitor and signed as a true record. The person making it is called a deponent.

Applicant

The person who first comes to the Court asking for an order to be made. The person who has made an application.

Arbitration

Non judicial procedure for resolving disputes. An independent arbitrator listens to both sides and makes a decision (known as an award or an agreement) that is binding on both parties.

Callover

The procedure by which cases are assessed to determine whether or not they are ready to be allocated a hearing date, or to a hearing that day, before a magistrate.

Cause

A civil proceeding – usually referred to as an action.

Civil Proceedings

Civil proceedings are bought by the Crown or a private party to redress a wrong suffered which is not covered by a law which imposes a penalty. Example – recovery of debt, claim for damages for injury to a person or property, compensation for breach of contract.

Default Judgment

Judgment in favour of the plaintiff resulting from the defendant's failure to bring a defence.

Defendant

A person against whom a civil action has been brought.

Deposition

Written statement made under oath as testimony of the accused or a witness.

Discovery

Pre trial procedure where parties may compel each other to list all documents relating to the case that are or have been in their possession.

Equity

Historically, the law made by judges became entrenched in formal rules and this sometimes

resulted in injustices. Equity provides remedies where it would be unjust or unfair to enforce the common law strictly.

Injunction

A type of relief available in civil proceedings whereby a party is ordered to abstain from performing an act or deed. If a party is ordered to do something it is called a mandatory injunction.

Interrogatories

Pre hearing process in which each party submits written questions to the other seeking clarification of relevant points of dispute. Answers must be provided in writing on oath or affirmation.

Mediation

Dispute resolution using one or more third parties to help parties reach a resolution. The decision is dependant on the parties' agreement and is not binding.

Parties

The people directly involved in a case.

Plaintiff

The party who initiates civil proceedings – also known as the applicant (Family Court), complainant (Local Court) and petitioner (Federal Court).

Service

The formal delivery of a court document (or process) to a party or witness (eg summons). Service may be personal (given to the actual person) or substituted (via a third party, by post or by advertisement).

Statement of Claim

A pleading in which the plaintiff sets out the details of their claim and the relief sought.

Statement of Defence

A pleading where the defendant sets out the details of their defence to the allegations in the plaintiff's Statement of Claim.

Sources:

Jerram, Mary S, 2000, "A day in a City Local Court", *Reform,* Issue 77, p 29-32.

Ponting, Jane, 1998, *Oxford Legal Studies Study Dictionary,* Oxford University Press.

Western Australian Department of Justice, *Glossary,* Available on www.justice.wa.gov.au.

Progress of a Civil Case

Statement of Claim filed by the Plaintiff

The Statement sets out the details of the plaintiff's claim and the relief they are seeking (eg damages, injunction) and is lodged with the registry. All Statements of Claim do not proceed to contested hearings. The filing of the Statement of Claim (FSC) "starts the clock" for case management in the District Court.

⇩

Statement of Claim served on Defendant

The Statement is delivered to the defendant. This action must take place within one month of the FSC in the District Court. The defendant may answer it with: a Statement of Defence and/or a Notice of Cross Claim or a confession or payment in full of the amount claimed by the plaintiff.

⇩

Statement of Defence filed by Defendant

This Statement sets out details of the defendant's arguments against the allegations in the Statement of Claim. The filing of the first defence (FSD) "starts the clock" for case management in the Local Court where the Statement is to be served on the plaintiff within 14 days of being filed. In the District Court, the Statement of Defence must be filed within 28 days of receipt of the Statement of Claim.

⇩

Pre-hearing or pre-trial activities

Local Court (months):

Callover FSD+1.5
Review FSD+4

District Court (months):

Pre Trial Conference FSC +3
Status Conference FSC+7

Local Court

A callover is held within 6 weeks of the FSD. The matter may be referred to arbitration or mediation at this time and the Registrar (or Magistrate) will question the parties regarding their progress in pre-trial procedures.
A review date will be set at least 28 days before the hearing date. The hearing date itself will be set within a month of FSD + 5 months.
At least 14 days before the review, each party is required to serve on all other parties, copies of written statements or affidavits of intended evidence plus any other documents that will be relied on in Court.
On the review date, each party files a written summary of the case, including references to relevant case law or statute.
The review is conducted by a Magistrate. If the Magistrate is not satisfied with the preparations of either party (and the matter is not struck out), the action, defence or other process may become the subject of specific, detailed directions, with compliance compelled.

