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**Court Delays in NSW: Issues
and Developments**

by

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CONTENTS

EXECUTIVE SUMMARY

1.	INTRODUCTION	1
2.	DEFINING AND MEASURING COURT DELAY	2
2.1	Problems caused by delays	4
2.2	Who measures delay?	5
2.3	How are delays measured?.....	6
3.	CURRENT STATE OF DELAYS IN NSW COURTS	12
3.1	Local Court	13
3.2	District Court	15
3.3	Supreme Court.....	17
4.	CAUSES OF DELAY	21
4.1	Case load.....	21
4.2	Duration of hearings	22
4.3	Resource issues	24
4.4	Party delays	25
4.5	Court processes and legal procedures	26
4.6	A BOCSAR analysis of delays in the criminal jurisdiction of the District Court	28
5.	DEALING WITH COURT DELAY.....	30
5.1	The context of dealing with delay	30
5.2	Dealing with court delay in NSW.....	33
5.3	Measures to reduce delay	37
5.3.1	Court management and managing the delay problem.....	37
5.3.2	Case management.....	41
5.3.3	Court resources	45
5.3.4	Changes to legal procedural and court processes.....	49
5.3.5	Local Courts reform package.....	53
5.3.6	Other	59
6.	CONCLUSION.....	60
APPENDIX A.	Terminology	
APPENDIX B.	Summary of the stages of proceedings	
APPENDIX C.	Medical negligence case study	
APPENDIX D.	Summary of delay reduction initiatives in the Supreme Court and amendments to the Supreme Court Rules to further the ‘overriding purpose’ of the Court.	

EXECUTIVE SUMMARY

- This paper examines the issue of delays in relation to the Local, District and Supreme Courts of NSW. Delay has been a long-standing concern to the courts and successive NSW Governments. The operation of an efficient and effective court system is crucial to the administration of justice and delays are a significant obstacle to achieving these goals. Innumerable legislative and administrative initiatives have been undertaken over the years, and while many have been successful in their specific aims, court delay is an ongoing problem, not least of all because the causes of delay are not static (**Section 1**).
- Generally, ‘delay’ refers to the amount of time between the commencement and the conclusion of court proceedings which exceeds the time necessarily spent in the preparation of a case for trial, the conduct of its hearing and the determination of its final outcome (**Section 2.1**). Delays create many problems, having both a personal and financial impact on parties, as well as financial and other effects on the court system. (**Section 2.2**).
- The courts are the main source of information about delays. They keep a variety of statistics and publish information about delays in their annual reviews. Other bodies also report on court delays (**Section 2.3**). Delays are generally measured by establishing the time taken for cases to progress through the court system, usually expressed as the ‘median delay’ between two points in proceedings. Other measurements or statistics fill out the ‘picture’ of delays such as new cases and dispositions, pending caseload and compliance with time standards. Reading statistics and other information about delays must be done with care (**Section 2.4**).
- The Local Court is the court of general access in NSW, with jurisdiction to deal with many different matters. It sits in 158 locations across NSW. While delays vary from location to location, there was an overall increase in delays in the Local Court in 2000. (**Section 3.1**). The District Court is the intermediate court in NSW, handling most of the serious criminal cases that come before the courts and civil cases where the amount being claimed is up to \$750,000. Generally, the District Court has been successful in reducing delays in the criminal jurisdiction in the last few years and has contained the level of delays in its civil jurisdiction (**Section 3.2**). The Supreme Court is the highest court in NSW. It has unlimited civil jurisdiction and handles the most serious criminal matters and appeals. Generally, the Supreme Court has been successful in reducing delays in the past few years. In the 1999/2000 financial year the median waiting times for criminal trials in the Supreme Court have been reduced and improvements have also been reported in relation to the Court’s civil list (**Section 3.3**).
- There are multiple causes of delay. In relation to a particular court or aspect of a court’s jurisdiction, one or more causes may be more or less significant. The courts have varying degrees of control over these factors. Causes include: an increased caseload; increased length of hearings; insufficient court resources; problems with the management of court resources and caseload; inefficient legal procedures and court processes; party delays; and others (**Section 4**).

- There is no legal right, under common law or legislation, to have court proceedings conducted within a reasonable amount of time, in any Australian jurisdiction. Regardless of this, all stakeholders in the court system have long recognised the problems caused by delays and the importance of reducing delay. Dealing with court delay raises issues of performance, accountability and judicial independence (**Section 5.1**).
- The issue of delays in the NSW court system has been a concern for many years. Several reviews and inquiry's have been undertaken over the years to identify the causes of delays and the develop measure to reduce delays (**Section 5.2**).
- Because of the number and diversity of the causes of delay, addressing the problem of court delay is not straightforward. Measures include: increased, and efficient use of, court resources; court management initiatives which have a flow on effect on delays; case management; simplification of legal procedures; the recent Local Court reform Acts; and others. Some measures such as the court management initiatives are broad in scope and ongoing, while others are designed to fix specific problems causing delays and once implemented are complete (**Section 5.3**).
- Delay is a problem endemic to all legal systems. While great improvements have been made over the last decade in reducing delays and addressing the causes of delay, delays are an ongoing problem. The measures implemented to deal with delays to date, and the recent focus on improving court management would seem to provide the infrastructure for dealing with delays in the future (**Section 6**).

1. INTRODUCTION

This paper examines the issue of delays in relation to the three main courts in the NSW court system: the Local, District and Supreme Courts. Throughout this paper they will be referred to collectively as ‘the courts’. Court delay has been a long-standing concern of the courts and successive NSW Governments.¹ The operation of an efficient and effective court system is crucial to the administration of justice and delays are a major obstacle to achieving this goal.

The 1989 *Review of the NSW Court System* (**‘1989 Review’**) identified excessive delays in several jurisdictions of the courts.² Since then considerable effort has been made by the courts and the Attorney General’s Department, which is responsible for courts administration, to understand the extent of delays and why they occur, and to implement reforms to address the problem. Innumerable legislative and administrative initiatives have been undertaken over the years, and while many have been successful in their specific aims, court delay is an ongoing problem, not least of all because the causes of delay are not static. Overall however, it should be noted that there have been improvements in reducing delays in NSW in the past few years.

A 1996 Research Service Briefing Paper examined the issue of court delay in NSW.³ This paper updates and develops the information in that paper, as well as canvassing some additional issues. The paper examines how delay is defined, why delay is problematic, who measures delay and how delay is measured. The many factors that contribute to delay are also explored in order to understand the complexity of the problem and the background to dealing with the issue of court delay. The paper then looks at how the problem of delay has been dealt with by the courts and the Government, exploring some contextual and historical issues, as well as some measures used to tackle particular aspects of the delay problem.

A glossary of terms is contained in Appendix A.

¹ It is interesting to note however, that although the issue of court delay is of continuing interest, there has not been much media focus on the issue in NSW this year.

² Coopers & Lybrand WD Scott, *Report on a Review of the New South Wales Court System*, 1989.

³ ‘Dealing with Court Delay in New South Wales’, by Honor Figgis, *NSW Parliamentary Library Research Service*, Briefing Paper No 31/96.

2. DEFINING AND MEASURING COURT DELAY

Defining 'delay'

One of the goals of the court system is to ensure that the period between the initiation and finalisation of court proceedings is as short as possible, without compromising the quality of justice provided.

There are many stages of court proceedings (as summarised in **Appendix B**). Certain periods of time are necessary to move from one stage to the next and also to progress within each stage. Some of these periods are set in legislation or court rules. For example, in proceedings in the District Court, the Court can order that 'party B' give discovery to 'party A' *28 days* in which to comply in the required manner.⁴ These periods are necessary intervals in the conduct of a case. To illustrate that some court proceedings take a necessarily long length of time, a case study of a medical professional negligence case is included in **Appendix C**.

The classic definition of court delay is 'the amount of time between the commencement and the conclusion of court proceedings which exceeds the time necessarily spent in the preparation of a case for trial, the conduct of its hearing and the determination of its final outcome.'⁵ Delays can occur at any stage of proceedings and more than one delay can accumulate to create an overall delay in the processing of a case. Delays can be caused by a variety of factors as examined in Section 4.

But the concept of delay is more complex than this. In light of the goal stated in the first paragraph, delay also includes the amount of time required by the legal procedure and court rules that dictate the conduct of a case, which may be unnecessarily complex or time consuming. Some of these inefficiencies are also examined in Section 4. Therefore, when dealing with delay, the aim is to not only eliminate the amount of time that exceeds that which is necessary for the conduct of a case, it is also to ensure that the procedures and rules which dictate the conduct of a case are as efficient as possible.

It is important also to note that not all delays are a cause for concern. As pointed out by the *1989 Review*, in some cases it may be wrong to assume that all parties to all litigation desire to get their cases dealt with as soon as possible:

There may be good reason why one party to litigation may desire some measure of delay, for example, when a plaintiff in a personal injury case seeks time for his or her injury to stabilise...delay, in some cases can be highly desirable because it can provide a 'cooling-off' period which can assist settlement; this is particularly the case in relation to debt claims, breach of contract, wrongful dismissal, compensation for a civil wrong, family law matters and partnership disputes.⁶

⁴ *District Court Rules 1973*, Pt 22 r 3.

⁵ Brebner D and Foster R, 'The Development of National Objectives or Goals for the Disposition of Cases in the Higher Courts' (1994) 4 *Journal of Judicial Administration*, 100, p 103.

⁶ Coopers & Lybrand, n 2, p 40.

In such instances delay may be constructive to the pursuit of justice and even a delay of a considerable period of time in these circumstances may not be considered unreasonable (this is in contrast to delays deliberately caused by a party as a ‘trial tactic’, see Section 4.4).

Similarly, some delays may occur at a point in proceedings that is not time-critical and therefore does not present a problem. For example, ‘[i]n the Supreme Court of New South Wales, which has criminal jurisdiction almost exclusively concerned with murder trials, the period after a guilty verdict or plea is not time-critical. Any sentence is almost invariably going to be a long one and the time between the guilty verdict or plea and sentence does not need to be targeted.’⁷

Terminology

In recent years, there appears to be some momentum for a change in terminology in relation to this issue, with the emergence of the term ‘waiting times’. For example, in 1999 the Audit Office of NSW conducted a performance audit into the ‘Management of Court Waiting Times’ (1999 Audit’) and in it, the term ‘waiting times’ is used interchangeably with

⁸ This terminology has been followed by the PAC in its ‘Inquiry into Court Waiting Times’ (PAC Inquiry’), which was instituted on the basis of the Audit Office’s audit.⁹

While this emerging trend may eventually evolve in to a change in nomenclature, this paper retains the use of the more traditional term ‘delays’.

⁷ NSW Attorney General’s Department, *Submission to the Public Accounts Committee Inquiry Into the Management of Court Waiting Times*, November 2001.

⁸ Audit Office of NSW, *Performance Audit Report: Management of Court Waiting Times*, September 1999. See also: Audit Office of NSW, *Performance Audit Report: Follow-up of Performance Audits – The School Accountability and Improvement Model and The Management of Court Waiting Times*, September 2001.

⁹ Interestingly, the Attorney General’s Department’s submission to the PAC Inquiry makes a distinction between ‘waiting times’ and ‘delay’, stating: “some steps in litigation take time: claims are made and a prescribed time may be allowed, or even ordered by the Court, for preparing responses to those claims. Performance of the required action within the specified time is not delay. The time taken between commencement and disposal is more accurately termed ‘waiting time’. This may or may not include elements of ‘delay’. It is important to make this distinction at the outset”: Attorney General’s Department (Submission to PAC), n 7.

2.1 Problems caused by delays

Delays in relation to both criminal and civil cases create many problems. These are summarised below.

- In criminal cases, where an accused is remanded in custody, delay lengthens the time an accused is remanded. This negatively impacts on both the accused and the resources of the prison system.
- Delay in the completion of criminal cases may cause stress and anxiety to the victims of crime and the accused, and to the family and friends of both;
- Delay increases the cost of civil and criminal cases, causing financial hardship to parties and the court system. Apart from the cost of legal representation, parties may suffer other financial hardships, for example, a plaintiff in a personal injury case may require money for treatment; rebuilding his or life may be acutely effected by delays.
- Some litigants may abandon claims due to the prospect of lengthy delays.
- Evidence may be lost.
- Witnesses may forget evidence, die or may be unable to be contacted.
- A party may deliberately cause a delay or adjournment of proceedings that are detrimental to their interests; this may reinforce the power of the financially stronger party that can better withstand the financial consequences of delay.¹⁰
- Delay undermines public confidence in the court system.
- Court resources are wasted. For example, if a trial listed for hearing is adjourned when one party is not prepared, the time allocated for that hearing may not be able to be utilised at short notice.
- Delay due to the stressed resources of a court may indicate that the quality of services provided by the court is diminished.

As the preceding points illustrate, delay can have both a personal and financial impact on parties, as well as financial and other effects on the court system. The effect of delays may vary between the three courts examined in this paper and have different consequences in relation to a civil or a criminal case. For example, delay is a less contentious issue in relation to criminal cases in the Local Court than the higher courts because cases in the Local Court,

¹⁰ NSW Parliament, Public Account Committee, *Customer Service in Courts Administration: The Missing Dimension. A Review by the Public Accounts Committee of the Interim Performance Report by the NSW Audit Office into Courts Administration* (T Rumble MP, Chairman), June 1996, p 28.

being summary proceedings, are generally dealt with much faster.¹¹

2.2 Who measures delay?

The courts are the main source of information about delays. There are other bodies that comment on court delays and release information about court delays, although they generally do not collect the statistics themselves.

The courts

They collect a variety of statistics that are useful in establishing a picture of the state of delays in each court. The main statistics collected, with some variation between the courts, are listed below. These data types are explained in more detail in Section 2.4.

- (a) New cases commenced (also called ‘new filings’, ‘registrations’, or ‘applications’).
- (b) Disposals (also called ‘case dispositions’ or ‘cases finalised’).
- (c) Pending caseload (also called ‘cases on hand’ or ‘backlog’).
- (d) Median delays (also called ‘median waiting times’).
- (e) Compliance with time standards.
- (f) Others statistics such as, the duration of trials, listing outcomes, sentence compliance rates with standards, and the number of sitting hours.

The courts all publish basic statistical information in their annual reviews. Data is usually collated in relation to the different areas of each court’s jurisdictions. For example, in relation to its Common Law Division, the Supreme Court’s *Annual Review 2000* contains statistics on: new case filings; bail applications lodged and heard; disposals; pending caseload; the number of civil arbitrations; performance against time standards; and median trial delays and statistics for civil and criminal matters.¹² Similar information is presented in relation to the court’s Equity Division, the Court of Appeal and the Court of Criminal Appeal. Because the Local and District Courts sit in more than one venue, in their annual reviews data is often presented in relation to each venue (as well as combined data).

Others

The NSW Bureau of Crime Statistics and Research (‘**BOCSAR**’) produces an annual report on criminal court statistics that includes statistics on court delays.¹³ BOCSAR has also conducted studies and published bulletins and reports on delays in the criminal jurisdictions of NSW courts.¹⁴ Unfortunately, there is no similar organisation to investigate the civil

¹¹ Doak P, ‘Recent Trends in Criminal Court Delay’, *NSW Bureau of Crime Statistics and Research*, Bureau Brief, Issue Paper No 14, September 2001, p 4.

¹² Supreme Court of NSW, *Annual Review 2000*, p 13-28.

¹³ The latest report is: NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2000*, Statistical Services Unit (2001).

¹⁴ See for example: Doak P, n 11; BOCSAR (Criminal Courts Statistics 2000), n 13; Weatherburn D and Baker J, ‘Managing Trial Court Delays: An Analysis of Trial Case

jurisdiction in NSW.

The *Australian Bureau of Statistics* ('**ABS**') publishes an annual report titled 'Higher Criminal Courts in Australia' which contains some statistics about delays in the higher courts in all Australian jurisdictions, including the District and Supreme Courts of NSW.¹⁵

The *Productivity Commission*, under the auspices of COAG, produces a 'Report on Government Services' each year that includes a review of 'court administration'.¹⁶ The issue of delays is usually canvassed in that report and interstate comparisons are drawn.

The *NSW Attorney General's Department* comments on the state of delays and related developments in the NSW courts, in its annual report.

As previously mentioned, the *Audit Office of NSW* ('**Audit Office**') conducted a performance audit on the management of court waiting times in NSW, in 1999. It conducted a follow up performance audit in 2001 ('*2001 Follow Up Audit*').

The NSW Parliament Public Accounts Committee ('**PAC**') conducted an Inquiry into Customer Service in Court Administration in 1996, examining the issue of delays. The PAC is also currently conducting an inquiry into court delays. The current inquiry and the previous inquiry arose from the Audit Office reports into the management of court waiting times.

2.3 How are delays measured?

Generally, delays are measured by examining the time taken for cases to progress through the court system. Different types of cases, such as civil and criminal cases (and also subsets of each) are usually examined separately. Other measurements and statistics are also relied on to fill out the 'picture' of delay in a court such as, the number of new cases and dispositions, the pending caseload and, more recently, time standards. There is some inconsistency in data collection and collation between the courts.

Processing in the NSW District Criminal Court', *NSW Bureau of Crime Statistics and Research*, General Report Series, 2000; Weatherburn D, 'Measuring Trial Court Performance: Indicators for Trial Case Processing', *NSW Bureau of Crime Statistics and Research*, *Crime and Justice Bulletin – Contemporary Issues in Crime and Justice*, No 30, June 1996; and Weatherburn D, 'Grappling with Court Delay', *NSW Bureau of Crime Statistics and Research*, *Crime and Justice Bulletin – Contemporary Issues in Crime and Justice*, No 19, January 1993.

¹⁵ See for example, Australian Bureau of Statistics, *Higher Criminal Courts Australia, 1999-2000*. Note that the ABS obtains its information on the NSW Courts from the NSW Attorney General's Department.

¹⁶ See for example: Steering Committee for the Review of Commonwealth/State Service, Productivity Commission, *Report on Government Services 2001*, Vol 1, Jan 2001, Ch 9. Note the criticisms of this report in Section 2.4.

The *1989 Review* reported that statistics kept by the courts were inadequate for the purpose of analysing delays. This has largely been rectified today. The *1999 Audit* found that there is no lack of information to establish the extent of court delays, although it was critical of the dearth of information available to establish the causes of court delays.¹⁷

Improvements on collecting statistics and reporting on delays are being made.¹⁸ In particular, the recent development of the Model Key Performance Indicators for NSW courts (see Section 5.3.1) are designed to enable the production of a simple, clear and comprehensive picture of how well the courts are performing in relation to delays. It is also designed to ensure that in the future information about court performance is consistent among the courts.

