

Trial court delay and the NSW District Criminal Court

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Aim: To describe the growth in trial court delay in the NSW District Criminal Court and the factors affecting it.

Method: Descriptive analysis of court data.

Results: Where the accused is on bail, the average time between committal for trial and case finalisation in the NSW District Criminal Court has grown by 34 per cent since 2007. Where the accused is in custody, the average time between committal for trial and case finalisation has grown by 44 per cent. The principal causes of the growth in delay are (1) a growth in persons arrested for serious (strictly indictable) offences, (2) an increase in the proportion of cases registered for trial that are actually proceeding to trial and (3) a growth in trial duration.

Conclusion: Action needs to be taken to reduce court delay in the NSW District Criminal Court and to improve the indicators of trial case processing. Measures that expand the Court's capacity or improve its efficiency will have a more immediate (though not necessarily larger) effect than measures that reduce demand for trial court time.

Keywords: trial court delay, backlog, case processing, efficiency, guilty plea, District Criminal Court

INTRODUCTION

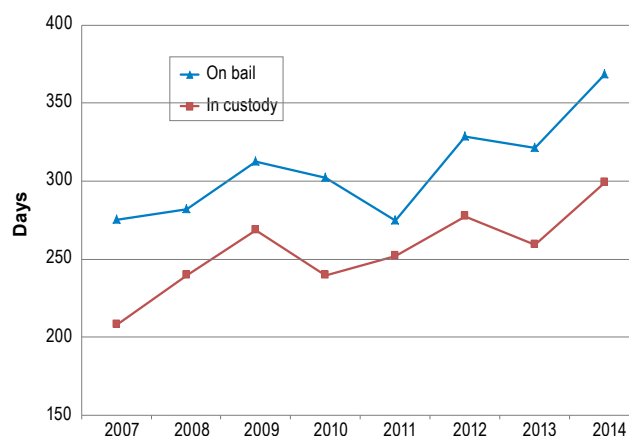
Each year, about 2000 people are committed for trial in the NSW District Criminal Court (DCC). Less than 40 per cent (37.6%) of these cases will be finalised by trial. Nearly 50 per cent (48.8%) will plead guilty before (or during) the trial (NSW Bureau of Crime Statistics and Research 2015, p. 95). The time taken to finalise those cases that do proceed to trial has been growing over the last five years.

In 2014 it took, on average, 369 days to finalise¹ a case committed to trial where the accused was on bail in the New South Wales District Criminal Court (DCC). This is 34 per cent higher than in 2007 (276 days). The growth in trial court delay for custody cases (i.e. cases where the defendant is in custody awaiting trial) has been even greater. In 2007 the average time between committal for trial and case finalisation for custody cases in the DCC was 209 days. Last year it was 300 days; an increase of 44 per cent.²

This is not the first time court delays have risen significantly in the DCC. Similar problems occurred in 1988 and again in 2000

(Weatherburn & Baker 2000). The object of this report is to examine some of the factors that have brought about this current increase in trial court delay and to suggest what needs to be monitored to prevent the problem recurring.

Figure 1. Average time (days) between committal for trial and case finalisation (2007 to 2014)



Source: NSW Bureau of Crime Statistics and Research

We begin with a brief description of the factors that influence the time taken to process trial cases in the DCC. We then examine changes in the pending trial caseload, the number of trial cases registered and the number of trial cases finalised. The section that follows examines trends in trial court capacity. Following this, we turn our attention to changes in trial duration and the number and percentage of matters registered for trial that are actually finalised by trial. In the final section we identify trends in the number of people proceeded against by police (hereafter referred to as ‘arrested’) that might shed light on the growth in trial registrations.

Important note: In what follows, except where otherwise indicated, a reference to ‘trials finalised’ is a reference to matters committed for trial that have been finalised by whatever means (e.g. trial, plea, no-bill etc.).