District Court

The pre-trial conference takes place within three months of the filing of the Statement of Claim and seeks to determine what actions are required to advance the matter to trial (eg what medical reports are needed, whether the matter is suitable for arbitration).
If a jury is required, the jury demand must be filed at least two months before the scheduled status conference.
At the time of the status conference, parties must be ready to take an arbitration date, have their case referred to mediation or take a trial date before a Judge (generally within 1-2 months).

Hearing or Trial Local Court (months) Within a month of FSD + 5 District Court (months) Within a month of FSC + 9	**Local Court** The plaintiff files a statement of agreed facts and issues seven days before the hearing date. Under the newly introduced time standards, the hearing will take place during the month commencing five months after the filing of the Statement of Defence. The plaintiff's witnesses are called first. Each is subject to: - examination-in-chief by the plaintiff (or their legal representative) – to detail the evidence of the claim; - cross examination by the defendant (or their legal representative) – to test the accuracy and objectivity of the evidence; and - re-examination by the plaintiff – to clarify issues arising from the cross examination. The same process is repeated with the defendant's witnesses who are examined by the defendant (or their representative) and cross-examined by the plaintiff. **District Court** At least seven days before the hearing, each party must serve on all others a schedule of medical and/or experts reports which are to be tendered at the hearing while the plaintiff must also serve a full chronology of events and a schedule of all economic loss, interest and out of pocket expenses claimed. Under civil time standards, the hearing is to commence during the month commencing nine months after the filing of the Statement of Claim. The procedure is similar to that described for the Local Court.
⇩	
JUDGMENT	**Local Court** This may be made by the Magistrate immediately or may be reserved (delayed). Under the Court's time standards, the judgement must be handed down within 6 months of the filing of the Statement of Defence. It is up to the plaintiff to recover any amount awarded. This may involve a garnishee on the defendant's wages or the seizure and sale of goods by the Sheriff. **District Court** If the matter involves a jury, the Judge will direct its members as to the principles of law they should apply when considering the case and they will return a verdict. In civil cases, majority decisions are sufficient (ie a unanimous verdict is not required). The Judge will then determine the allocation of costs and any appropriate penalties. If a jury is not involved, the Judge may make a decision immediately or may adjourn the matter to consider the evidence further.

Appendix Nine

Delay Reduction in the Supreme Court – A Six Year Summary

Year	Developments in Case Management in the Supreme Court
1996	**Common Law – Civil** Use of the "Sydney Circuits" program to reduce the backlog. The program operated in a similar way to country circuit sittings by concentrating legal representatives and using a "running list". Case management by registrars and Judges was intense with Issues and Listing Conferences conducted and pre-trial directions issued to ensure that: documents and exhibits were exchanged; issues for trial were narrowed; and a Judge's brief was prepared for each matter. Continued application of Differential Case Management (DCM) – revised by Practice Note 88 on 8 December 1995). DCM differentiated between the level of management required by cases on the basis of their complexity and the need for pre-trial activity – standard track (uniform set of directions from the registry); individual track (receive specific directions from the court); special case management track (for proceedings of unusual urgency, complex proceedings and/or proceedings involving many parties); default track (liquidated claims – a large proportion are not defended – where a defence is filed, the matter becomes subject to case management); and a "not ready" list. **Equity** Commercial Division Practice Note introduced which allowed earlier hearing dates to be offered when other cases settle and encouraged ADR. **Court of Appeal** Pending cases were reduced from 1,000 to 700. This was achieved via a combination of a fundamental change in listing procedures and changes to the way the Court dealt with interlocutory work: • previously, appeals were placed on one list and dealt with chronologically. In 1996, the Court created five lists: Compensation; Expedited Appeals; Short Appeals; Damages and General. Groups of appeals from each list (other than the General List) were listed for hearing for periods of between one and four weeks. During this time the Court will sit in two or more divisions – one dealing with the General List and one with the special list. Acting Judges of Appeal were also used. This procedure increased the percentage of proceedings dealt with by ex tempore judgment (oral judgment immediately after trial) from 36 per cent in 1995 to 48 per cent. Such judgments are much more time effective than reserve judgments (which are written after the trial); and • with regard to interlocutory work, arrangements were made to allow ordinary motions to be dealt with by the Registrar of the Court of Appeal and to allow "leave to appeal" applications to be dealt with by two rather than three Judges of Appeal.