The time taken between various stages of court proceedings – median delays

The main stages of proceedings are summarised in **Appendix B**. Measurements can be taken at several stages in proceedings, depending on which court and/or jurisdiction within the court is being measured. Broadly, the most common measurement is the time taken between the ‘commencement’ and ‘finalisation’ of a case.¹⁹

In criminal cases, ‘commencement’ usually refers to the point where an accused is committed for trial, although the arrest has also been used as a commencement point in some instances. ‘Finalisation’ can occur at a number of points including: when a case proceeds to trial and a decision is made by a judge or jury; when an accused is sentenced after pleading guilty; where the Director of Public Prosecutions (**‘DPP’**) decides not to proceed with a prosecution; and cases where the accused person abscond, dies or becomes incapacitated.²⁰ As Dr Don Weatherburn, the Director of BOCSAR has noted, the focus of interest when discussing court delays is upon those cases which actually proceed to trial.²¹ It is these cases that spend the longest in the court system and are thus more susceptible to delays and the problems associated with delays (the same applies to civil cases). Weatherburn has classified different periods used in measuring delays in criminal trials:²²

¹⁷ Audit Office (1999), n 8, p 4.

¹⁸ Coopers and Lybrand, n 2, p viii.

¹⁹ Briefing Paper No 31/96, n 3, p 5.

²⁰ Weatherburn (1996), n 14, p 3.

²¹ *ibid.*

²² *ibid.*, pp 3-4.

<i>Trial hearing delay</i>	Time between the date a matter is committed for trial and the date the trial commences.
<i>Remanent finalisation delay</i>	Time between committal for trial and finalisation of a matter regardless of how it is finalised.
<i>Trial finalisation delay</i>	Time between committal for trial and finalisation of a trial.
<i>Listing delay</i>	Time between the date of committal for trial and the earliest date on which a matter can be set down for trial. ²³

In civil matters ‘commencement’ is usually taken to be either the date of registration of a matter, or the date that a matter is ready for trial. Civil cases can be finalised in a number of ways including: being settled out of court; discontinued; by default judgment; or summary judgment.

Once the period of measurement is identified, court statistics in relation to a particular type of case are then gathered. The measurement can be presented as the *average* number of days taken for cases to reach the stages measured, or the *median* number of days. Measurements of median delay are generally considered more useful than measurements of average delay, as a few exceptionally long or short delays can distort the average.²⁴ Table A in Section 3.1, is an example of median delay statistics (for the criminal jurisdiction of the Local Court). Courts use the terminology ‘median waiting times’ or ‘median disposal times’ or ‘median

²⁵ When median delay statistics are compared over a number of years they can show increases or decreases which reflect the courts performance in relation to delay reduction. Note that median delay statistics do not show the proportion of time necessarily spent in the conduct of the case, in relation to the proportion of time that represents an actual ‘delay’ as defined in Section 2.1.

Building the picture of delays

Establishing how long it takes for cases to progress through the court system is insufficient on its own to understand delays, even if statistics from two or more years are compared. Other factors and measurements must be considered to create a more accurate picture of delays. But as the proceeding discussion highlights there are inherent problems with these measurements/factors as well.

Pending caseload: The pending caseload, which is alternatively referred to as ‘backlog’ or ‘cases on hand’, refers to the number of matters registered or committed for trial which have not yet been finalised. Reporting will always look bad when a court is dealing with a large backlog of cases. Therefore, it is important to refer to the backlog when examining the extent of delays. Also a decline in the number of cases yet to be finalised is sometimes taken

²³ For further discussion on listing delays see Section 4.5.

²⁴ Briefing Paper 31/96, n 3, p 5.

²⁵ See for example, District Court of NSW, *Annual Review 2000*, pp 26 and 32. A ‘median’ is the middle figure in a group, where 50% of figures are above it and 50% below it.

as evidence of an improvement in court performance. However, pending caseload is not necessarily a useful tool in measuring delays, as there can be several reasons for an increase or decrease in caseload that do not indicate that cases are taking longer to be heard. For example, a change in the jurisdiction of a court, as occurred between the District and Supreme Courts in 1996,²⁶ may increase or decrease the number of cases on hand. Weatherburn also identified this as one of the commonly used measures of criminal trial performance, warning that this conclusion may not be warranted:

...matters committed for trial are not necessarily finalised by way of trial. Thus a decline in the pending trial caseload may come about simply because of an increase in the proportion of matters finalised by way of a 'no

²⁷

Disposals: Disposals (also referred to as 'case dispositions', or 'cases finalised') refers to the number of cases completed during a certain period such as a calendar or financial year. Disposals are often referred to in the context of court performance and delays. However, reference to an increase or decrease in the number of disposals may not necessarily imply improvement or poor performance in the area of delays. In regard to the use of disposal statistics in understanding delays, Weatherburn has commented (in the context of criminal trials) that '[t]he main problem with this measure is that there is no necessary linkage between the number of trial cases disposed of and the time it takes to bring a trial case from committal to the start of a hearing'.²⁸

New cases commenced: The number of new cases commenced (also referred to as 'new filings', 'registrations' or 'applications') is useful data when examining delays. It reveals sudden influxes of cases, compared to other years and a dramatic rise in cases may mean that a court takes longer to deal with the caseload. When compared to disposals it also provides information about the pending caseload of a court. New cases commenced within a certain period is sometimes compared with the number of cases finalised within that period to provide some indication of a court's performance. The recently developed *Model Key Performance Indicators for NSW Courts* (discussed in Section 5.3.1) refers to this as the 'clearance ratio', which is identified as one of four key measures for assessing court performance under the model.²⁹

Percentage of trial court time utilised in the hearing of trials: Weatherburn also identifies the percentage of trial court time utilised in the hearing of trials as another measure of criminal trial court performance, with some qualification:

²⁶ 3077 civil matters were transferred from the Supreme Court to the District Court following its increase in jurisdiction in 1997: Attorney General's Department of NSW, Annual Report 1999-2000, p 26.

²⁷ Weatherburn (1996), n 14, p 3.

²⁸ *ibid*, p 4.

²⁹ Glanfield and Wright E, *Model Key Performance Indicators for NSW Courts*, Justice Research Centre, February 2000, p 5.

...this measure is extremely useful in understanding trends in [delay]. But a growth in the percentage of trial court time utilised in the hearing of trials does not necessarily imply a reduction in [delays]...The full argument behind this conclusion is quite complex...In brief the argument is as follows. At low levels of trial court utilisation, an increase in utilisation may result in more trials being held and shorter trial hearing delays. Due to the inherent variability of trial duration, however, the smaller the gap between trial court capacity and the demand for trial court time, the greater the risk that demand for trial court time will exceed trial court capacity. If demand for trial court time exceeds trial court capacity, trial hearing delay will tend to grow.³⁰

Compliance with time standards:³¹ Compliance with time standards can be used as a source of information in understanding delays, to the extent that the standards indicate what the court considers to be a reasonable time within which cases should be finalised. However, there are a few concerns with the use of time standards to understand delays. First, they are not specifically designed to measure delays. Rather, they are ‘goals’ for reasonable disposition times, ie for how long it should take to finalise cases. Second, establishing time standards is difficult and if unrealistic standards are set any use of them to gain an understanding of the status of delays is negated. For example, the Supreme Court’s time standards for 2000 and 2001 have proven to be unrealistic and the court set new standards for the 2002.³² Third, if the case mix changes it may effect the attainability of standards so that they are no longer appropriate and do not shed light on a court’s performance in terms of delays. Finally, there will always be some cases where the time taken is far beyond the time standard set. These cases distort the results and raise the question whether it is legitimate to take them out when examining compliance with time standards, or whether it is always necessary to set a time for 100% finalisation.

Others: statistics relating to other matters such as, the duration of trials, listing outcomes, sentence compliance rates with standards, and the number of sitting hours may also be useful to consider in the context of delays.

Reading statistics and delay information

When reading statistics and other information about delays it is important to remember several points:

1. Statistics must be viewed in context. For example, what may be considered a delay in one court may not be a delay in another as each court deals with matters of varying complexity.
2. Terms, such as ‘finalised’ and ‘number of matters handled’ and even deceptively simple terms such as ‘case’ are not always defined or used consistently within and among documents and reports concerning delays from the various courts.
3. Statistics may also be collected differently. For example, ‘[i]n civil cases, the NSW

³⁰ *ibid.*

³¹ Time standards are examined in detail in Section 5.3.2.

³² Supreme Court (2000), n 12, p 25.

jurisdictions count new cases differently... a case transferred from one Local Court to another is counted as two new cases in the Local Courts system, whereas a case filed in a regional registry and subsequently transferred for hearing, say, to Sydney is counted only once in the District and Supreme Courts.³³

4. Comparisons between courts in different Australian jurisdictions may not always be informative. Differences in law and procedure, jurisdiction, terminology and the way information is compiled may undermine the usefulness of some comparisons. Important qualifications and variables are not always defined.

For example, the Supreme Court has expressed concern about the accuracy and appropriateness of the Productivity Commission's interstate comparisons in this respect.³⁴ Similarly, the Attorney General's Department recently noted that '[t]his Report has been criticised over a number of years for failing to adequately reflect the impact of real differences between the States in the administration of courts.'³⁵

5. It is important to note the date information was released and the period of time to which it relates: some information can be relatively old. For example, statistics contained in court annual reviews can be over 18 months old before the next review is released. Information may have been superseded by the release of more up-to-date statistics, from the same or other sources. For example, in June 2001, ABS released statistics that showed that NSW was near the top in terms of the duration of criminal trials among the Australian States and Territories during the 1999/2000 financial year.³⁶ However, BOCSAR quickly pointed out that more recent figures it had compiled showed substantial reductions in delay between committal for trial and trial finalisation in the District and Supreme Courts between the 1999 and 2000 calendar years. BOCSAR suggested that 'the ABS figures reflected the situation in NSW prior to the impact of major administrative and legal reform in the second half of 2000 which were designed to reduce trial court delays.'³⁷
6. The authors of the BOCSAR study reviewed in Section 4.6 note that there has been a lack of empirical study into the causes of court delays in NSW and that '...indeed, past policies designed to deal with delay in NSW have proceed largely without regard to evidence on its causes and, by and large, without much empirical

³³ Attorney General's Department (Submission to PAC), n 7, p 39.

³⁴ Audit Office (1999), n 8, p 67

³⁵ Attorney General's Department (Submission to PAC), n 7, p 9. The Department also noted that it has received advice that in relation to the 2000/01 data; that the data specifications have been misinterpreted by at least one jurisdiction, leading to a distortion of the statistics.

³⁶ ABS, n 15, p 18.

³⁷ NSW Bureau of Crime Statistics and Research, 'Commentary on the ABS Publication 'Higher Criminal Courts: Australia', *Media Release*, 20/6/01.

evaluation'.³⁸

3. CURRENT STATE OF DELAYS IN NSW COURTS

The state of delays in NSW courts has fluctuated over the years and at various times there have been differences between the three main courts and between the civil and criminal jurisdictions. Broadly, however, there was widespread concern about court delays in the late 1980s, which led to the initiation of the *1989 Review*. The review identified excessive delays in several jurisdictions of the courts but also concluded that some parts of the court system were operating satisfactorily and were not subject to undue delays.³⁹ In its 1996 *Report on Customer Service in Courts Administration*, the PAC found that '[w]hile some success has been achieved in reducing court backlog and delay, this has not been universal. Accordingly, the objective of reducing court backlog and delays is as important now as it was in the late 1980s'.⁴⁰ Three years later, the report by the Auditor General into the *Management of Court Waiting Times* observed that, 'when compared with available information against the other Australian Supreme/District Courts, the operations in NSW compare unfavourably in terms of overall case finalisation times.'⁴¹ The Attorney General's Department recently reported that there have been enormous improvements in the management of court delays in NSW since 1995 and that these improvements are now bearing fruit, particularly in relation to criminal trials.⁴²

In this section, an overview of the current state of delays in the Local, District and Supreme Courts is undertaken. As the previous section highlighted, different statistics and information gathered and presented by various bodies can be referred to for an understanding of the current status of delays. Rather than presenting all the various statistics as published by the courts, the interpretation of them by relevant bodies, including the courts, the Attorney General's Department and the Audit Office will be referred to. Some basic statistics such as median delay statistics and caseload information are included. The most recent information publicly available, in relation to each court, has been relied on. The lack of uniformity in the information presented in relation to each of the courts reflects the inconsistencies in information available.

³⁸ Weatherburn and Baker, n 14, p 7. Note that the Australian Law Reform Commission conducted empirical research of delays in the Family Court, the Federal Court and the AAT for its discussion paper on the Review of the Civil Justice System: 'Court delays: *Law Institute Journal*, 73 (6) 1999, p 50.

³⁹ Coopers & Lybrand, n 2.

⁴⁰ PAC, n 10, p 22. Note that Briefing Paper No 31/96, n 3, contains an overview of court delay at that time, pp 5-9.

⁴¹ Audit Office (1999), n 8, p 3. Note that these reviews and reports are examined in further detail in Section 5.2.

⁴² Attorney General's Department (Submission to PAC), n 7, p 4.

3.1 Local Court

The Local Court sits in 158 locations across NSW and delays vary from location to location.⁴³ The Local Court is the court of general access in NSW, with jurisdiction to deal with many different matters. Those matters include: the vast majority of criminal and summary prosecutions; civil matters with a monetary value of up to \$40,000; committal hearings; some family law matters; children's criminal and care matters; juvenile prosecutions and care matters; and coronial inquiries.⁴⁴

There has been an overall increase in the caseload of the Local Court over the past few years and the work of the Court continued to increase in 2000. There was also an overall increase in delays in 2000. The Local Court has identified the Olympics as the main cause of this increase:

The Olympics had a two-fold effect on the work of the [Local] Court during the latter part of the year. The diversion of police resources to Olympic-related activities resulted in a drop in criminal matters coming before the Court during and after the Games period. There was a reduction in criminal hearings during the same period due to the fact that many police were not available to give evidence. The overall impact may be that there will be longer delays in some courts during 2001.⁴⁵

The *2001 Follow-Up Audit* also noted that the number of matters handled by the Local Court has increased since 1999, and that the average time delay has increased by one week since 1999.⁴⁶

Criminal jurisdiction

The criminal jurisdiction deals with approximately 98% of all criminal prosecutions in NSW. Criminal trials in the Local Court are not as complex as trials in the District and Supreme Courts. Proceedings are therefore usually shorter in the Local Court than proceedings in the higher courts and delay periods correspondingly shorter. The demand on the criminal jurisdiction has increased by 22% during the last 5 years.⁴⁷ In 2000 there were 266,769 new matters, an increase of 0.27%, from the previous year.

⁴³ Local Court of NSW, Annual Review 2000, p 2 and Local Court of NSW, Annual Review 1998, p 9.

⁴⁴ For further information about the Local Courts, see the Courts' web page at: www.lawlink.nsw.gov.au/lc.nsf/pages/index (accessed 7/10/01).

⁴⁵ Local Court (2000), n 43, p 2. See also Audit Office (2001), n 8, p 28 and 'Games shutdown slows justice to snail's pace', *The Sydney Morning Herald*, 8/6/01, p 6.

⁴⁶ Audit Office (2001), n 8, p 28. The Court received some negative press as a result of the Follow up Report: 'NSW local courts still dragging the chain', *The Australian Financial Review*, 21/9/01, p 59.

⁴⁷ Local Court (2000), n 43, p 2.

In early November 2001, the Attorney General, Hon Bob Debus MP, noted that '[t]he Local Courts finalise 94% of criminal matters in less than six months, which is better than the national average – an achievement that has been repeated two years in a row.'⁴⁸

BOCSAR recently reported that the Local Court median delay statistics for 2000 present a 'mixed picture of delays' in the criminal jurisdiction of the Local Court, as there are both increases and decreases since 1999. The median delay in relation to persons on bail has generally risen in 2000 compared with 1999, while there has generally been a decrease in the median delay where the person has been in custody, as shown in **Table A**.

Table A. Median delay from first appearance to determination (in days)⁴⁹

	Median delays for 1999	Median delays for 2000
Persons on bail		
Defended hearing	82	84
Where all charges were dismissed	94	104
Where defendant was found guilty of at least one charge	71	72
Persons in custody		
Defended hearings	27	13
Where all charges were dismissed	56	50
Where defendant was found guilty of at least one charge	21	7

Civil jurisdiction

The Attorney General's Department Annual Report for 1999/2000 noted that there was a decline in the caseload of the civil jurisdiction during that financial year:

[t]here has been a decline in workload in the civil claims jurisdiction once again this year. This has been a continuing trend since 1995-96, with a total reduction of 24 percent of matters finalised in the Small Claims Division and 2 per cent in the General Division since that time. The lower number of matters proceeding to hearing reflects improved case management and the use of diversionary procedures for civil claims, such as providing the parties with access to specialist assessors.⁵⁰

The Local Court's *Annual Review 2000* noted that there were no civil listings during the Olympics and that this had the effect of extending delays in the Civil Jurisdiction.⁵¹ However, the Chief Magistrate of the Local Court, Patricia Staunton, stated that overall the court dealt with civil cases in 2000 in a 'timely manner' and that with careful case management, the backlog of cases is expected to be cleared during 2001.⁵² The Review also states that for the first time in several years, the Local Court at the Downing Centre was able to hear fully contested day-long cases within ten months of the filing of the Statement of Claim.⁵³

⁴⁸ NSWPD, Hon Bob Debus MP, Attorney General, 8/11/01, p 18250.

⁴⁹ Information taken from Doak, n 11, p 4.

⁵⁰ Attorney General's Department (Annual Report 1999/00), n 26, p 30.

⁵¹ Local Court (2000), n 43, p 11.

⁵² *ibid*, p 5.

⁵³ *ibid*, p 12.

3.2 District Court

The District Court is the intermediate court in NSW. It handles most of the serious criminal cases that come before the NSW courts, with responsibility for indictable criminal offences ie, serious criminal offences (except treason, piracy and murder) which are normally heard by a judge and jury but on occasions by a judge alone.⁵⁴ The District Court also handles civil cases where the amount being claimed is up to \$750,000. The Court can deal with cases where larger amounts are involved if the parties to the case agree. The Court deals with certain types of equitable claims or demands for recovery of money or damages to a maximum amount of \$750,000. The Court has an unlimited jurisdiction in claims for damages for personal injuries arising out of a motor vehicle accident. The Court also has jurisdiction to deal with cases under a number of Acts including the *Property Relationships Act 1984*, the *Family Provision Act 1982*, the *De Facto Relationships Act 1984* and the *Testator's Family Maintenance and Guardianship of Infants Act 1916*.⁵⁵ The Court's judges hear appeals from the Local Court and also preside over a range of administrative and disciplinary tribunals.

Generally, the Court has been successful in reducing delays in the criminal jurisdiction in the last few years and has maintained the level of delays in the civil jurisdiction with the median time from commencement to finalisation remaining steady since 1998.