TRIAL CASE PROCESSING

Trial case processing is a complex process. At one level, the size of the pending trial caseload is determined simply by the ratio of trials registered to trials finalised. When the ratio is greater than one, the pending trial caseload and the time taken to finalise trial matters grows, When the ratio is less than one, both these measures decrease.

The ratio of trials registered to trials finalised, however, is affected by the percentage of matters registered for trial that actually proceed to trial and the average trial duration. A growth in either of these factors will, other things being equal, result in an increase in the size of the pending trial caseload and an increase in time the time taken to finalise trial cases.

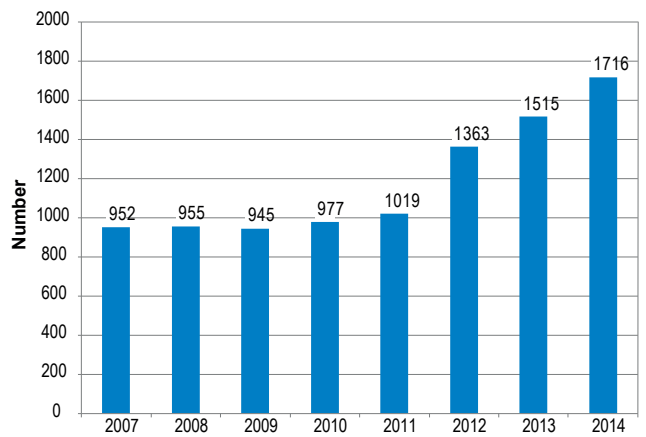
The percentage of matters proceeding to trial and the average trial duration depend, in turn, on factors such as the offence profile of offenders coming before the DCC (some types of offence taken longer to finalise than others), the speed with which forensic and other evidence can be obtained and the efficiency with which prosecutors and defence counsel prepare their cases.

Supply-side factors are important as well. The court’s capacity to hear and dispose of criminal cases obviously depends on the number of courtrooms and judges. Since criminal cases require both prosecution and defence lawyers, the resources available to prosecute and defend criminal cases are also important as well.

CHANGES IN THE PENDING TRIAL CASELOAD

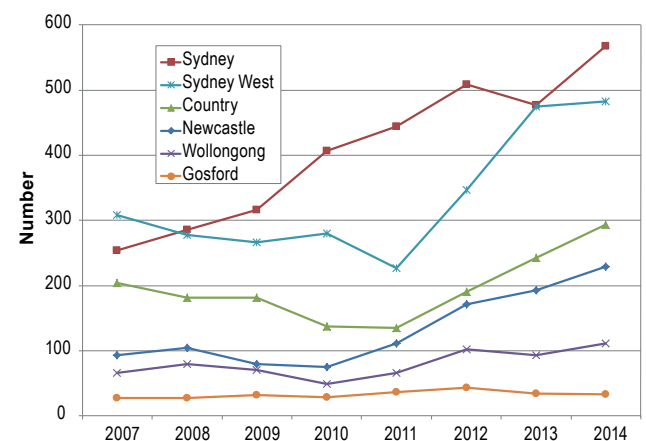
Past research has shown a strong relationship between the time taken to finalise trial cases in the DCC and the size of its pending caseload. Chilvers (2001) found that each 10 per cent increase in the size of the DCC pending trial caseload leads one year later to a 6.2 per cent increase in the median time between committal

Figure 2. Total trials pending: NSW District Criminal Court (2007-2014)



Source: NSW District Criminal Court

Figure 3. Trials pending by Registry NSW District Criminal Court (2007-2014)