Year	Developments in Case Management in the Supreme Court
1997	**Common Law – Civil** The District Court Amendment Act 1997 was enacted on 18 July 1997. This led to a 17 per cent reduction in cases commenced in the Supreme Court in calendar 1997. In addition, some 2,174 matters were transferred to the District Court. The pending caseload was reduced from 5,551 as at 31 December 1996 to 2,349 as at 31 December 1997. An Acting Judge Program was introduced in September 1997 to clear pre-DCM matters. **Equity** Expansion of mediation. **Court of Appeal** Use of Acting Appeal Judges. Continued use of specialist lists. While this meant that certain classes of case "jumped the queue", significant savings were achieved by hearing numerous similar cases within a limited period. In the case of specialist lists relating to a single class of matters, the same three Judges could be listed to hear all cases in a week – thus enhancing efficiency, consistency and the promotion of settlement. Changes to leave requirements and procedures were introduced in December 1997 in response to legislative changes which had increased the number of in matters of this type in the Court.
1998	**Common Law – Civil** Cases were audited in January 1998 to identify matters where there was little or no activity by the parties to the action. As a result, 269 matters were transferred to the District Court and a further 589 were settled, dismissed or removed from the list. The pending caseload was 2,183 matters at the end of 1998. Announcement of a Professional Negligence List in December (to commence on 1 April 1999). Mediation is particularly encouraged in this List. **Common Law – Criminal** Practice Note 103 (October 1998) introduced arraignment in criminal trials approximately four months after committal to encourage the early entry of guilty pleas and allow case management to commence.

Year	Developments in Case Management in the Supreme Court
1999	**Common Law – Civil** Practice Note 105 (March 1999) introduced practitioner guidelines for the use of technology in civil litigation. Provisions of section 7A of the Defamation Act implemented. An initial hearing is held before a jury to determine whether the matter complained of carries the alleged imputation and whether it is defamatory. If this is proven, a second hearing take place to determine whether a defence can be established and assess damages. The addition of this procedure reduces pre-trial interlocutory disputes and, for those cases dismissed at the first hearing, saves further court time. An ADR Steering Committee was established. In August it recommended to the Chief Justice that legislative amendments be proposed to: • extend arbitration to the Equity Division; and • provide judicial power to order matters to mediation, where appropriate. **Common Law – Criminal** Pilot program of listing reserve criminal trials (overlisting) conducted. This was successful and continues under close judicial management. **Equity** Equity Division Judges responsible for specialist lists were announced in June. From 1 July 1999, the business of the Admiralty and Commercial Divisions was transferred to Equity along with the Construction List of the Common Law Division (and its three judges). **Court of Appeal** Two lengthy appeals were heard electronically. Instant computer access to transcript and exhibits was provided in addition to real-time transcription of proceedings. Continued use of Acting Judges of Appeal.