Criminal jurisdiction

The Audit Office reported that since 1999, there has been a decrease in criminal matters (2,015 in 2000 compared to 2,479 in 1999) in the District Court.⁵⁶

The latest criminal court statistics for 2000, released by BOCSAR on 14 November 2001, show that the District Court has significantly reduced the delays from committal to outcome of criminal trials, which had been a feature of their operation in previous years.⁵⁷

For example, delays for trial cases where the accused was on bail fell significantly by 22.8%, from 434 days in 1999 to 335 days in 2000. However, where the accused was in custody there was a minor increase of 2% in median delay from committal to outcome, from 205.0 days in 1999 to 209 days in 2000.⁵⁸ **Figure 1** shows the *monthly trend* in median delay (in days), from committal to outcome, for criminal trials held in the NSW District Court from

⁵⁴ This information is taken from the District Court of NSW, see the Court's web site at: www.lawlink.nsw.gov.au/dc.nsf/pages/index (accessed 7/11/01).

⁵⁵ *ibid.*

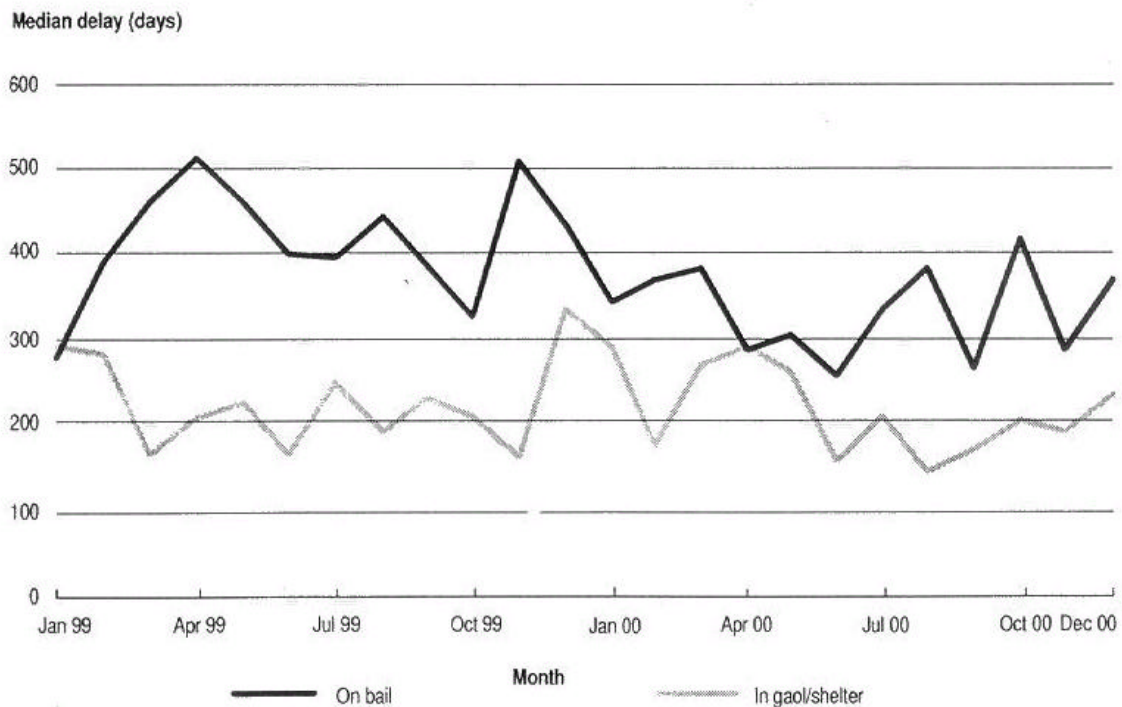
⁵⁶ Audit Office, n 8, p 24.

⁵⁷ BOCSAR (Media Release), n 37.

⁵⁸ *ibid* and Doak, n 11, p 3. Note that median delays for trial cases where the accused is held in custody are generally shorter than delays where the accused is on bail.

January 1999 to December 2000.

Figure 1.⁵⁹ District Court – Median delay committal to outcome, monthly 1999-2000



Civil jurisdiction

In September 2001, the Audit Office reported that since 1999, there has been an increase in the number of civil matters handled by the Court (15,070 in 2000 compared to 14,621 in 1999).⁶⁰ The District Court's *Annual Review 2000* similarly reports that the civil caseload continued to rise in 2000.⁶¹

The *Annual Review 2000* reports that despite an increase in the court's jurisdiction, which produced a significant rise in new cases and inflated the number of cases awaiting finalisation, the court managed to contain delays.⁶² It reports that: 'the median time from commencement to finalisation for dispositions in 2000 was 11.5 months. This is almost the same as 1998 and 1999, but far better than 1997 which was 15.7 months.'⁶³

⁵⁹ This graph is reproduced from Doak, n 11, p 2.

⁶⁰ Audit Office (2001), n 8, p 24.

⁶¹ District Court, n 25, p 2.

⁶² *ibid*, p 26.

⁶³ *ibid*.

The *Annual Review 2000* also reports that in 2000, 54% of all completed actions were finalised within 12 months and 90% were finalised within 24 months. This compares with 57% of all completed actions finalised within 12 months and 90% finalised within 24 months in 1999.⁶⁴

3.3 Supreme Court

The Supreme Court is the highest court in NSW. It has unlimited civil jurisdiction and handles the most serious criminal matters and appeals.⁶⁵ The Audit Office recently reported that since 1999, the number of cases commenced in the Supreme Court has remained static (33,191 in 2000 compared with 33,228 in 1999). It also reported that the number of matters finalised has increased from 31, 437 in 1999 to 34,191 in 2000.⁶⁶

The Supreme Court appears to have had some success in reducing delays in the past few years. The Chief Justice of the Supreme Court, the Hon JJ Spigelman AC reported in the court's *Annual Review 2000* that: '[o]ver the course of the year, the Court had made progress in reducing delays. This was made possible by additional resources in the form of two new Judges...as well as significant funding for acting judges.'⁶⁷

Criminal List (Common Law Division)

In the criminal list, there were 123 new filings during 2000, compared to 110 in 1999, 124 in 1998 and 119 in 1997.⁶⁸

In the 1999/2000 financial year the Attorney General's Department reported that median waiting times for criminal trials in the Supreme Court have been reduced for cases where the accused is in custody and also for cases where the accused is on bail.⁶⁹ This is supported by latest statistics released by BOCSAR.

The latest criminal trial statistics released by BOCSAR on 14 November 2001 show an overall picture of significant reduction in delay from the date of committal to date of

⁶⁴ *ibid.*

⁶⁵ For further information about the Supreme Court of NSW, see the Court's web site at: www.lawlink.nsw.gov.au/sc/sc.nsf/pages/index (accessed 7/11/01). Note that the Court of Appeal and Court of Criminal Appeal are not examined in this paper. The Court of Appeal and Court of Criminal Appeal hear appeals from decisions made in most of the Courts of NSW and from decisions made by a single judge of the Supreme Court.

⁶⁶ Audit Office (2001), n 8, p 20.

⁶⁷ Supreme Court (2000), n 12, p 3.

⁶⁸ *ibid.*, pp 17-18.

⁶⁹ Attorney General's Department (Annual Report 1999/00), n 26, p 32.

outcome in the Supreme Court from 1999 to 2000.⁷⁰ The reductions apply to both defendants on bail (an overall reduction of 13.7%) and to those in custody (an overall reduction of 8.5%).⁷¹ For example, delays from committal to trial for accused persons on bail fell 13.7%, from 632 days in 1999 to 546 days in 2000.⁷² **Table B** shows the median delay, from committal to outcome in days for criminal trials in the Supreme Court for 2000 compared with 1999.

Table B. Median delay, committal to outcome (days) in the Supreme Court⁷³

	Median delays for 1999	Median delays for 2000
PERSONS ON BAIL		
On bail, proceeded to trial	632.5	546.0
Acquitted of all charges	535.0	467.0
Found guilty of at least one charge	637.0	564.5
On bail, proceeded to sentence only	439.0	419.5
PERSONS IN CUSTODY		
In custody, proceeded to trial	405.5	371.0
Acquitted of all charges	346.0	284.0
Found guilty of at least one charge	457.0	453.0
In custody, proceeded to sentence only	405.0	352.0

As there are only a small number of trials held in the Supreme Court each year (eg 62 in 2000), the median delay figures can be very volatile from month to month, therefore it is useful to look at quarterly figures.⁷⁴ **Figure 2** shows the quarterly figures for median delays from the date of committal to the date of the outcome for both defendants on bail and those in custody from March 1999 to December 2000.⁷⁵

⁷⁰ BOCSAR, Media Release, n 37.

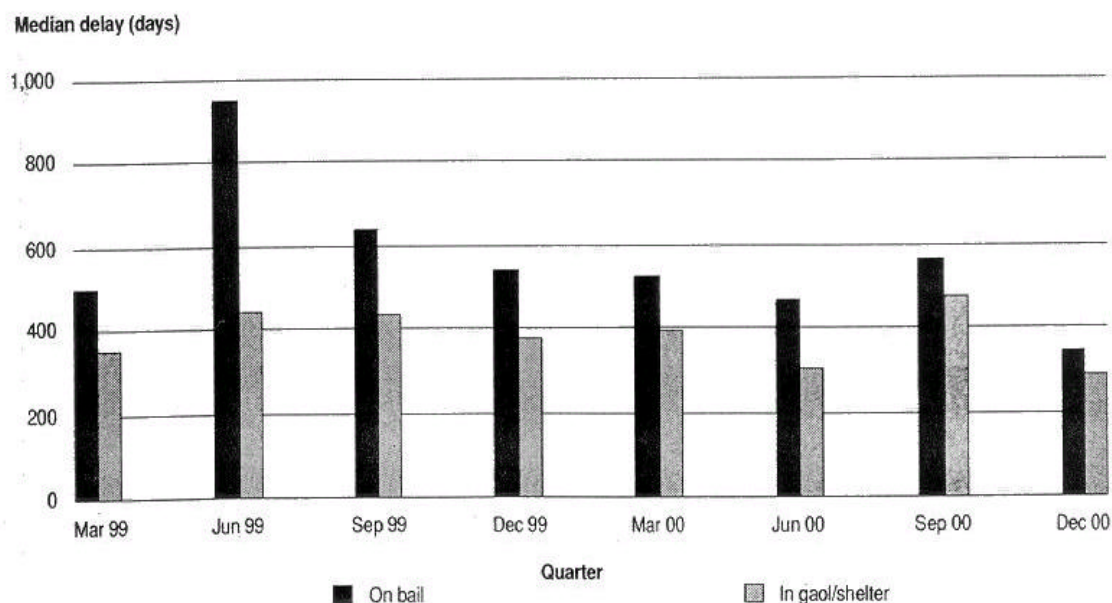
⁷¹ Doak, n 11, p 2.

⁷² BOCSAR, Media Release, n 37.

⁷³ BOCSAR (Criminal Court Statistics (2000)), n 13, 85.

⁷⁴ Doak, n 11, p 1.

⁷⁵ *ibid.*

Figure 2.⁷⁶ Supreme Court - Median delay committal to outcome, quarterly 1999-2000

In the *Annual Review 2000*, it was noted that: '[t]he continued reduction in waiting time for criminal trials has been achieved through increased allocation of judicial resources to criminal trial work and the number of early pleas encouraged by the new arraignment procedure, along with prudent listing of back-up trials, which permit more effective use of the allocated judicial time.'⁷⁷

Civil Matters (Common Law Division)

Broadly, the court's civil matters caseload has stabilised since the significant drop in filings during 1997/98. 4,177 cases were commenced in 2000 compared to 3,817 in 1999.⁷⁸

The *Annual Review 2000* contains details of the median delay for civil cases in specialist lists for 2000 (reproduced in **Table C**). This is the first time details of median delays in the civil list have been published by the Court. Unfortunately, without similar statistics for the previous year it is hard to draw meaningful conclusions.

⁷⁶ This graph is reproduced from Doak, n 11, p 2.

⁷⁷ Supreme Court (2000), n 12, p 25.

⁷⁸ *ibid*, pp 17-18.

Table C.
Median delay for civil cases in specialist lists from commencement to final disposal (in months)⁷⁹

	2000
Administrative Law list	6.3
Defamation List	30.2
Professional Negligence List	49.2
Possession List	
- Default	6.8
- Defended	4.1

In its 1999/2000 Annual Report, the Attorney General's Department reported that the 'significant improvements made over the last two years for civil cases have been maintained and apply to all matters regardless of the length or complexity of the case. For all cases, once ready to proceed to hearing, the time taken for a hearing date to be allocated is less than two months.'⁸⁰

⁷⁹ This table is extracted from the Supreme Court (2000), n 12, p 27.

⁸⁰ Attorney General's Department (Annual Report 1999/00), n 26, p 32.

4. CAUSES OF COURT DELAY

There are multiple causes of delay that can occur at various stages of court proceedings. In relation to a particular court or part of a court's jurisdiction, one or more causes may be more or less significant. It is important to note also that the courts have varying degrees of control over many of these factors and no control over some. A few of the more identifiable causes of delay are examined in this section under broad headings, some of which overlap.

4.1 Caseload

A significant growth in the demand for court hearings was noted in 1989 and this trend has generally continued, with a few ups and downs, during the intervening years.⁸¹ Increases in a court's caseload will impact on delays if the court's resources are not sufficient to efficiently process the increased number without delay. Sudden and unpredictable rises in new cases are particularly difficult to cater for. Some of the factors contributing to changes in a court's caseload are noted below.

- *Changes in population levels in suburban and rural areas* (mainly effects the Local Court).
- *The crime rate.*
- *Police numbers.* In its 1996 report the PAC noted that 'every time the Government provides additional police resources in response to a "law and order campaign" more work is generated for the courts'.⁸²
- *Availability of legal aid.*
- *Changes in jurisdiction of the courts.* For example, 3077 civil matters were transferred from the Supreme Court to the District Court following its increase in jurisdiction in 1997.⁸³ The jurisdiction of the Local Court was also increased in 1995 through the passage of the *Criminal Procedure (Indictable Offences) Amendment Act 1995* leading to increased caseload for the Local Court, causing delays.⁸⁴

⁸¹ Coopers and Lybrand, n 2, p ii.

⁸² PAC, n 10, 13.

⁸³ Attorney General's Department (Annual Report 1999/00), n 26, p 26.

⁸⁴ Local Court of NSW, *NSW Chief Magistrates Review 1995*, p 6. Following the implementation of the *Criminal Procedure (Indictable Offences) Amendment Act 1995*, the prosecution or the defendant could elect whether serious indictable matters should be dealt with to finality in the District Court or the Local Court (this discretion formerly rested with the presiding magistrate. In addition, the range of offences that could be dealt with by the Local Court was increased. This led to an increase in the caseload of the Local Court. The fact that this Act increased the caseload of the Local Court and contributed to delays is noted in subsequent Annual Reviews.

- *Policy changes.* For example, the substantial increase in criminal prosecutions in the Local Court in 2000 has been attributed to the significant number of serious and complex prosecutions being confined to the Local Court as a result of the deliberate policy by the DPP to use the Local Court jurisdiction wherever possible as an alternative to committal to the District Court.⁸⁵
- *The general litigiousness of the community.* People are becoming more aware of their rights and a more litigious culture is developing. In May 2001 it was reported that ‘more people than ever are resorting to US-style civil law suits to solve minor disputes’, causing a significant rise in cases brought before the District Court.⁸⁶ Whether parties settle civil disputes or utilise ADR methods also contributes to the caseload of courts.
- *Changes in law.* For example, legislative amendments expanding the areas in which domestic and personal apprehended violence orders can be made and providing for a more pro-active role for police officers in seeking orders on behalf of people in need of protection lead to a substantial increase in the caseload of the Local Court over several years.⁸⁷ Changes this year to common law rights regarding medical negligence and workers compensation lead to a notable increase in common law claims.⁸⁸

4.2 Duration of hearings

A rise in case durations, particularly through the increasing *complexity* of cases has also impacted on delays. The effect has been felt in all three courts as the following examples show.

- The introduction of the *Criminal Procedure (Indictable Offences) Amendment Act 1995*, saw greater complexity and seriousness in prosecutions before the Local Court and the effect of this amendment in increasing delays was still being felt by the Court five years later.⁸⁹
- BOCSAR considered increases in the average duration of hearings when identifying the overall demand for court time in the criminal jurisdiction of the District Court.⁹⁰

⁸⁵ Local Court (2000), n 43, p 10.

⁸⁶ ‘How Ally is choking our court system’, *The Daily Telegraph*, 25/5/01, p 2.

⁸⁷ See for example, Local Court of NSW, *Annual Review 1997*, p 5.

⁸⁸ Attorney General’s Department (Submission to PAC), n 7, p 36.

⁸⁹ Local Court of NSW, *NSW Chief Magistrate’s Review 1996*, p 4 and Local Court of NSW, *Annual Review 1999*, p 15.

⁹⁰ New South Wales Bureau of Crime Statistics and Research, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court*, by Weatherburn D and Baker J, 2000, p 6.

- The Attorney General’s Department recently noted a trend toward more complex and longer cases in the District Court which ‘presents listing challenges for the court as there are fewer shorter cases which can be commenced mid week as judges finish other cases.’⁹¹ The Department also noted that ‘[t]he increasing complexity of commercial transaction, arising from developments in technology and increased globalisation, is proportionately apparent in the disputes that can arise.’⁹²
- In 1996, in the context of delay reduction, the Supreme Court noted that ‘[e]xceptionally long civil matters such as *Nutrasweet* and *Chelmsford* and criminal matters such as *Milat* and *Mris* have placed further pressure on these [judicial] resources’.⁹³

Other factors that may lengthen hearings include:⁹⁴

- The failure or inability of the parties to define or narrow the issues before the trial, so that time is spent during the trial identifying the issues genuinely in contention.
- Insufficient or inadequate preparation of cases.
- Insufficient or late service of statements of witnesses and exhibits.
- *Legal aid funding*. Trials in which the defence was funded solely from private sources tend to be shorter than those funded by legal aid alone or a combination of legal aid and private sources.
- *Lack of legal representation*. Cases in which the accused or the litigants are unrepresented tend to be longer than cases involving legal representation.
- *Number of parties*. Criminal trials with multiple accused persons, and civil trials with a number of plaintiffs and/or defendants, are said to take longer. Trials tend to take longer where there are a large number of witnesses.
- *Number and type of charges*. The practice of over-charging accused persons (that is, laying the maximum number of the most serious charges possible, rather than laying selected charges that represent the criminality of the accused’s conduct) is said lengthen trials. Criminal cases where the charges relate to drugs, fraud, or conspiracy tend to take longer than other cases.
- The complexity of many of the rules of *evidence*, and restrictions placed on the presentation of evidence. Interruptions of the trial due to the need for evidentiary

⁹¹ Attorney General's Department (Submission to PAC), n 7, p 34.

⁹² *ibid.*

⁹³ Supreme Court of NSW, *Annual Review 1996*, p 14.

⁹⁴ Briefing Paper No 31/96, n 3.

rulings, and the holding of examinations on the voir dire (ie a trial within a trial where the admissibility of evidence or the competency of a witness or juror is examined).

- The use of *juries* is said to increase the length of trials, particularly complex fraud cases, due to difficulties in explaining complex commercial transactions or technical evidence; difficulties in keeping juries focussed on many issues; the need to explain and repeat matters which would require no explanation to a judge; and the need to remove the jury during a voir dire.

4.3 Resource issues

A lack of court resources is one of the more obvious factors that contribute to delays. In evidence to the PAC in 1996, the then Chief Judge of the Supreme Court, the Hon Murray Gleeson AC, stated that the *principal* cause of delay is the mismatch between the caseload of the court and the resources that are made available to it.⁹⁵ More recently, the Chief Magistrate of NSW, Patricia Straunton noted in the Local Court's *Annual Review 2000* that: '[i]n some parts of the State the timely disposition of Court business continues to be hampered by lack of sufficient court room and associated facilities.'⁹⁶

All of a court's resources are relevant in this context, including, the number of judicial officers and courtrooms, staffing levels, the availability and provision of interpreter services,⁹⁷ IT, and custody venues. Resource issues differ among courts and within the various areas of a court's jurisdiction. Some resource matters are ongoing while others arise from time to time. An example of a specific resource issue was highlighted by the NSW Bar Association in January this year, when it warned that the lack of daily transcripts in the District Court was reaching crisis point and that 'delays caused by this transcript arrangement have been notorious for years...'⁹⁸ Insufficient resourcing of the DPP and the Legal Aid Commission of NSW (**'Legal Aid'**) has also been identified as a potential contributor to delays.⁹⁹ In regard to Legal Aid, under-resourcing can increase waiting times for the processing of applications for Legal Aid, and delays in the preparation of cases by Legal Aid.

However, as noted in the *1989 Review*, it would be an oversimplification to argue that the cause of delay could be assigned to a shortage of resources compared with demand.¹⁰⁰ Other variables effect the ability of a court's resources to meet demand and these variables also represent other causes of delay. Some of these are examined in the following subsections.

⁹⁵ PAC, n 10, p 15.

⁹⁶ Local Court (2000), n 43, p 2.

⁹⁷ As noted in PAC, n 10, p 20.

⁹⁸ 'Judges feel the strain of too much writing', *The Sunday Telegraph*, 7/1/01, p 27.

⁹⁹ BOCSAR (2000), n 90, p 6.

¹⁰⁰ Coopers and Lybrand, n 2, p 70.

Inefficient management of court resources can also contribute to delay. For example inefficiently structuring sitting days and judicial vacations may mean that time that could have been spent on hearing cases is wasted.

4.4 Party delays

There are many ways in which the parties themselves may contribute to delay. Potential for parties to contribute to delays occurs mainly at the pre-trial or 'preparation' stage but can also occur during a trial.

Preparation: For example, the failure of parties to get their case ready for trial as soon as reasonably possible lengthens the duration of a case. Parties may be slow in following pre-trial procedures or preparing for trial, due to inefficient work practices, unforeseen circumstances or the nature of proceedings. For example, the prosecution may take a long time to draw up the indictment after the accused is committed for trial or there may be extended interlocutory proceedings and appeals from interlocutory orders.

Trial tactics: It may also be in the interest of a party to have a case delayed. For example, the memories of witnesses giving evidence detrimental to their case may fade or financial pressure may cause the other party to withdraw from civil cases. Therefore, it may be part of the 'trial tactics' of a party to seek to cause delays, or at least do nothing to prevent delays occurring. In this regard, the Chief Judge of the District Court, the Hon RO Blanch, stated in the court's *Annual Review 2000* that: '[t]he experience of the Court is that there are some accused facing trial who will adopt every device possible to avoid coming to trial. It is necessary in the interest of justice and the community for such tactics not to succeed.'¹⁰¹

Late guilty pleas: There appears to have been a rise in the incidences of late pleas of guilty in criminal jurisdictions which is having a detrimental effect on the listing processes of the courts, causing delays. Late guilty pleas have been identified by BOCSAR as a major factor is causing delays in the District Court's criminal jurisdiction, as discussed in Section 4.6. Similarly, in the Local Court's *Annual Review 2000*, the Chief Magistrate, Patricia Staunton, noted the increase of late guilty pleas and the impact of this practice:

The most challenging aspect of judicial administration within the Local Court has been to manage the culture of dealing with late pleas of guilty. In recent years there have been many matters listed for hearing on the basis of a plea of not guilty. On the day appointed for hearing, a significant number of these turn into pleas of guilty. These last-minute plea changes have widespread consequences – inconvenience to witnesses, loss of valuable court time and delays to other cases waiting for hearing.¹⁰²

¹⁰¹ District Court (2000), n 25, p 2.

¹⁰² Local Court (2000), n 43, p 10.

Other ways that parties contribute to delay include:

- The failure of parties to narrow the issues in dispute at an early stage;
- The reluctance of parties to settle civil cases;
- Judge shopping - where a party seeks adjournments until their case is heard by a judge they believe to be more sympathetic to their case, or who imposes lenient sentences.¹⁰³
- Failure by an accused to secure legal representation, or securing or changing representation late in the day;¹⁰⁴ and
- A case may have to be adjourned because witness may be ill or may have to travel from far away (although this is not strictly the fault of the parties).¹⁰⁵

Note that the advent of the ‘case management’ approach (discussed in Section 5.3.2), has reduced the amount of control the parties themselves have over the conduct of cases and has had an effect on minimising party delays.

4.5 Court processes and legal procedures

Problems and inefficiencies with the court processes and legal procedures that dictate the passage of cases through a court can contribute to delays. As the PAC pointed out in its 1996 report, ‘[c]ourt processes and procedures which have developed over time are not necessarily compatible with modern efforts to reduce court backlogs and delays. In some instances they exacerbate the problem’.¹⁰⁶ One significant aspect of court process where delays can occur is the listing process, as outlined below. Other court processes and legal procedure issues are examined in Section 5.3.4 in the context of reform designed (in whole or in part) to reduce delays.

Listing procedures: ‘Listing’ is the process whereby cases that are ready to go to trial are allocated a hearing date by the court. Because of the volume of cases, and the difficulty of estimating the time necessary to hear a case, as well as other variables, the smooth operation of listing processes is precarious and may lead to delays. Where a case is not heard on the date listed, it must be re-listed. If another date is not immediately available, the case will be delayed. The time allocated to that case will be wasted unless another case can be brought forward to fill the gap.¹⁰⁷

¹⁰³ Briefing Paper No 31/96, n 3, p 11. In regard to judge shopping see: Weatherburn D and Lind B, ‘Sentence disparity, judge shopping and trial court delay’, *Australian and New Zealand Journal of Criminology*, 29 (2) August 1996, pp 147-165.

¹⁰⁴ *ibid* and Briefing Paper No 31/96, n 3, p 12.

¹⁰⁵ As noted in PAC, n 10, p 20.

¹⁰⁶ PAC, n 10, p 16.

¹⁰⁷ Court resources will also be wasted if the time estimated to a case is too long and another case cannot be brought forward to fill the gap.

A case may not proceed to trial on the day listed for a variety of reasons including:

- One or both parties may not be ready to proceed to trial;
- Settlement in a civil dispute may be reached before the trial date;
- Late changes of pleas in a criminal trial mean that a case may not be able to proceed;
- A trial may need to be re-heard due to a mistrial or a hung jury; and
- A case may not be ‘reached’ ie the court may not be able to hear the case even though both parties are ready because, for example, the courts have ‘over-listed’ (see below).

A BOCSAR study noted that in the District Court, each time a matter fails to proceed on the date it is listed for trial, substantial delays are added to the time it takes to dispose of the matter:

...matters which have to be listed for trial three times take over twice as long to finalise as those that are finalised on their first listing. By their third listing, matters are taking an average of nearly 600 days (or over a year and a half) to finalise from their date of committal. The effect of this is to increase significantly the average age of all matters that proceed to trial. This data indicates that there are significant problems with the listing process in the NSW District Court...¹⁰⁸

‘Over-listing’ presents an interesting dimension to the delay problem. Rather than risk wasting court resources when cases move more quickly than estimated, or where cases do not proceed to hearing on the allocated date, the courts have developed a practice of over-listing. Over-listing means that more cases are listed for a day than can be dealt with given the available judges and courtrooms in that week. If all cases are ready to be heard or some cases run for longer than expected, not all cases will be reached. Delays caused by over-listing were highlighted as a problem by the PAC, in 1996, in relation to the Local and Supreme Courts.¹⁰⁹ Weatherburn has noted that over-listing is also a problem in the District Court:

Like many courts concerned about the wastage of judge time, caused by late pleas and adjournments, the NSW District Criminal Court has succumbed to the temptation to over-list matters... While this is done to prevent wastage of court and judge time, the inherent week to week variability in the proportion of trial matters which proceed makes it impossible to choose an over listing quota which precisely and reliably offsets the attrition due to plea changes, adjournment and other reasons. The result is that trial matters are frequently not reached.¹¹⁰

¹⁰⁸ Weatherburn and Baker, n 14, p 12.

¹⁰⁹ PAC, n 10, p 18.

¹¹⁰ Weatherburn and Baker, n 14, p 20.

4.6 A BOCSAR analysis of delays in the criminal jurisdiction of the District Court

In 2000, BOCSAR conducted an empirical study of the causes of delay in the processing of criminal trial cases in the District Court.¹¹¹ The study found that while the level of delay decreased between 1991 and 1994, there had been a 23% growth in delay in the District Criminal Court from 1996 to 1999.¹¹² The study investigates the causes of this delay and represents a rare empirical analysis of court delay in NSW. The findings of the study are reviewed in this section to illustrate that the causes of delay are numerous and specific to the court and jurisdiction in question.

The study first examined whether the rise in delay could be attributed to the demand for court time and the court's capacity. It found that there had been an increase in the number of days allocated to hearing criminal matters since 1996 and that during that time there had also been an overall reduction in the demand for court time.¹¹³ The study also estimated that the court had sufficient capacity, or resources, to meet the demand on court time, concluding that on balance, the growth in delay could not be attributed to the demand for court time and the court's capacity.

Rather, the study found that inefficiencies in processing criminal cases, and specifically, the failure of matters to proceed to trial when listed, was the major contributor to delay. The study noted that a significant number of cases did not proceed to trial when first listed. Some cases were listed more than six times before finally coming to trial.¹¹⁴ The problem with multiple listing is that '[e]ach time a matter fails to proceed on the date it is listed, substantial delays are added to the time it takes to dispose of the matter.'¹¹⁵ A survey conducted as part of the study showed that where a case was re-listed for trial the average delay to the next trial listing was 2.5 months.¹¹⁶ The study identified three main reasons why cases failed to proceed to trial when listed.

1. The study identified *late guilty pleas*, whereby the accused changes his or her plea from not-guilty to guilty on the day of the trial, as the most common reason why matters did not proceed to trial. The study identified several reasons for the late entry of guilty pleas. The two main reasons were: that there was a late decision by the Crown to accept a plea to a lesser charge, another or fewer charges in full discharge of the indictment; and that the

¹¹¹ BOCSAR (2000), n 90. A paper based on the report (as well as additional research) was published in the *Journal of Judicial Administration* and has also been referenced previously in this paper: Weatherburn and Baker, n 14.

¹¹² Weatherburn and Baker, n 14, p 6.

¹¹³ *ibid*, pp 7-11.

¹¹⁴ *ibid*, p 11.

¹¹⁵ *ibid*, p 12.

¹¹⁶ *ibid*, p 13. The survey involved judges' associates and court staff and sought to examine the fate of all trial matters appearing before the District Criminal Court between 2 August and 1 October 1999.

counsel or advocate was not able to discuss the matter with the Crown until late in the process.¹¹⁷ The study also found that ‘...guilty pleas are most disruptive to the listing process when they occur on the day the trial is due to commence.’¹¹⁸

2. *Adjournments* were identified as the second most frequent cause. The study found that most adjournments were not granted until the day of the trial. Adjournments, and particularly late adjournments, disrupt the listing processes, because there may not leave sufficient time to organise a new date for trial.¹¹⁹ The most frequent reasons given by the defence for seeking an adjournment were difficulties with legal representation and the fact that further preparation was required. The most frequent reasons cited in the survey in relation to adjournment sought by the prosecution were that witnesses were unavailable and that further preparation was required.¹²⁰

3. The third most common reason for a criminal matter failing to proceed to trial on the day listed was *cases not being ‘reached’*. Not being ‘reached’ means that the court was not able to hear the case on the day listed because either too many matters were listed, there was no judge available or another matter ran longer than expected.¹²¹

¹¹⁷ Weatherburn and Baker, n 14, p 15.

¹¹⁸ *ibid*, p 13.

¹¹⁹ *ibid*, p 16. Note that the study also examined who is responsible for seeking the adjournment, and the reasons given.

¹²⁰ *ibid*, pp 17 and 18.

¹²¹ *ibid*, p 18.

5. DEALING WITH COURT DELAY

Section 4 highlighted that there are many factors that contribute to court delays. Because of the number and diversity of those factors, addressing the problem of court delay is not straightforward. This section reviews some of the myriad of measures adopted to deal with court delay. First, by way of background, four contextual issues are examined.

5.1 The context of dealing with delay

No legal right to have cases heard without delay

There is no legal right, under common law or legislation, to have court proceedings conducted within a reasonable amount of time, in any Australian jurisdiction. The International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory, states that in the determination of any criminal charge everyone shall be entitled 'to be tried without undue delay.'¹²² This right has not been enacted in any domestic Australian legislation. While the common law recognises the right to a *fair* criminal trial in NSW, there is no specific right to a trial without unreasonable delay separate from the right to a fair trial.¹²³

It does not seem likely that a statutory right to a criminal trial without undue delay will be enacted in NSW, least of all within the framework of a Bill of Rights.¹²⁴ In determining that it would not be within the public interest to enact a statutory Bill of Rights in NSW, the Standing Committee of Law and Justice touched on the issue of a right to a criminal trial without undue delay. It noted that the incorporation of a right relating to unreasonable delay in criminal trials in the Canadian Charter of Rights and Freedoms had some interesting consequences:

In *R v Askov*, the Canadian Supreme Court had ruled that the applicant had not been given a trial within a reasonable time. The result of this case was that charges against 34,000 people in Ontario were dropped because their cases could not be held within reasonable time. An additional \$39 million was allocated to the Ministry of the Attorney General to reduce delays in the court system.¹²⁵

¹²² ICCPR (New York, 19 December 1966), Article 14(3)(c).

¹²³ *Jago v District Court of NSW* (1989) 168 CLR 23 (High Court). However, in a small number of cases of undue delay in a criminal trial, courts have asserted a power to stay a proceeding to prevent injustice to an accused in certain circumstances. For further information of the power to stay proceedings to prevent injustice to the accused due to undue delay see: *The Laws of Australia*, The Law Book Company, Vol 11.6 ¶ [44] - [45].

¹²⁴ A right to a trial without unreasonable delay has been recognised in other countries with 'Bill of Rights' type enactments such as the USA and Canada. The 6th Amendment to the US Constitution states that, among other things, 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial'. S 11(b) of the *Canadian Charter of Rights and Freedom* states that, among other things, any person charged with an offence has the 'right to be tried within a reasonable time'.

¹²⁵ NSW, Parliament, Standing Committee on Law and Justice, *A NSW Bill of Rights*, Report

Recognition of the importance of the timely provision of justice

Despite there being no legal right to have court proceedings dealt with without unreasonable delay, all stakeholders in the legal system have long recognised the importance of reducing delays. As noted by the Chief Justice of the Supreme Court, the Hon JJ Spigelman AC, ‘the ability of courts to ensure the efficient and expeditious disposition of proceedings has been at the forefront of judicial administration for many years.’¹²⁶ The reduction of delays is an overriding concern for all courts and permeates much of the court management and administration initiatives undertaken by them.

Similarly, court delay has been a concern for successive NSW Governments. Several reviews and inquiries have been undertaken to identify why delays occur, and to explore measures to deal with delay (see Section 5.2). One of the primary goals of the Attorney General’s Department of NSW, in relation to its responsibility for administering and supporting the NSW court system is to ‘...promote the *earliest*, most effective and efficient resolution of criminal matters and civil disputes’ (emphasis added).¹²⁷

In its 1998 *Access to Justice* report (*‘Access to Justice Report’*), the Law Society of NSW set out the ‘fundamental principles’ that should inform and guide government’s, the courts and tribunals, and the legal profession in administering and participating in the NSW justice system. The principles include that a ‘fair, impartial, just and efficient legal system is a core requirement of justice’. More specifically the goal that ‘all disputes should be determined as quickly as possible’ is recognised.¹²⁸

Performance, accountability and judicial independence

Delays are generally examined as an indication of the *performance* of the court system ie, how well is justice being administered, can improvements be made? The core of the court system is made up of the judiciary, and the executive government in its role of funding and largely administering the courts.¹²⁹ While the variety of causes of delay illustrate that the problem is broadly based and that dealing with delay involves the entire court system (ie litigants, legal profession etc), accountability for delays rests primarily within this core. The

¹²⁶ Supreme Court (2000), n 12, p 2.

¹²⁷ Attorney General’s Department (Annual Report 1999/00), n 26, p 4. Note that the Department has a diverse range of functions pursuant to this role, including the provision of court registry services.

¹²⁸ The Law Society of NSW, *Access to Justice*, Final Report, December 1998, p 11.

¹²⁹ Note that the court registries are staffed by public servants, but the judicial officers who constitute the court, as well as deciding how individual cases will be heard and determined, either control or strongly influence the procedures and practices adopted by the registries: Chief Justice of the High Court of Australia, the Hon Murray Gleeson AC, ‘State of the Judicature Address,’ *Law Institute Journal*, December 2001, p 152.

accountability of the executive Government is well understood and outside the scope of this paper. Judicial accountability raises some issues that will be explored briefly here, before moving on to examine some of the measures adopted to reduce delays in Section 5.3.