Year	Developments in Case Management in the Supreme Court
2000	**General** Adoption of a formal, overriding purpose in the Supreme Court Rules – to facilitate the "just, quick and cheap" resolution of real issues in dispute. The introduction of time standards for Crime, the Court of Appeal and the Court of Criminal Appeal in February. Practice Note 108 – Cost Orders Against Practitioners. Practice Note 109 – Expert Evidence – new rules and a Code of Conduct provided for expert witnesses which establish that the paramount duty of an expert witness is to the Court and create a mechanism for conferring between experts. Practice Note 116 – Early Listing – every case is to be listed in the Court within six months of filing. Voice recognition software is being piloted. **Common Law – Criminal** Practice Note 112 – Arraignments to occur within one month of committal. The pilot of back-up trials was continued to determine whether, with additional judicial resources, it could be adopted as a permanent feature. Of 19 matters listed, only one had to be listed on a second occasion. **Common Law – Civil** A Possession List commenced on 1 February 2000 to improve the management of proceedings for the recovery of possession of land. List management encourages early resolution through settlement, mediation and individual case management. An audit of all pending cases at the Court's regional registries was conducted. Following the audit, all new regional cases are centrally recorded at the Sydney registry and defended cases are allocated to an appropriate list and case-managed in a similar way to cases filed in Sydney. **Equity** ADR extended to Probate List matters.

Year	Developments in Case Management in the Supreme Court
2001	**General** Practice Note 118 – Details the amendment of the Supreme Court Act 1970 which allows matters to be referred to mediation at the Court's discretion at any time, whether or not the parties agree. Review of time standards for Crime, Court of Appeal and Court of Criminal Appeal in May. **Common Law – Civil** Amendment of DCM procedures to standard timeframes do not apply where cases can be prepared more quickly. Practice Note 119 – Explanation of the operation of the Administrative Law List. **Equity** Expansion of the Construction List to become the Technology and Construction List from 1 January 2002.

Source: Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry,* p 13-14 and Supreme Court of NSW, Annual Reviews for 1996, 1997, 1998, 1999 and 2000.

Appendix Ten

Professional Negligence and Delay

Introduction

During 2000-01, the median time from commencement to finalisation in the Professional Negligence List was 2.5 years. None of this "waiting time", however, is necessarily delay.

The "Mechanics" of a Professional Negligence Case

Claims relating to injuries need to be lodged within three years. This is a statutory limitation. If a claim is not lodged within this time, the plaintiff will need to apply to the Court for permission to commence proceedings and take the risk that their application may not be successful.

It may, however, take longer than three years for injuries to stabilise (for example, where an infant sustains brain damage and full assessment of the extent of its injuries may not be appropriate the teen years are reached). In such cases the Court will, if necessary, put the matter "on hold".

Once a case is lodged in the Professional Negligence List, case management starts with the parties being given three months' notice of a conference hearing. During these three months, the parties are required to: discuss the case, file all defences and cross-claims, make arrangements for medical examinations, narrow the case to the issues truly in dispute, agree on necessary orders required from the Court and prepare a draft timetable for the future management of proceedings. In reality, this is a very tight timetable and prompt action on the part of the litigants is essential.

Generally, at least two further conferences are required to deal with any necessary interlocutory steps, including the completion of all medical evidence. The Court sets the conference dates – it does not wait for the parties to apply for them. This keeps the case under strict management. Parties who obstruct the progress of the case can be ordered to pay the costs resulting from their obstruction. Lawyers can be ordered to pay costs personally. Expert witnesses such as doctors are subject to a code of conduct that states their overriding duty is to the Court, not to any party. Mediation is strongly promoted and many cases are resolved in this way.

When the Court is satisfied all necessary evidence is available and the case is ready for hearing, a hearing date (generally one-two months away) is allocated. This period is necessary to allow practitioners to adequately schedule their other practice commitments.

Therefore, at least 11 months is required for case preparation, providing are no confounding factors such as the complexity of the medical issues involved and/or

delays in medical examinations and associated reports.

In general, a longer period will be required if parties are forced (because of time limitations) to commence litigation before injuries have stabilised. None of this additional time, however, indicates that either the parties or the Court are hindering the progress of the case. To force such a matter to be finalised more rapidly may be more "efficient" in simplistic terms but is not necessarily effective, equitable or just and is likely to create additional litigation via appeal.

On the other hand, where a case is urgent, application can be made to the Court for an expedited hearing at any time.

Source: Feneley, John, *Attorney General's Department of NSW Submission to the Inquiry,* p 37-38.