The Chief Justice, the Hon JJ Spigleman AC has stated that '[p]erhaps the foremost challenge for judicial administration at the present time is to ensure that the requirements of accountability and efficiency remain consistent with the imperative of judicial independence'.¹³⁰ Similarly, the Chief Justice of Australia, the Hon Murray Gleeson AC noted that the 'performance' of the judiciary must be understood in the context of reconciling 'the requirements for accountability with the constitutional imperative of judicial

¹³¹ In regard to judicial independence the *1999 Audit* noted:

[j]udicial independence is the centre piece of any court system and the judiciary must, within the law, be individually and collectively independent in their decision making. However, the efficient management of the court facilities is distinct and separate from the judicial independence. There is a need for accountability and transparency in the management of our courts as in the rest of the public administration.¹³²

Chief Justice Gleeson addressed the issue of evaluating the performance of the courts in his State of the Judicature Address for 2000. He stated that accountability is attached to the courts, like all governmental institutions, and that this is appropriate so long as the mechanics of evaluation are not permitted to define the objectives of the courts. As to the method of evaluating court performance he emphasised that '[t]he starting point for any examination of performance is an understanding of the objectives of the person or institution whose performance is under scrutiny'.¹³³ In this regard he noted the *Statement of Principles of Independence of the Judiciary* in which it was declared that the objectives and functions of the judiciary include the following:

- (a) To ensure that all persons are able to live securely under the Rule of Law;
- (b) To promote, within the proper limits of judicial function, the observance and the attainment of human rights and

¹³⁰ Supreme Court of NSW, *Annual Review 1998*, p 1. For further information about other issues relating to judicial independence see: 'Cunningham H, (Ed), 'Fragile Bastion, Judicial Independence in the Nineties and Beyond', *Judicial Commission of NSW*, (1997). For further reading on the issue of judicial independence, performance and accountability see: the Hon JJ Spigleman AC, *Judicial Accountability and Performance Indicators*, paper prepared for the 1701 Conference: The 300th Anniversary of the Act of Settlement, Vancouver, British Columbia, Canada, 10 May 2001 and The Hon JJ Spigleman AC, *The New Public Management and the Courts*, Address to the Family Courts of Australia 25th Anniversary Conference 27 July 2001. These papers can be viewed at: http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/speeches_index. See also Lauwaars, FC, van der Doelen FCJ and Weimar A, 'Professional Quality: the Balance between Judicial Independence and Social Effectiveness, *Trema*, 20001, nr 4a (April), pp 43-48.

¹³¹ Gleeson, n 129, p 152. See also Local Court (2000), n 43, p 2.

¹³² Audit Office (1999), n 8, p 15.

¹³³ Gleeson, n 129, p 147.

(c) To administer the law impartially among persons and between persons and the State.¹³⁴

In other words, when it comes to ‘performance’, courts must be evaluated on the basis of all the things that they do, especially the important things they do, and not just on the basis of one issue such as delay. The Chief Justice of the Supreme Court has stated that ‘[t]he most important criteria by which the performance of the court must be judged are qualitative: the fairness of its processes and of its outcomes.’¹³⁵ The time taken to finalise proceedings must surely be part of this in terms of fairness and also outcomes.

5.2 Dealing with court delay in NSW

The issue of delays in the NSW court system has been a concern for many years. In 1976 the Law Reform Commission of NSW identified management problems contributing to delays in a working paper on the courts.¹³⁶ By the late 1980’s there was widespread criticism of delays in the court system, particularly in relation to criminal trials.¹³⁷ At that time various organisations and professional bodies involved in the administration of justice undertook inquiries, made submissions to the Government, and set up initiatives to address the problem. For example, the NSW Bar Association and the Law Society of NSW made submissions to the Government on methods of reducing court delay.¹³⁸ The courts also established several initiatives to deal with delay. In particular, the Delay Reduction Project was established in the Common Law Division of the Supreme Court and a package of changes to the District Court listing procedures were made effective in January 1989.¹³⁹

1989 - Review of the NSW Court System

The first major review of the issue of delays was undertaken in 1988/89, when the Greiner Government commissioned an independent review of the NSW court system.¹⁴⁰ The review was initiated ‘...in light of increasing public concern about delays and inefficiencies in the

¹⁴¹ The report made many recommendations relating to, broadly:

- Management information. For example, the introduction of improved management

¹³⁴ The Statement was adopted by Chief Justices of the Asia-Pacific region at Beijing in 1995.

¹³⁵ Supreme Court (1998), n 130, p 1.

¹³⁶ Coopers and Lybrand, n 2, p 71. See, Law Reform Commission of NSW, *Working Paper on Courts*, 1976.

¹³⁷ BOCSAR (2000), n 90, p 1.

¹³⁸ Coopers & Lybrand, n 2, p 6.

¹³⁹ *ibid.* For further information about this period see Coopers & Lybrand, n 2, pp 6-8.

¹⁴⁰ Coopers & Lybrand, n 2.

¹⁴¹ *ibid.*, p i.

- information systems for the courts;
- Caseflow management. For example, the continued development of case flow management initiatives;
 - Legal policy criminal. For example, the abolition of committal proceedings, or alternatively the introduction of a paper committal system and the introduction of audio or video recording of confessional evidence;
 - Legal policy civil. For example, the abolition of jury trial except in certain cases;
 - Resource allocation and utilisation;
 - Court reporting;
 - Organisation and management. For example, the establishment of a separate department of courts administration and the appointment of acting judges to help clear the criminal backlog; and
 - Reducing the backlog. For example, the introduction of a backlog reduction program and additional judges.¹⁴²

Many of these recommendations were subsequently adopted. For example, the audio recording of confessional evidence, the appointment of acting judges and a new Department of Courts Administration began operating in 1991 (although it later merged with the Attorney General's Department in April 1995).¹⁴³

Further reviews and initiatives

In 1994, a review of court services was undertaken by Andersen Consulting on behalf of the Department of Courts Administration. This report laid the foundations for the adoption of information technology consistent with the Case Management System (CMS) project.¹⁴⁴ In 1996, the Attorney General's Department engaged a consultant to develop an Information Technology Strategic Plan.¹⁴⁵

Audit Office of NSW – audit of the management of court waiting times

In 1999, the Audit Office of NSW conducted a performance audit on the management of court waiting times in the Local, District and Supreme Courts.¹⁴⁶ The Report was completed

¹⁴² *ibid*, p xv-xxxiv.

¹⁴³ BOCSAR (2000), n 90, p 1.

¹⁴⁴ PAC, n 10, p 10.

¹⁴⁵ *ibid*, p 11.

¹⁴⁶ The NSW Auditor-General is responsible for audits and related services under the *Public Finance and Audit Act 1983*, other NSW Acts and the Corporations Law. Performance audits provide independent assurance to Parliament and the public that government funds are being spent efficiently and effectively, and in accordance with the law. They seek to improve the efficiency and effectiveness of government agencies and ensure that the community receives value for money from government services. Where appropriate, recommendations for improvements are made. Every few years follow-up audits of past performance audit reports are undertaken. For information about the Audit Office of NSW, see the Office's web page at: www.audit.nsw.gov.au.

in September 1999 and a follow up audit was completed in September 2001.¹⁴⁷ A preliminary performance audit on the subject of court delays was conducted in 1995.¹⁴⁸ The 1995 audit was intended to be a review of the effectiveness of a program of reform to reduce delays arising out of the *1989 Review*. However the audit was curtailed because the reform process was incomplete (in 1996 the PAC conducted an inquiry on the basis of the 1995 audit as discussed below).

The *1999 Audit* reviewed the planning and internal control systems used by the NSW judicial administration, concentrating on managing court waiting times with a focus on the management processes of the courts.¹⁴⁹ The audit found that in comparison to other Australian jurisdictions, the Supreme and District Courts of NSW compared unfavourably in terms of overall case finalisation times. The Audit also found that the NSW court system lacked an adequate management framework and processes to deal with the issue of court waiting times, stating that:

...the court system in NSW does not possess a comprehensive management framework and, with some exception in relation to the District Court, there is a distinct lack of any reporting system in a management sense. There is little evidence of realistic objectives, forward plans, or clear definition of responsibilities for performance, and there have been few reviews of performance. There is no assessment of waiting times performance in relation to other measures of court performance.¹⁵⁰

The Audit Office acknowledged that the Attorney General's Department and the courts had taken steps to improve delays. However, it recommended that a more systematic approach to improve court waiting times was needed. The Report made several recommendations to assist the management of the courts including:

- Establishing standard time frames and targets for better identifying the causes of delays;
- Reporting performance against the time frames and targets;
- Better defining accountability where it was shared between the court committees and the Attorney-General's Department;
- Improving the quality of strategic plans; and
- Monitoring and reporting progress against strategic plans in reports to the public.¹⁵¹

The *2001 Follow Up Audit* found that the Supreme and District Courts have reported improvements in court waiting times since the *1999 Audit* and that those courts had also implemented most of the recommendations about improving the management of waiting times from the *1999 Audit*. In regard to the Local Court, the Report noted that 'progress

¹⁴⁷ Audit Office (1999), n 8 and Audit Office (2001), n 8.

¹⁴⁸ Audit Office of NSW, *Performance Audit Report: Department of Courts Administration – Management of the Courts, A Preliminary Report*, April 1995.

¹⁴⁹ Audit Office (1999), n 8, p 2.

¹⁵⁰ *ibid*, p 3.

¹⁵¹ Audit Office (2001), n 8, p 19.

had not been the same...with few changes in practices or performances.’¹⁵² In response the Attorney General’s Department pointed out that due to the timing of the report, significant developments in the Local Court had not been included in the Follow-Up Audit. It was noted in this context that that the newly released Local Court Strategic Plan for 2002-2005 incorporated many recommendations raised in the *1999 Audit*.¹⁵³

Inquiry’s by the NSW Parliament Public Accounts Committee

Pursuant to the *Public Finance and Audit Act 1983*, s 57(1), the PAC may conduct reviews or hold inquiries into matters raised in performance audit reports. The 1995 preliminary performance audit report mentioned above was the subject of a review by the PAC in 1996. The PAC found that while some success had been achieved in reducing court backlog and delay it had not been universal and that accordingly ‘...the objective of reducing court backlog and delays is as important now as it was in the late 1980’s.’¹⁵⁴ The PAC made several recommendations to improve court delays relating to: assisting first time users of courts; developing court charters and standards of service; information technology; funding for courts and other matters.

The PAC is currently inquiring into the issue of court waiting times in NSW in response to matters raised in the *1999 Audit* and the *2001 Follow Up Audit* (**‘the PAC Inquiry’**). The PAC has set the following terms of reference with respect to both civil and criminal matters heard by the Local, District and Supreme Courts of NSW:

1. Consideration of demand-related issues such as increasing civil litigation and the impact of the growing caseloads of other forums (such as the Administrative Decisions Tribunal);
2. Consideration of research findings concerning the causes of court delay;
3. A review of the procedures employed to manage court waiting times in NSW and consideration of the approaches used in other jurisdictions;
4. A review of the management information available in NSW courts; and
5. Any other relevant matters.

The submission period for the Inquiry is complete and public hearings were held on 6-7 December 2001. The PAC will present its findings and recommendations, in a report to be tabled in the Legislative Assembly, in the first half of 2002.

Reform initiatives by the courts and the Government

All through these inquiries and reviews, the courts themselves and the Government have undertaken reform measures, introducing new schemes, initiatives, practice notes etc designed to streamline their processes to facilitate the efficient and timely provision of

¹⁵² *ibid*, p 18.

¹⁵³ *ibid*, p 33.

¹⁵⁴ PAC, n 10, p iii.

justice. Some of these are mentioned in the following sections.

5.3 Measures to reduce delay

Like the causes of delay, the measures to reduce delay are numerous and no single measure will be sufficient to resolve the problem of delays. Some measures such as the court management and case management matters are broad in scope and ongoing, while others are designed to fix specific problems leading to delays and once implemented are complete. The categories used to group the measures in this section are broad and some measures will fit into more than one category. The summary of delay reduction initiatives in the Supreme Court contained in **Appendix D** illustrates these points.

5.3.1 Court management and managing the delay problem

Effective court management promotes the efficient and effective operation of all aspects of a court's business, including the expeditious resolution of cases. It also enables the courts to understand the extent and causes of delay and this is a crucial preliminary step to dealing with court delay. The *1999 Audit* emphasised that 'effective court management requires very close linkages between the judicial and administrative components of the courts.'¹⁵⁵ Several initiatives designed to improve overall court management have been implemented by the NSW courts and the Government. Some of these are described below.

Strategic planning

Attorney General's Strategic Framework for Courts: In 2000, the Attorney General's Department developed a *Strategic Framework for the Courts* to coordinate the many initiatives under way within or effecting the courts. The framework places all departmental court related initiatives within a single corporate planning framework. The purpose of the *Framework* is to provide a broad strategic framework for the future direction of NSW court services over a four-year period. The Framework sets out four key priorities, all of which are relevant in some way or another to court delays: implementation of electronic service delivery; procedural reform in the courts; improving court environments; and improving court management and administration. The Framework has been reported against every six months and is currently being revised.¹⁵⁶

Court Strategic Plans: The Local and District Courts have also set out their strategic approach to their operations. Generally, a strategic plan is a statement of a court's goals and how it intends to achieve those goals. As an aspect of court management and administration, strategic plans contribute to the overall improvement of a court. In relation to delays, a plan may incorporate the goals of achieving the efficient and effective resolution of cases, and may also incorporate matters such as the use of time standards, that relate to delays. The District Court published a strategic plan in 1995 - one of the first strategic plans developed by an Australian court. The plan included the goal of 'case management – to discharge the court's responsibilities in an orderly, cost effective and expeditious manner (emphasis

¹⁵⁵ Audit Office (1999), n 8, p 17.

¹⁵⁶ Attorney-General's Department (Submission to the PAC), n 7, p 4.

added).¹⁵⁷ The Local Court's first strategic plan was released in July 1997, and its plan for the next four years has recently been finalised.¹⁵⁸ The new plan incorporates:

...time standards for the completion of civil and criminal matters which will soon be adopted, providing clear objectives and measurable outcomes that will allow the work of the Court to be more objectively reviewed and evaluated on an ongoing basis. New practice notes, detailing case management procedures in both criminal and civil matters, and a guide to best practice standards for magistrates are adopted as part of the plan.¹⁵⁹

The *1999 Audit* noted with approval the development of strategic plans by the Local and District Court. It recommended their continued use (with improvements) and recommended that the Supreme Court should adopt a strategic plan.¹⁶⁰ The Follow-Up Report noted that the Local and District Courts now measure achievements against the plan in their Annual Reviews, as recommended by the 1999 report.¹⁶¹

Managing information

The *1999 Audit* found that there was a lack of information available to establish the cause of delays. It identified a lack of information about resource utilisation, processing efficiency, compliance with time standards at different stages, and a lack of an 'integrated information system to identify, examined and manage waiting time problems and evaluate initiatives taken to improve.'¹⁶² The report recommended that 'a hierarchy of performance information is needed (on contributory factors to waiting time) in a simple management information system.'¹⁶³ Since then there have since been vast improvements in the collection and reporting of information about delays and progress in this area continues.

The Attorney General's Department is undertaking several initiatives to improve the management of information:

- The *Model Key Performance Indicators* (described below) are designed to improve the information use by the courts to inform decision making.
- *Courts Information System*, of which the KPIs form a part, is being developed to provide management information for the courts, as well as all areas of the Department.

¹⁵⁷ The Court's second plan was recently published: District Court (2000), n 25, p 1.

¹⁵⁸ See Local Court (2000), n 43, p 9, for details of the strategic plan.

¹⁵⁹ Audit Office (2001), n 8, p 33. Many of these were recommended by the *1999 Audit*.

¹⁶⁰ Audit Office (1999), n 8, pp 5-6. The 2001 Audit reported that instead of a strategic plan, '...each year the Chief justice outlined his strategic direction for the Court, including time standards for the disposition of matters which are adopted by the Policy and Planning Committee for monitoring and reporting purposes': Audit Office (2001), n 8, p 23.

¹⁶¹ Audit Office (2001), n 8, pp 27 and 30.

¹⁶² Audit Office (1999), n 8, p 4.

¹⁶³ *ibid.*

A customised software package for the courts is being developed to ‘provide milestone management and statistical information and reporting facilities, allowing the courts and the Department to identify reasons for delays, and to plan and manage more effectively the caseload and resources of the courts.’¹⁶⁴ The package is expected to be ready for implementation in the Supreme Court in the second half of 2002 and in the Local and District Courts in 2003.

- Work on the reporting of data within the Department and to stakeholders (ie the courts), with particular improvements in the reporting of performance information for the management of the Local Courts.

Management Performance Measurement – Model KPIs

The most significant recent development in court management in NSW has been the development of ‘Model Key Performance Indicators’ () for NSW courts.¹⁶⁵ The KPIs were developed by the Attorney General’s Department in conjunction with the Justice Research Centre to improve the management information available to the courts. They are designed to assist the NSW courts meet increasing demands, to manage their resources more efficiently and to be publicly accountable for their performance by improving the information they use to inform decision making. The aim is to ‘produce, using the fewest statistics possible, the simplest, clearest, most comprehensive picture possible of how well the Courts were performing, in terms relevant to the operational needs of their managers but also addressed to the interests of a wider public.’¹⁶⁶ Monthly reporting against the KPI’s will provide court administrators with an important tool for managing improvements in court delays. There are four simple performance indicators:

- 1) Backlog identifies the number of pending cases that are taking too long compared with a court’s *time standards*. Relates directly to a court’s performance against its case processing time standards.
- 2) Overload identifies the number of pending cases in excess of the number a court can expect to process within time. Relates the size of a court’s *caseload* to its *time standards*.
- 3) Clearance ratio identifies the ratio of the Court’s *new registrations* to the number of *finalisations*. Relates to the court’s caseload capacity.
- 4) Attendance Index identifies the number of cases where there has been more than the benchmark number of attendances. Relates to the efficiency and effectiveness of the Court’s processes regarding the maximum number of times it should be necessary for parties to attend court.¹⁶⁷

The development of the Model KPI’s was influenced by four basic axioms about court

¹⁶⁴ Audit Office (2001), n 8, p 32.

¹⁶⁵ Glanfield and Wright, n 29.

¹⁶⁶ *ibid*, p 2.

¹⁶⁷ *ibid*.

performance measurement. First, that performance has to be measured against goals fixed by the Courts. Second, that the Courts should set goals for themselves, in measurable terms. Third, that the performance measurement should support management activity and finally, that ‘key’ means comprehensive but simple and few.¹⁶⁸ The Report stresses that performance measurement is not about blame, recognising that there are some circumstances beyond the control of the court that will mean that performance criteria cannot be satisfied. However, it also emphasises performance measurement does involve acceptance by the Court of some management responsibility for the efficiency of its processes.¹⁶⁹

In September 2001, the Attorney General’s Department reported that monthly reporting against the KPIs was under way.¹⁷⁰ In November 2001, it reported that the KPIs have been fully implemented in the District Court and partially implemented in the Local and Supreme Courts.¹⁷¹

The Supreme Court’s overriding purpose

In January 2000, the Supreme Court adopted a ‘formal overriding purpose’ to its Supreme Court Rules, in their application to civil proceedings: ‘to facilitate the just, *quick* and cheap resolution of the real issues in dispute in such proceedings’ (emphasis added).¹⁷² The Court is under an express obligation to give effect to the overriding purpose in both the interpretation and application of the rules.

Through subsequent amendments to the Rules to further this purpose, and other means such as the use of Practice Notes, the Court is endeavouring to promote ‘a culture where the legal profession, litigants and witnesses are aware of their obligation to assist the Court to achieve this overriding purpose.’¹⁷³ If this culture develops, which will surely take some time, it will have a positive effect on delays which can be attributable in whole or in part to the legal profession, litigants (Section 4.4) and witnesses.

5.3.2 Case management

The courts in NSW (and other jurisdictions) have, over the past decade, taken a new approach to their role by adopting a ‘case management’ approach to their caseload. Case management requires parties to prepare their cases for trial according to a number of events

¹⁶⁸ *ibid*, pp 2-4.

¹⁶⁹ *ibid*, pp 28-30.

¹⁷⁰ Audit Office (2001), n 8, p 32.

¹⁷¹ Attorney General's Department (Annual Report 1999/00), n 26, p 7.

¹⁷² Supreme Court Rules (Amendment No. 337) 2000, r 1.3.

¹⁷³ Attorney General's Department (Submission to PAC), n 7, p 10. Amendments to the Supreme Court Rules to further the overriding purpose (some of which are mentioned elsewhere in this paper) are set out in Appendix D.

controlled by the court, such as pre-trial conferences, directions hearings and call-overs. At each point, the progress of the case is assessed and opportunities are taken to explore possibilities for settlement or referral to alternative dispute resolution to encourage timely disposal. Case management is aimed at increasing the number of early settlements, encouraging the parties to prepare thoroughly and identify the contentious issues at an early stage, bringing cases that cannot settle to trial in the shortest possible time, and reducing the costs of litigation. The Australian Law Reform Commission described the approach as follows:

...the adversarial system of litigation traditionally left primary responsibility for the pace of litigation in the hands of the parties and their lawyers. The court's role was reactive – the judge was the umpire, not a player in the process. Over the last ten years Australian courts have become more active in monitoring and managing the conduct and progress of cases before them, from the time a matter is lodged to finalisation. Case management involves a deliberate transfer of some of the initiative in case preparation from the parties to the court, with the aim of controlling costs and ensuring time resolution of cases, without compromising the quality and fairness of the process. To support case management objectives, practice and procedure rules have in turn been significantly modified so that pleadings, discovery, evidence presentation and settlement facilitation are subject to court control and supervision.¹⁷⁴

Case management was highlighted by the *1989 Review* as a central element in developing a system of court administration that will avoid problems of delay.¹⁷⁵ There are a number of different case management schemes, as each court develops and fine-tunes systems that best suit its requirements. Case management is primarily used in civil jurisdictions, although it is also being used for some criminal matters. The Supreme Court's Differential Case Management ('DCM') system is outlined briefly by way of example.¹⁷⁶ Matters to be heard in the Supreme Court's Common Law Division are placed into one of several lists, according to the type of matter, one of which is the *DCM Civil Matters List*.¹⁷⁷ Most of the Court's personal injury accident cases are in the DCM list. DCM is a system that individually manages cases according to their complexity and need for pre-trial activity to promote the early settlement of cases. The Supreme Court has issued a Practice Note setting out comprehensive rules on the conduct of cases in the DCM.¹⁷⁸ The rules relate to several matters including: proceedings covered by DCM; removal of proceedings from the DCM List; requirements of the DCM document; status conferences; action prior to the first status conference; representation; ADR; variation of directions; final conference; personal

¹⁷⁴ Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System*, Report No 89, January 2000.

¹⁷⁵ Coopers & Lybrand, n 2, p viii.

¹⁷⁶ For information about case management in the District Court's civil jurisdiction see: District Court (2000), n 25, p 15 which outlines the *Civil Case Management System* which was commenced in 1996.

¹⁷⁷ The other lists are: Administrative Law Division List; Defamation List; Professional Negligence List; Possession List; Common Law Duty List; Criminal List and Bail List. The first four lists are 'specialist lists' which are described below.

¹⁷⁸ Supreme Court of NSW, Practice Note No. 120, Differential Case Management List, 03/07/2001. Note that this Practice Note replaced earlier Practice Notes (81, 87 and 88) concerning the DCM.

attendance of parties; and listing proceedings for hearing. After DCM cases are case managed and are determined to be ready for hearing they are placed into the holding list (to be called up to obtain a hearing date).

In its *Access to Justice Report*, the Law Society of NSW expressed support for the use of case management in the NSW courts and suggested that it should be expanded and that the courts should assume even more control over the conduct and timing of litigation. It recommended that the Government carry out a research project to consolidate and publish a comprehensive guidebook to case management procedures to assist courts, tribunals and legal practitioners. It also recommended that legal education providers include case management in their annual programs.¹⁷⁹

As well as specific systems such as the DCM system in the Supreme Court, the case management approach also includes other aspects that likewise contribute to delay reduction. In this regard, the adoption of time standards; the reliance on alternative dispute resolution methods; and the use of specialist lists are examined below.

Time standards

Time standards are *goals* for reasonable case disposition times that are used as a 'case management' tool. They are generally expressed as a percentage of cases to be finalised within a certain time period. The standard will necessarily vary for different types of cases and for different courts and jurisdictions. The *1989 Review* recommended that, as part of new case management procedures, time standards should be developed for each main type of case and jurisdiction for the period from filing to disposition and for intermediary stages, and adopted on a consistent basis across the courts throughout the State.¹⁸⁰ The Review noted that 'once adopted, time standards serve important operational purposes in addition to defining the limits of delay. They provide a basis for measuring the effectiveness of the court's case flow management system.'¹⁸¹ In this regard, it is noted that the KPIs (discussed above) rely on time standards.

Time standards have since been developed by the Local, District and Supreme Courts in some areas of their operation. The District Court was the first NSW court to embrace the development of time standards and will be examined by way of illustration.¹⁸² The District

¹⁷⁹ Law Society, n 128, p 7.

¹⁸⁰ Coopers & Lybrand, n 2, Recommendation 5, p xvi.

¹⁸¹ *ibid.*

¹⁸² The Local Court has a number of time standards to monitor the progress of criminal cases through the system. The standards have been set for finalisation and intermediary steps in relation to defended hearings, pleas of guilty and committal proceedings. While there are procedures in place for monitoring civil claims, no time standards have been set. The Supreme Court established standards for the disposal of Criminal List cases in 2000, relating to the time of commencement to finalisation of cases. The Supreme Court has not developed standards for its civil jurisdiction, although the Court stated its intention to do so after improvements have been made to computer-based case management systems. The standards will apply to all of the Common Law Division's civil trial work,

Court has set time standards for overall progress of criminal and civil cases and some intermediate stages, as set out below. The standards are part of the goal of case management in the Court's *Strategic Plan* (see Section 5.3.1), and were adopted with the first Strategic Plan in 1995. The Court views the standards as 'an ideal and against which it endeavours

¹⁸³ For civil matters, the time standards are based on the American Bar Association's standards generally accepted in the US, Canada and the UK.¹⁸⁴ For criminal matters the Court adopted the time standards used in England and Wales.¹⁸⁵

District Court Time Standards

Criminal Jurisdiction	<p>For trials or all ground appeals, hearings should be commenced within:</p> <p>(a) 112 days of committal (or such other event which gives rise to the trial) or the lodging of the appeal in 90% of cases.</p> <p>(b) 1 year of committal (or other such event which gives rise to the trial) or the lodging of the appeal in 100% of cases.</p> <p>For sentence & appeals against sentence, hearings should be commenced within:</p> <p>(a) 2 months of the committal or the lodging of the appeal in 90% of cases (this was increased to 3 months for sentence matters only from July 2000)</p> <p>(b) 6 months of the committal or the lodgment of the appeal in 100% of cases</p>
Civil Jurisdiction	<p>Cases should be disposed of within:</p> <p>(a) 12 months of the initiation of the proceedings in 90% of cases</p> <p>(b) 2 years of the initiation of the proceedings in 100% of cases</p>

combined with all Equity Division Matters: Supreme Court (2000), n 12, pp 2 and 26.

¹⁸³ District Court (2000), n 25, p 14.

¹⁸⁴ *ibid*, p 23.

¹⁸⁵ Attorney General's Department (Submission to PAC), n 7, p 8.

The Court publishes information about compliance with time standards in its Annual Reviews. For example, **Table D** shows the time standards compared with the actual percentage of case finalised within the time period for 2000 for finalisation of criminal trials (it is clear that the court did not meet its time standards).

Table D. Compliance with time standards for 2000 criminal trials¹⁸⁶

	%of cases finalised within 112 days of committal	%of cases finalised within 1 yr of committal
Standard	90%	100%
Actual %		
- where accused was in custody	59%	99%
- for trials disposed of by verdict	37%	98%
- where accused was on bail	21%	65%
Actual % - where matters proceeded to verdict	13%	63%

The *1999 Audit* supported the use of time standards as a means of improving the basis against which performance in NSW courts may be assessed and managed. It recommended that standard times should be established for durations and intermediate stages of all court proceedings and that the courts should report on the level of compliance against standards.¹⁸⁷ The *2001 Follow Up Audit* noted that the Local and Supreme Courts had partially implemented this recommendation, while the District Court's time standards fully complied with its recommendation, although the standards that had been set had not been widely achieved.¹⁸⁸

There has been some wariness of the use of time standards, in terms of the difficulty in fixing appropriate standards and the implications of failing to meet standards. In regard to the implications of failing to meet standards, Glanfield and Wright note that rather than assessing blame, the '...consequences for a court in not meeting its performance standards is that it should investigate and explain. If its performance is being effected by factors beyond its control, it is important that this should be explained.'¹⁸⁹ And, while time standards are set by the courts the ability to comply with them depends not only on the judiciary, as noted by Australia's Chief Justice, the Hon Murray Gleeson AC:

If courts are to undertake a commitment to dispose of cases within a specified time, then it would be misleading to represent to the public that fulfilment of such a commitment is in the hands of the judiciary. In so far as the capacity of a court to achieve certain time standards depends upon the resources made available to the court by the executive government, then such a commitment is only credible if the executive government itself is a party to the commitment.¹⁹⁰

¹⁸⁶ These statistics are taken from District Court (2000), n 25, pp 39-40.

¹⁸⁷ Audit Office (1999), n 8, p 5.

¹⁸⁸ Audit Office (2001), n 8, pp 21, 25 and 29.

¹⁸⁹ Glanfield and Wright, n 29, p 28. Note that these comments were made in the context of the use of time standards as a 'Model KPI'.

¹⁹⁰ Gleeson, n 129, p 153.

Alternative dispute resolution

The use of alternative dispute resolution ('ADR') methods, such as mediation and arbitration, are encouraged as a case management strategy in the NSW courts. ADR encourages parties to resolve their disputes by agreement rather than relying on a court for final determination. It therefore assists with reducing backlogs of cases and enables the cheaper resolution of disputes. In the District Court Review 2000, Chief Judge R O Blanch reported on the use of ADR in dealing with the increased civil caseload of the court:

Although the rate of disposal of cases has increased the rate of registration of cases has increased at an even higher rate so that the civil caseload continues to grow. During the course of the year 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 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.¹⁹¹

Specialist lists

Specialist lists have been established in the Supreme Court to provide case management procedures appropriate to different types of cases.¹⁹² For example, the Common Law Division includes the Administrative Law List, the Defamation List, the Professional Negligence List and the Possession List. Specialist lists assist in facilitating the speedy resolution of cases and have been described by the Attorney General's Department as follows:

These lists are supported by more tailored management information reporting developed by registry staff. Particular judges are nominated to administer those lists and the court has adopted measures to more effectively and efficiently deal with cases. These measures include publication of new practice notes and amendment of the Supreme Court Rules. Rigorous judicial case management is applied in the specialist lists, to focus the parties on the real issues at an early stage in proceedings and ensure timely exchange of witness statements. Through judicial supervision of the preparation of every case, supported by good caseload reporting, matters are brought on for hearing quickly.¹⁹³

5.3.3 Court resources

The inadequacy of court resources as one cause of delay was examined in Section 4.2. The provision of additional resources such as judicial officers, administrative staff, court rooms and information technology is an obvious way of alleviating pressure on a court's resources and to assist in reducing delays.

¹⁹¹ District Court (2000), n 25, p 2.

¹⁹² Note that the specialist lists are different from the Differential Case Management List described above. The DCM list contains most common law civil cases that are not included in specialist lists.

¹⁹³ Attorney General's Department (Submission to PAC), n 7, p 10.

Increased sitting capacity

Increasing the number of hours of judicial sitting capacity is an obvious way of ensuring that more cases are heard in a shorter amount of time. This can be achieved by appointing additional and ‘acting’ judges.¹⁹⁴ The appointment of acting judges also enables flexibility that is valuable for case listing efficiency. Additional and acting judges have been appointed to all three courts at various times over the years.

An acting magistrates program was initiated in the Local Court in 1996 to target specific areas of delay within the court and four part-time Magistrates were appointed in 1998.¹⁹⁵ The Local Court reported a number of initiatives designed to ‘streamline’ the work of the Court during the 2000/01 financial year, redirecting resources to areas in need, and rostering the Children’s Magistrates throughout the State.¹⁹⁶

In 1990, additional judges were appointed to the District Court. Between 1995 and 1999 the capacity of the criminal jurisdiction of the District Court was increased by 92%, primarily by appointment of a large number of acting judges in 1996.¹⁹⁷

In the 1999/00 financial year, an additional \$736,000 was allocated to the Supreme Court to enable the appointment of acting judges.¹⁹⁸ Subsequently, the Chief Justice of the Supreme Court reported that the reduction in delays in 2000 was ‘...made possible by additional resources in the form of two new Judges – one allocated to the Court of Appeal and one to the Common Law Division – as well as significant funding for acting judges.’¹⁹⁹

Managing judicial time: Increased sitting hours can also be achieved by efficiently managing judicial time. For example, in its 1999 report, the Audit Office noted that the District Court had replaced its traditional fixed judicial vacations with variable vacations (and introduced an acting judge scheme) which markedly increased judicial sitting capacity.²⁰⁰ The Court

¹⁹⁴ Note that the appointment of ‘acting judges’ is particular to the States – the federal government, under the constitution, does not have the power to appoint acting judges: Gleeson, n 129, p 150. It has been noted by Sir Anthony Mason, former Chief Justice of Australia, that while there has been opposition to the appointment of acting judges on the basis that it weakens judicial independence, their appointment is justified as a measure to overcome a temporary difficulty: Cunningham H, *Fragile Bastion – Judicial Independence in the Nineties and Beyond*, Judicial Commission of NSW, 1997, p 9.

¹⁹⁵ Local Court (1996), n 89, p 4 and Local Court of NSW, *Annual Review 1998*, p 3.

¹⁹⁶ Local Court (2000), n 43, pp 3-4.

¹⁹⁷ BOCSAR (2000), n 90 p 1 and Weatherburn and Baker, n 14, p 7.

¹⁹⁸ Attorney General's Department (Annual Report 1999/00), n 26, p 7.

¹⁹⁹ Supreme Court (2000), n 12, p 3.

²⁰⁰ Audit Office (1999), n 8, p 37.

now sits continuously throughout the year, except for 2 weeks over the Christmas, New Year period.²⁰¹

Special sittings: Special court sitting days and weeks have periodically been conducted to attempt to clear backlogs of particular types of cases. For example, in February 1999, a specialist panel of magistrates sat for civil cases at the Downing Centre:

[t]his initiative concentrated civil cases into identified weeks, with three magistrates sitting in adjoining courtrooms dealing with a large number of contested cases. There were fifteen special civil weeks...and the concept has been a substantial success. Magistrate availability and court use have been maximised and only a small number of cases could not be heard on the allocated day.²⁰²

Civil weeks were continued at the Downing Centre in 2000 with success.²⁰³ A panel of acting magistrates was also recently created to conduct all magistrate inquiries under the *Mental Health Act 1990* with the effect of allowing 'the equivalent of 8 sitting days in each week to be reallocated to the general sittings of the court.'²⁰⁴

IT initiatives

The integration of IT resources in the NSW court system has occurred over the last few years. Updating existing technology and introducing new technological initiatives has contributed to the increased efficiency of the courts with some impact on delays. Some developments include:

- Development of databases of certain information. For example, the District Court has developed a database of criminal exhibits and criminal listings.²⁰⁵
- Updating computer systems and software. For example, during the 1996/97 financial year, the Supreme Court's Local Area Network was upgraded to link computers within the Supreme Court to the Attorney General's Department.²⁰⁶
- Establishment of electronic lodgment facilities for certain documents. It was reported that after the introduction of the Local Court's electronic lodgment facility it achieved a 40% decrease in processing times.²⁰⁷
- In 1999 technological advancements in the Local Court included: computer equipment upgraded and enhanced, linking on-line all Local Court registries and the Attorney General's Department network; the transfer of responsibility for IT from the Judicial Commission of NSW to the Attorney General's Department, with an upgrade in

²⁰¹ Attorney General's Department (Submission to PAC), n 7, p 19.

²⁰² Local Court (1999), n 89, p 17.

²⁰³ Local Court (2000), n 43, p 11.

²⁰⁴ Attorney General's Department (Submission to PAC), n 7, p 17.

²⁰⁵ Attorney General's Department (Annual Report 1996/97), p 21.

²⁰⁶ *ibid.*

²⁰⁷ Attorney General's Department (Annual Report 1997/98), p 27.

- equipment and email access; and the introduction of telephone conferencing facilities.²⁰⁸
- In July 2001, a ‘virtual court system’ was established linking 13 courts, nine jails and several juvenile justice centres to allow minor matters to be heard without the prisoner appearing in court. The system is designed to save court time, as well as improve security and reduce the cost of transporting prisoners.²⁰⁹
 - The new courts information system developed by the Attorney General’s Department was discussed in Section 5.3.1.

Other

Interpreter services: An agreement between the Director General of the Attorney General’s Department, the NSW Police Service and the Ethnic Affairs Commission concerning the improvements of services to clients from diverse cultural backgrounds was made during the 1998/99 financial year. The initiative was designed in part to reduce delays caused when matters had to be adjourned while interpreter services were found.²¹⁰

Funding: Additional funding for the courts is an obvious resource solution. In 1995, the former Chief Justice of NSW, the Hon Murray Gleeson AC described the allocation of resources to the judiciary as ultimately a political problem. He stated that ‘in a democratic community resources are allocated according to political priorities’ and wondered: ‘how does the ordinary justice system compete, for limited resources, against politically significant objects of expenditure?’²¹¹

Additional funding has been allocated over the years for specific needs on an ad hoc basis. For example, during the 1997/98 financial year, the Attorney General’s Department allocated enhancement funding of \$1.288 million to reduce the backlog of old Supreme Court Common Law Division cases. The funding provided for additional acting judges and associated support services.²¹² During the 1998/99 financial year, the Department obtained \$460,000 of enhanced funding to provide additional judicial resources for the Court of Appeal. It also funded two extra permanent judges and one acting judge in the District Courts 1998/99 budget.²¹³

5.3.4 Changes to legal procedure and court processes

Legal procedures and court procedures are constantly being reviewed and new initiatives introduced by the Government and the courts to streamline the passage of cases through the

²⁰⁸ Local Court (1999), n 89, p 12.

²⁰⁹ ‘Virtual courts to save time, money’, *The Newcastle Herald*, 13/7/01, p 18.

²¹⁰ Attorney General’s Department (Annual Report 1998/99), p 20.

²¹¹ Supreme Court of NSW, Annual Review 1995, p 2.

²¹² Attorney General’s Department (1997/98), n 207, p 28.

²¹³ Attorney General’s Department (1998/99), n 210, p 24.

court system to reduce delay.²¹⁴ For example, listed below are some of the many initiatives undertaken to reduce criminal trial delay in the District Court since 1990 (some of these initiatives overlap with other categories of dealing with court delay).²¹⁵

Initiatives to reduce delay in the District Court

- *1990* A statutory discount on sentencing for early guilty pleas was introduced, the requirement for summing up in short trials was removed and judge-alone trials were introduced.²¹⁶
- *1991* The Court introduced a scheme of early arraignment hearings and the DPP assumed responsibility for prosecution in committal proceedings (at least partly in order to encourage early guilty pleas and reduce delays).
- *1992* The sentence indication scheme was introduced to further encourage earlier and more frequent guilty pleas.
- *1993* A pilot system of allocating matters to individual judges was trialed to encourage greater ‘date and judge’ certainty.
- *1994* The Court announced a ‘strict adjournment policy’ designed to reduce the rate at which trial matters were being adjourned.
- *1995* A legislative requirement for audio recording of confessional evidence was introduced partly in hope that this would also reduce the average duration of trials.²¹⁷ The Court laid down explicit time standards governing the speed with which matters should be brought to trial.
- *1996* The range of criminal matters triable summarily was increased to reduce the caseload of the Court and the number of sitting days allocated to criminal matters was substantially increased.
- *1999* A List Judge was assigned to the Sydney Registry to oversee criminal case progress. Part of the role involves listing trial matters shortly before their trial date to confirm readiness to proceed to prevent late adjournments.

²¹⁴ Initiatives in this vein examined by the PAC Inquiry in 1996 include the use of the Self Enforcing Infringement Notice System and the introduction of paper committals: PAC, n 10, pp 17-18.

²¹⁵ These initiatives are noted in: BOCSAR (2000), n 90, p 1.

²¹⁶ *Crimes Legislation Amendment Act 1990*, *Crimes Act 1990*, s 405 and *Criminal Procedure Act 1990*, s 32 respectively.

²¹⁷ *Criminal Procedure Act 1986*, s 108.

Other recent initiatives and proposals

Refining listing processes: Delays arising from the listing process, caused by problems such as over-listing, were examined in Section 4.5. The courts have been developing and fine-tuning their listing procedures for their various jurisdictions. For example, new listing procedures were recently implemented in the Downing Centre to speed up the work of the court.²¹⁸ The listing reforms implemented in the District Court were recently summarised by the Attorney General's Department as follows:

- In Sydney, a permanent List Judge has been assigned to the Downing Centre
- All cases committed to the Downing Centre are listed for mention before that List Judge on the last sitting day of the following week to ensure:
 - (a) that the accused is represented at the earliest possible opportunity
 - (b) a date for arraignment is set no later than the next 8 weeks
 - (c) the number of appearances in the arraignment is minimised
 - (d) only those cases expected to be trials are listed for trial
- In Sydney West, from the start of 2000, committals are mentioned on the last business day of the second week after a committal, to determine whether an arraignment should proceed immediately or be adjourned. Sentence matters are similarly listed, to ensure that legal aid issues are resolved and any pre-sentence reports ordered. Appeals are listed for hearing by the registry within the same standards.
- Before close of business each week, the committing Local Court is to provide the District Court with a list of all cases committed during the week
- The listing practices for trials at circuit courts are set out in Practice Notes 51 and 55. This has included a re-determination of the Court's capacity to dispose of trials and the manner in which cases will be dealt with.²¹⁹

In the Supreme Court, the use of acting judges has enabled the court to hear cases that would otherwise be in danger of not being reached and has reduced the necessity to adjourn matters part heard at the end of their allotted time, and 'this allows cases to continue to move up in the list, thus reducing waiting times overall'.²²⁰ The practice of over-listing continues as it is argued that 'massive delays would arise in some areas of the Court if all cases were allocated an exclusive fixed period for final hearing'.²²¹

Managing the arraignment of accused persons in the Supreme Court: In late 1998, a new system of managing the arraignment of accused persons for trial or sentence in the Supreme Court was instituted. The new procedure sets time frames within which certain stages in proceedings must occur and is designed to reduce delay between committal, arraignment and trial or sentence. It was designed to ensure that '...criminal trials are managed in a

²¹⁸ Local Court (2000), n 43, p 3.

²¹⁹ Attorney General's Department (Submission to PAC), n 7, p 16.

²²⁰ *ibid*, p 13.

²²¹ *ibid*, p 13.

systematic way that is intended to achieve early preparation and disposal of cases by prosecution and defence.²²² The Attorney General's Department recently reported that under the court's new approach to arraignment, 'waiting times for criminal trials have been significantly reduced. The median waiting time for disposal of criminal cases in the Supreme Court during 2000-2001 was 8.7 months. Even allowing for changed measurement methods this is the best performance in over 10 years.'²²³

Centralised committal scheme: The centralised committal scheme was established in 1998. Its purpose is to remove matters from the District Court that might more properly be dealt with in the Local Court. It is also designed to increase the likelihood that defendants sent to the District Court would plead guilty, rather than go to trial. BOCSAR reported in August last year that '...both objectives had been met and the result will be a substantial saving in public resources.'²²⁴ However, while the scheme has had the effect of reducing criminal trial delays in the District Court, it has increased the caseload of the Local Court 'with a greater number of matters being dealt with to finality by magistrates instead of being sent forward to the District Court'.²²⁵

Late guilty pleas in the Local Court: The impact of the increase of late guilty pleas in criminal cases in the Local Court was addressed by the production of Practice Note 2 of 2000. The Practice Note '...is intended to primarily ensure that defendants obtain comprehensive legal advice before the court sets the matter down for hearing and to avoid, wherever possible, the unproductive loss of court time through the late entry of pleas of guilty.'²²⁶ The Court noted in its 2000 Annual Review that there were early indications that the Practice Note was having the desired effect.²²⁷

Pre-trial defence disclosure: The *Criminal Procedure (Pre-trial Disclosure) Act 2001* was assented to in April 2001. The purpose of the Act is to '...introduce a process where courts, on a case by case basis, may impose pre-trial disclosure requirements on both the prosecution and the defence to *reduce delays* and complexities in criminal trials' (emphasis added).²²⁸

²²² Supreme Court of NSW, 'Reducing Delays in Criminal Trial', *Media Release*, 20/10/98. The new procedure was developed by the Supreme Court in consultation and agreement with the NSW DPP, the NSW Legal Aid Commission and the Senior Public Defender.

²²³ Attorney General's Department (Submission to PAC), n 7, p 12.

²²⁴ BOCSAR (Media Release), n 37.

²²⁵ Local Court (1999), n 89, p 5.

²²⁶ Local Court (2000), n 43, p 10. The effect that late pleas of guilty are having on delays in the Local Court and the District Court was examined in Section 4.4 and 4.6.

²²⁷ *ibid.*

²²⁸ NSWPD, Hon Bob Debus MP, Attorney General, 16/8/01, p 8288. For further information about the Act see: 'Pre-Trial Defence Disclosure: Background to the Criminal Procedure Amendment (Pre-trial Disclosure) Bill 2000' by Gareth Griffith, *NSW Parliamentary Library Research Service*, Briefing Paper No 12/2000.

Reform of the procedures for commencing and hearing cases in the Local Court: In December this year a package of bills to reform the procedures for commencing and hearing cases in the Local Court was passed by Parliament. The underlying philosophy of the package is to ‘...streamline processes, to *reduce delay* and to reduce the amount of administrative work being undertaken by magistrates, freeing them up for more court hearings’ (emphasis added).²²⁹ The bills are examined in detail in Section 5.3.5.

Restricting availability of juries in civil cases: Trial by jury has been criticised as much more time consuming than trial by judge alone, particularly in civil trials.²³⁰ Long standing reform proposals²³¹ for limiting the availability of juries in civil trials have recently been realised. The *Courts Legislation Amendment (Civil Juries) Act 2001*, passed in mid-December 2001, amends the *District Court Act 1973* to provide that civil proceedings in the District Court are to be tried without a jury, unless the Court otherwise orders. It also amends the *Supreme Court Act 1970* to provide that civil proceedings in any Division of the Supreme Court (other than in respect of proceedings for defamation) are to be tried without a jury, unless the Court otherwise orders.²³² The amendments are not intended to abolish civil juries but rather to restrict the use of civil juries to those cases where a special need is demonstrated. The reforms are designed to assist the courts to better manage their lists and to assist in reducing delays in the courts:

... jury trials can be more costly and time consuming than trials before a judge alone. If resources are diverted to a long jury trial then other cases may have to wait longer to come before the court. For example, in the District Court, parties often estimate that a case involving a jury will last three or four times longer than a case without a jury. Additional sitting time is allocated at the call-over on this basis. If, as occurs in a large majority of these cases, the case actually settles on the first day of the hearing, the court list is disrupted. Whilst back-up matters can be listed to fill the vacated spot, it would be a better use of court resources and would be less disruptive to other parties if this did not occur. When jury trials do proceed, they can take up a significant amount of court time.²³³

This reform has attracted criticism from those who argue (among other matters) that citizens should participate in the administration of civil justice, including the Law Society of NSW and the Australian Plaintiff Lawyers Association.²³⁴

²²⁹ *ibid.*

²³⁰ Briefing Paper 31/96, n 3, p 30. Note that trial by judge alone for some indictable criminal offences has been a feature of the NSW criminal justice system for some years.

²³¹ The *1989 Review* recommended that consideration should be given to providing that all civil matters should be heard without a jury, except in certain circumstances: Coopers & Lybrand, n 2, p 138.

²³² Courts Legislation Amendment (Civil Juries) Bill 2001, Explanatory Notes. Note that the Act does not affect the availability of juries in criminal trials.

²³³ NSWPD, Hon Bob Debus MP, Attorney General, 28/11/2001, p 19039.

²³⁴ ‘Fewer court duties for 12 good citizens’, *The Sydney Morning Herald*, 3/12/01, p 6. See also comments made by Justice Bill Priestly of the Court of Appeal: ‘Judge deplores diminished role of civil juries’, *The Sydney Morning Herald*, 12/12/01, p 5. See also NSWPD, 6/12/01 (LA Proof), pp 1-7, for debate on the Bill.

Proposal to introduce majority jury verdicts for criminal matters: Currently, unanimous jury verdicts are required in all criminal trials in NSW.²³⁵ There has been support over the years for the introduction of majority verdicts for criminal trials to prevent the occurrence of hung juries and mistrials, and thereby to save time and costs to parties and the court system. In deciding not to introduce majority verdicts the Government was influenced by BOCSAR research it commissioned on this issue in 1997. In general, the research concluded that there would be no real practical impact of this reform in terms of saving time and costs.²³⁶

5.3.5 Local Courts reform package

On 13 December 2001, Parliament passed a package of bills that reform the procedures for commencing and hearing cases in the Local Court: the Criminal Procedure Amendment (Justices and Local Courts) Bill 2001; the Crimes (Appeal and Review) Bill 2001; and the Justices Legislation Repeal and Amendment Bill 2001.²³⁷ Originally, the procedures to be followed for criminal cases and non-criminal statutory applications in the Local Court were set out in the *Justices Act 1902* (*'Justices Act'*). The Attorney General described the *Justices Act* as '...complex, disjointed and difficult to interpret', containing '...antiquated rules and practices that are difficult to adapt to accommodate technological and social change. It has created impediments to court efficiency.'²³⁸ The three bills replace the *Justices Act* to establish new streamlined procedures for commencing and hearing cases in the Local Court. The underlying philosophy of the package of bills is to '...streamline processes, to *reduce delay* and to reduce the amount of administrative work being undertaken by magistrates, freeing them up for more court hearings' (emphasis added).²³⁹

The process of reforming Local Court procedures began in the early 1990s.²⁴⁰ In 1992, a review of the *Justices Act* was undertaken to investigate how it could be made more relevant to modern needs and to make it more understandable to everyone effected by it. A draft bill was circulated in 1994. However, it was considered to be too long, and too detailed and procedurally orientated, and was subsequently abandoned. The project was revived in 1997

²³⁵ Note that majority verdicts are permitted in civil trials.

²³⁶ For further information on this issue see: *Majority Jury Verdicts*, by Gareth Griffith, NSW Parliamentary Library Research Service Briefing Paper No 6/96; and *Update to Briefing Paper No 6/96*, by Gareth Griffith. Note that the New Zealand Law Commission recently explored this issue, see: Law Commission, 'Juries in Criminal Trials', *Report 69*, (2001).

²³⁷ A fourth bill, the Justices of the Peace Bill 2001, was also included with the package of bills when they were tabled as exposure drafts (see below). The bill was designed to reform the method of appointment and regulation of the Office of the Justice of the Peace in NSW. The bill was later removed from the package.

²³⁸ NSWPD, Hon Bob Debus MP, Attorney General, 20/9/01, p 16997.

²³⁹ *ibid.*

²⁴⁰ The following paragraphs are based on information provided by the Legislation and Policy Branch of the Attorney General's Department of NSW (personal communication, 6/11/01), unless otherwise stated.

by the then Attorney General, Hon Jeff Shaw. The most pressing problems were addressed in a number of major legislative changes introduced in the late 1990s relating to fine enforcement, committals, briefs of evidence and appeal procedures.²⁴¹

A review of the remaining provisions of the *Justices Act* was undertaken by a working party comprised of senior officers of the Attorney General's Department and senior magistrates from the Court Management and Technology Committee. The working party recommended the repeal of the *Justices Act* and circulated a draft bill to replace it. Comments and submissions were received from interested parties including, court administrators, judges and magistrates, the Law Society of NSW, the Office of the Director of Public Prosecutions (NSW), the Legal Aid Commission of NSW, and the NSW Police Service. Responses supported the need for reform and simplification, calling for an overhaul of the procedures to improve access to justice and to increase understanding of the system.

Subsequently, on 20 September 2001, the reform package was tabled as an exposure draft to provide an opportunity for interested individuals and organisations to make submissions. A number of minor drafting, interpretation and procedural issues were identified in a series of seminars held with metropolitan magistrates and in submissions received from a variety of sources including those mentioned in the preceding paragraph as well as others.²⁴² In the second reading speech on the package, the Attorney General stated that the Chief Magistrate had expressed 'strong support' for the package and that general support had been received from other stakeholders.²⁴³ He went on to note that: 'the amendments to the package as a result of the wide consultation and quality submissions received since exposure have further improved this body of legislation.'²⁴⁴ The package was uncontroversial and was generally viewed as a necessary reform to promote the efficiency of Local Court procedures. In this regard the Opposition stated that 'these three important bills reflect the concern of Parliament that justice delayed is justice denied'.²⁴⁵ The package of bills was passed without amendment.²⁴⁶

Justices Legislation Repeal and Amendment Act 2001

The Justices Legislation Repeal and Amendment Act 2001 repeals 13 pieces of legislation,

²⁴¹ Through the passage of: the *Fines Act 1996*; the *Justices Amendment (Briefs of Evidence) Act 1997*, the *Justices Amendment (Procedure Act) 1997*; and the *Justices Legislation Amendment (Appeals) Act 1998*.

²⁴² NSWPD, Hon Bob Debus MP, Attorney General, (LA Proof) 4/12/01, p 38.

²⁴³ *ibid.*

²⁴⁴ *ibid.*

²⁴⁵ NSWPD, Hon James Samios MLC, (LC Proof), 13/12/01, p 31.

²⁴⁶ Note that the tabling of the exposure drafts passed with little media comment, with only a handful of suburban and local newspaper reporting the reforms, for example: 'Courts set for revamp', *Liverpool Leader*, 3/10/01, p 6.

including the *Justices Act* and the *Supreme Court (Summary Jurisdiction) Act 1967*.²⁴⁷ The Act consequentially amends other acts, primarily the *Local Courts Act 1982*. Amendments to the *Local Courts Act 1982* are contained in Schedule 2 of the Act and include:

- to provide that a Local Court is to be constituted by a Magistrate sitting alone;
- to make the Local Court a court of record;
- to provide for the appointment and functions of ‘registrars of Local Courts (instead of ‘Clerks of Local Courts), including the issue of Ministerial guidelines relating to specified functions;
- to omit the provision conferring the powers of a Justice of the Peace on Magistrates with the effect that they will lose powers relating to keeping of the peace;
- to confer on the Local Court the same powers as the District Court to deal with contempt of court;
- to provide for a general rule-making power for matters required or permitted to be dealt with by rules under any Act; and
- to provide for the way in which matters (not relating to criminal offences) formerly dealt with by making a complaint under the *Justices Act* are to be dealt with;

Other consequential amendments include: changing references to ‘Clerks of Local Courts’ to ‘Registrars of Local Courts’; amending the *Crimes Act 1900* to include provisions formerly contained in the *Justices Act* relating to aiders and abettors being punishable as principals; and amending the *District Court Act 1973* so that District Court judges lose their powers relating to keeping the peace.

Criminal Procedure Amendment (Justices and Local Courts) Act 2001

This Act sets out the procedure for dealing with criminal matters in the Local Court. It amends the *Criminal Procedure Act 1986* so that all the provisions dealing with criminal cases within NSW will be found within that piece of legislation. A further object of the Act is to simplify the procedure for commencing criminal prosecutions in the Local Courts in the same way as non-criminal offences.²⁴⁸ For example, police and public officers will be able to attend a court registry to swear an Information and have a summons issued, previously it was much easier for police to ‘charge’ offenders than issue a summons. The new procedures provide one simple method of commencing a criminal prosecution.²⁴⁹ The main aspects of the Act are outlined below.

Amendments relating to criminal law generally: The Act amends the *Criminal Procedure Act 1986* so as to group provisions applying generally to the criminal law, offences and criminal proceedings into proposed Chapter 2 of that Act. The amendments achieve this by renumbering existing provisions of the *Criminal Procedure Act 1986* and re-enacting

²⁴⁷ A full list of legislation to be repealed is contained in Schedule 1 of the Act.

²⁴⁸ Information provided by the Legislation and Policy Branch of the Attorney General's Department of NSW (personal communication), 6/11/01.

²⁴⁹ *ibid.*

provisions of the *Justices Act*. In cases where provisions of the *Criminal Procedure Act 1986* and *Justices Act* currently have the same or a similar effect, the provisions of the *Criminal Procedure Act 1986* have been retained and applied in respect of criminal proceedings to which the *Justices Act* currently applies.²⁵⁰

Amendments relating to committal proceedings and trials of indictable offences: The Act re-enacts the provisions of the *Justices Act* relating to committal proceedings with some modifications. The modifications are outlined below.

- Committal proceedings are to be conducted by magistrates and may no longer be conducted by Justices;
- Committal proceedings are to be commenced by the issue of a court attendance notice by a Registrar of a Local Court or by a police officer or a public officer rather than by the laying of an Information, although provision is made for the arrest of an accused person if there are substantial reasons to do so and it is in the interests of justice;
- Provisions relating generally to criminal proceedings (including provisions relating to the attendance of witnesses and the production of evidence and to warrants for arrest and warrants of commitment) are applied to committal proceedings.²⁵¹

The Act also groups provisions currently contained in the *Criminal Procedure Act 1986* and the *Justices Act* relating to trial procedure for indictable offences. These provisions are re-enacted without modification and include provisions relating to pre-trial disclosure.²⁵²

Amendments relating to summary offences in lower courts: The Act re-enacts the provisions of the *Justices Act* relating to the conduct and determination of proceedings for summary offences before Local Courts, Licensing Courts, Industrial Magistrates, and Warden's Courts, in the *Criminal Procedure Act 1986*. Some modifications are made to the provisions, including those noted below.²⁵³

- Summary proceedings are to be commenced by the issue of a court attendance notice by a registrar of a Local Court or by a police officer or a public officer rather than by the laying of an Information or the issuing of a summons or an attendance notice, although provision is made for the arrest of an accused person if there are substantial reasons to do so and it is in the interests of justice;
- Provisions are to apply directly to courts other than Local Courts, as referred to above;

²⁵⁰ Criminal Procedure Amendment (Justices and Local Courts) Bill 2001, Explanatory Note, p 2.

²⁵¹ Criminal Procedure Amendment (Justices and Local Courts) Bill 2001, Explanatory Note, pp 2-3. These provisions are to be contained in proposed Part 2 of proposed Chapter 3 of the *Criminal Procedure Act 1986*.

²⁵² *ibid.*

²⁵³ *ibid.*

- The Court may adjourn proceedings generally for up to two years;
- Rule making powers with respect to procedure have been inserted, as matters formerly dealt with by Regulations under the *Justices Act*, being matters of detail are not to be dealt with by the rules of Court;
- Provisions relating to warrants of arrest and warrants of commitment have been grouped so as to avoid duplication and provide clear procedures;
- Magistrates are given the power to award costs against a prosecutor when proceedings are withdrawn or adjourned, in addition to the circumstances in which costs may currently be awarded; and
- Magistrates are given power to dispense with requirements of the Rules.

Amendments relating to summary offences in higher courts: The Act re-enacts, with some modifications, provisions currently in the *Supreme Court (Summary Jurisdiction) Act 1967* relating to the jurisdiction of the Supreme Court with respect to summary criminal proceedings and the conduct of such criminal proceedings.²⁵⁴ In terms of modifications, the Act applies the provisions directly to the following courts other than the Supreme Court: the District Court; the Industrial Relations Commission in court session; the Land and Environment Court; and the Court of Coal Mines Regulation.²⁵⁵ The amendment is designed to ‘...ensure that all summary offences are dealt with the same way, creating greater certainty and consistency for court users.’²⁵⁶

Amendments relating to the summary disposal of indictable offences and evidentiary provisions: The Act moves provisions relating to the summary disposal of indictable offences and evidentiary matters into new Chapters 5 and 6 of the *Criminal Procedure Act 1986*.²⁵⁷

Crimes (Appeal and Review) Act 2001

This Act consolidates and simplifies the criminal appeal and review provisions of the *Justices Act*. The Act re-enacts Parts 4, 5, 5A and 5B of the *Justices Act* in connection with the repeal of that Act by the Justices Legislation Repeal and Amendment Act 2001

²⁵⁴ Criminal Procedure Amendment (Justices and Local Courts) Bill 2001, Explanatory Note, Overview of Bill, para (b). These provisions are to be contained in proposed Part 6 of proposed Chapter 4 of the *Criminal Procedure Act 1986*.

²⁵⁵ Criminal Procedure Amendment (Justices and Local Courts) Bill 2001, Explanatory Note, p 4.

²⁵⁶ See n 248.

²⁵⁷ Criminal Procedure Amendment (Justices and Local Courts) Bill 2001, Explanatory Note, p 4.

(described above). The consolidated provisions of the Act are substantially the same in substance as those of the *Justices Act* that they replace, but the opportunity has been taken to simplify and standardise their form.²⁵⁸ A number of changes have been made, however, and some of these are noted below.

The provisions of the proposed Act with respect to appeals from decisions of Local Courts deal only with appeals from criminal proceedings. They do not deal with appeals from other proceedings. However, consequential amendments to that Act and other Acts have the effect of applying Parts 2, 3, 4 and 5 of the proposed Act to such appeals. For the purpose of applying those Parts to appeals on non-criminal matters, the proposed Act authorises the making of regulations to prescribe the modifications to be made to those Parts in their application to such appeals.²⁵⁹

As part of the process of simplification, the expressions ‘defendant’ and ‘prosecutor’ are used throughout the Act, rather than ‘accused’, ‘applicant’ and ‘informant’ as they appear in some of the provisions being replaced. References to the Attorney General have been removed where they would otherwise augment references to the DPP. There is instead a provision that simply states that any function of the DPP under the proposed Act may be exercised by the Attorney General.²⁶⁰

The appeal provisions of the *Justices Act* were substantially amended in 1998²⁶¹ and this Act clarifies some matters that have arisen since then. For example, it makes it clear that the Land and Environment Court of NSW is to be the appeal court for all summary environmental offences.²⁶²

The Act expands the definition of ‘environmental offence’ relevant to the apportionment of jurisdiction between the Land and Environment Court and the Supreme Court, to include any offence for which proceedings can be taken in the Land and Environment Court in the exercise of its summary jurisdiction.²⁶³

5.3.6 Other reform proposals

Merging the higher courts

The idea of merging the higher courts in NSW to form a single court, in order to improve

²⁵⁸ Crimes (Appeal and Review) Bill 2001, Explanatory Note, Overview of Bill.

²⁵⁹ *ibid*, para (a).

²⁶⁰ *ibid*, para (c) and (d).

²⁶¹ Through the passage of the *Justices Act Legislation Amendment (Appeals) Act 1998*.

²⁶² Under the previous provisions, it was arguable that parties lodge appeals in either the Land and Environment Court or the Supreme Court: See n 248.

²⁶³ Crimes (Appeal and Review) Bill 2001, Explanatory Note, Overview of Bill, para (b).

efficiency, has been floated for several years.²⁶⁴ For example, in the *Access to Justice Report*, the Law Society recommended that a single superior trial court be established that unites the jurisdictions of the Supreme and District Courts. In recognising the problems of delays in the present system (among other matters), the Law Society argued that ‘a seamless superior trial court will have the advantage of being able to deliver increased flexibility in both the deployment of judicial-power and in the assignment of cases.’²⁶⁵

Reducing caseload by reducing crime and conflict

The relationship between caseload and delays is clear (see Section 4.1). The Attorney General’s Department has recently emphasised the need for strategies to reduce crime and conflict in the community to reduce the reliance on courts to resolve disputes. In its submission to the PAC Inquiry, the Department outlined its two main ongoing roles in the Government’s strategies for reducing crime and conflict. First, crime prevention initiatives undertaken by the Crime Prevention Division and the Aboriginal Justice Advisory Council and second, the resolution of community disputes through Community Justice Centres.²⁶⁶

Improved collaboration in the justice system

The Attorney General’s Department has also identified improved collaboration in the justice system as an important factor in managing delays. Cooperation between the key stakeholders at the court, state and national level was emphasised.²⁶⁷

²⁶⁴ Briefing Paper No 31/96, n 3, p 20.

²⁶⁵ Law Society, n 128, p 21.

²⁶⁶ Attorney General’s Department (Submission to PAC), n 7, p 1 and Part C.

²⁶⁷ *ibid*, pp 32-33.

6. CONCLUSION

Australia's Chief Justice, the Hon Murray Gleeson AC recently stated, in his State of the Judicature address, that delay is a problem endemic to all legal systems.²⁶⁸ Great improvements have been made over the last decade in reducing delays and addressing the causes of delay. However, delays are an ongoing problem in NSW, as they are elsewhere. The multiple causes of delay are not static and, as some causes are addressed, others emerge. Dealing with delay is therefore an ever-evolving challenge. The measures implemented to deal with delays to date, particularly case management, and the recent focus on court management issues through, for example, the development of the Model KPIs, provide an infrastructure for dealing with delays in the future.

²⁶⁸

Gleeson n 129, p 56.

APPENDIX A

Terminology

Adjournment	A suspension of the hearing of a case until a later date.
Committal proceedings	Proceedings held at the Local Court before a magistrate to determine whether there is sufficient evidence to put a person on trial for an indictable offence.
Default judgment	A judgment in favour of a plaintiff that a court may give where the defendant has failed to give notice of an intention to defend.
Discovery	A procedure in civil litigation that requires the parties to disclose all documents relevant to the issues in the litigation.
Higher courts	In NSW the higher courts are the Supreme Court and the District Court. Also known as 'superior courts'.
Indictable offence	A serious criminal offence that can be prosecuted before a judge and jury (where a jury is still used) in either the District or Supreme Courts.
Interlocutory proceeding	Proceeding to obtain a provisional order from the court in the course of legal action, before the court makes a final order.
Jurisdiction	The scope of a court's power to examine and determine the facts, interpret and apply the law, make orders and declare judgment. Jurisdiction may be limited by geographic area, the type of parties who appear, the type of relief sought, and the point to be decided.
List	<p>A calendar of proceedings commenced in the court within a specific division of the court. For example, the Professional Negligence List in the Common Law Division of the Supreme Court. In the case of the major (non-specialised) lists, the parties have indicated that they want the matter set down for trial and that they are prepared for trial. By contrast, entry to a special list leads to a case being subjected to control over its progress.</p> <p>Also, a document setting out in chronological order the matters scheduled to be heard by a court on a particular day.</p>
Lower courts	The courts of general access which deal with the majority of matters. In various states referred to as the Local Court, the Magistrates Court or the Court of Petty Sessions.
Not reached	When the parties to a case are ready to proceed to trial on the date scheduled, but where the court is not in a position hear the case.
Over-listing	Over-listing is a practice adopted by the courts whereby more cases are listed for hearing in a day than can be dealt with if all cases are ready to be heard on that day.
Practice note	Written notes of practice decisions made by the courts. A practice decision is a rule or direction regarding practice and procedure that is made by the judges of the court under a rule making power.
Summary offence	An offence not punishable on indictment or for which no procedure is specified.
Supreme Court Rules	Rules regulating and proscribing the procedure and the practice to be followed in proceedings, stated cases, appeals, the transfer of proceedings from any inferior court, for regulation of the sitting and order of business and for prescribing what powers may be exercised by the masters, registrar and other officers of the Court.

APPENDIX B

Summary of the stages of court proceedings

1. Cause of action to the commencement of proceedings

This stage is from the arising of a cause of action (for example, the time of the accident in a civil personal injury case, or the time of arrest in criminal proceedings), until the commencement of proceedings in a court by the filing of the initial process (a statement of claim or a charge).

2. Pre-trial stage

In the case of civil matters, this stage is from the filing of the initial process to the issue of a notice of readiness by the parties. In the case of a criminal matter it is the period between charging and committal.

3. Getting a trial date

Once the parties are ready to proceed to trial the matter must be listed for hearing. In civil proceedings, this is the period between the notice of readiness to the listing of a case. In criminal proceedings the period is from committal to listing for trial.

4. Trial stage

This stage is made up of the duration of a trial. Delays can also occur during a trial – for example, when a trial is adjourned at the request of one or both of the parties or otherwise at the court's discretion.

5. Final judgment

This stage is the period between the end of a trial to final judgment. (Note that many cases do not proceed to the final judgment stage eg. many civil cases are settled at an earlier point in proceedings.)

6. Appeal

If a case is appealed, this period is the time from judgment to final appeal.

APPENDIX C

Medical negligence case study

Extracted from the Attorney General's Department Submission to the Public Accounts Committee's Inquiry Into the Management of Court Waiting Times, pp 37-38.

The Supreme Court deals with the matters claiming medical professional negligence and seeking damages for the injuries arising. This type of case is among the longest of the Court's cases – the median time from commencement to finalisation for Professional Negligence List cases (legal and medical) during 2000-2001 was approximately 2.5 years. None of that waiting time needs be delay.

There is a statutory period of 3 years in which a claim relating to injuries can be lodged with the Court. Otherwise the plaintiff needs to apply for permission to start proceedings, at the risk of the Court refusing that permission. Yet it may take longer than 3 years for injuries to stabilise, eg where an infant sustains brain damage and full assessment of the extent of injuries may not be considered appropriate until that child is a teenager. (The same issue arises in the District Court). In such cases the court will if necessary agree to put the matter on hold to a future date to allow time for injuries to stabilise.

Once a case is lodged in the Professional Negligence List case management starts with the parties being given 3 month's notice of a conference hearing. This period of 3 months is not a whim of the Court: it is important time for the parties to discuss the case, file all defences and

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

Generally, at least 2 further conferences are required in the management of the case to deal with any necessary interlocutory steps, including the completion of all medical evidence.

the case under strict time-management. Parties who obstruct the progress of the case can be penalised with orders to pay legal costs incurred by their obstruction. Lawyers can be ordered

sets out their overriding duty to the Court, not to any party. Mediation is strongly promoted and many cases achieve resolution through that process and do not require a hearing.

hearing, a hearing date (generally 1-2 months away) is allocated. This 1-2 month period is necessary as legal practitioners generally need this much notice of a hearing date because of at this stage in the proceedings and the 1-2 month wait works well.

Thus at least 11 months (optimally) is required for the case preparation, providing there are availability of doctors for medical examinations and the subsequent preparation of those reports. Usually a longer period is required if parties are forced (because of time limitations)

difficulties arise in assembling the medical evidence or parties have other difficulties in complying with components of the timetable (unforeseen illness etc). Where a case is urgent without delay.

time for injuries to stabilise before those proceedings can be finalised, mean some cases take

several years from commencement to finalisation, none of which is the party or the Court hindering the progress of the case. To force such cases to be finalised more quickly may be 'efficient' or 'expedient' in simplistic terms but not necessarily effective, equitable or just and may even create more litigation through appeal proceedings.

APPENDIX D

Summary of delay reduction initiatives in the Supreme Court and amendments to the Supreme Court rules to further the overriding purpose of the court.

Extracted from the Attorney General's Department Submission to the Public Accounts Committee's Inquiry Into the Management of Court Waiting Times, pp 11-12.

Summary of delay reduction initiatives in the Supreme Court

- Continuation and modification of Differential Case Management 1996.
- Sydney Circuits program in 1996.
- New Commercial Division practice note allows earlier hearing dates to be offered when other cases settle, and encourages ADR.
- Significant changes in Court of Appeal procedures.
- Mediation program operating in Equity Division.
- Re-alignment of business between District and Supreme Courts.
- Acting Judge program during 1997-98.
- Acting Judges of Appeal.
- Specialist lists operating in Court of Appeal.
- Procedural changes and rule amendments for Court of Appeal.
- Introduction of new procedures for arraignment of accused persons and management of criminal trials.
- Work and Judges of the Probate and Commercial Divisions transferred to the Equity Division, allowing greater flexibility in assignment of that work amongst judges when cases exceed their estimated hearing time.
- Establishment of the Professional Negligence List in 1999 under judicial case management, and promoting use of ADR.
- Establishment of the Possession List in 2000 under judicial case management and promoting use of ADR.
- Practice Note 112 (February 2000) reduced the 4-month period to arraignment in criminal cases to one month.
- Pilot program of listing reserve criminal trials (over-listing) was run. This was successful and continues under close judicial management.
- Provisions of section 7A of the *Defamation Act 1974* implemented to reduce court time.
- Revised reporting for some specialist lists developed to target cases requiring judicial intervention.
- Practice note on use of electronic technology issued in 1999 to shorten hearing time through more efficient document management in suitable trials.
- Appointment of acting judges on a long-term, non-continuous basis, as a resource to prevent trials becoming part-heard or not reached.
- Guideline judgments given in the Court of Criminal Appeal may assist reducing hearing times in lower courts.
- Voice recognition software tested for judgment preparation (1999).
- ADR Steering Committee requested legislative amendments to expand use of arbitration and to confer a power to refer cases to mediation without the consent of the parties (initiated in 1999 and legislated in 2000).
- Transfer of regional cases to Sydney for their case management (2000).
- Differential Case Management List procedures amended so that standard timeframes no longer apply where cases can be prepared more quickly (2001).
- ADR extended to Probate List matters (2000).

Amendments to the Supreme Court Rules to further the overriding purpose of the court

- Oblige all parties to proceedings to refrain from making allegations, or maintaining issues, unless it is reasonable to do so. A new summary procedure was created for the payment of costs on an indemnity basis by parties who breach this obligation.
- Identify a range of specific directions which the Court may make in the course of 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 give a party a memorandum providing an estimate of the length of the trial, the costs and disbursements of that practitioner and of the estimated costs that would be payable by the party to another party, 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 forthwith, 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. The procedure for the making of such orders was established in Practice Note No. 108 (January 2000). Breach of duties to the Court – duties now reflected in the rules of the Bar Association of NSW – may lead to a practitioner being ordered to pay costs occasioned by the breach.
- Promulgate a Code of Conduct for expert witnesses. The Code establishes that an expert witness has an overriding duty to assist the Court impartially. It specifies that an expert witness's paramount duty is to the Court. He or she is not an advocate for party to the proceedings. Practice Note No. 109 relates to this Code and was issued in February 2000. The new Code establishes a system by which experts make full disclosure of relevant matters in their reports and, upon direction by the Court, confer with other expert witnesses in an endeavour to reach agreement on material matters. An expert is obliged to state any qualification without which, in his or her opinion, a report may be incomplete or inaccurate. Furthermore, where the expert has insufficient data or research to state a concluded opinion, he or she may say so. Practice Note No. 121 was issued in July 2001 concerning joint conferences of expert witnesses.