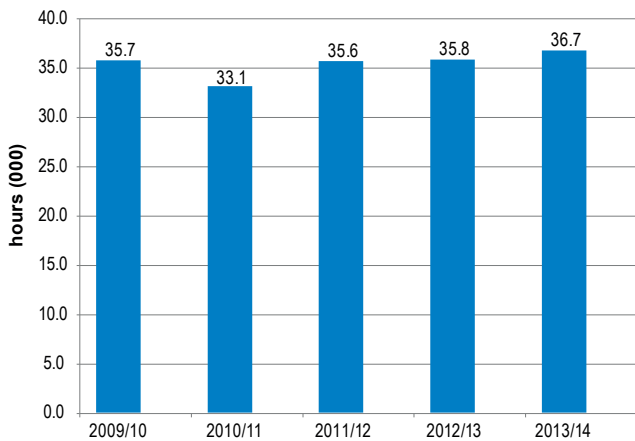


Source: NSW District Criminal Court

for trial and case finalisation. The growth in delay reflects an increase in the size of the pending trial caseload. Between 2007 and 2014, across the DCC as a whole, the pending trial caseload grew by 80 per cent (see Figure 2).

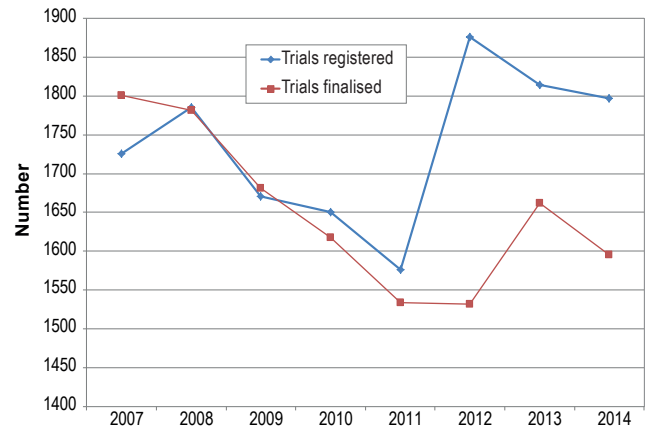
Figure 3 shows the pending trial caseload for the DCC over the period covered by Figure 2 (viz. 2007 to 2014), broken down by registry. There are marked differences between registries in the scale of the growth in the size of the pending trial caseload³. In order of declining magnitude, the growth in the number of pending trial cases between 2007 and 2014 has been Newcastle (+146%), Sydney (+123%), Wollongong, (+68%), Sydney West (+57%), Country (Dubbo, Wagga Wagga and Lismore) (+44%) and Gosford (+18%).

Figure 4. Total sitting hours (000) in crime NSW District Court: 2009/10 - 2013/14



Source: NSW District Criminal Court

Figure 5a. Trials registered and trials finalised NSW District Criminal Court (2007-2014)



Source: NSW District Criminal Court

TRIAL COURT CAPACITY

One of the first issues to consider when court delay increases is whether the capacity of the court has reduced. It is not possible to obtain data on the court time spent hearing and disposing of criminal trials. The DCC, however, does collect data on the hours it spends hearing and disposing of criminal matters (including trials, sentences and appeals).

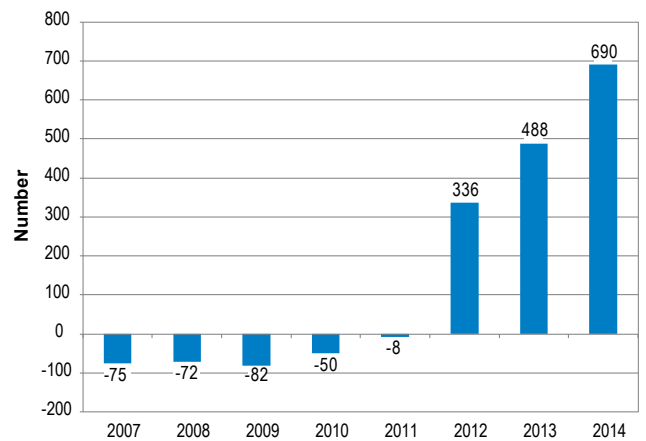
The trend in time spent dealing with criminal matters is shown in Figure 4. There is no indication here that the total time spent on criminal matters has changed significantly. It is possible that the proportion of criminal court time allocated to criminal trials has diminished but criminal trials are normally given priority in the allocation of court time (Fornito 2015).

CHANGES IN TRIALS REGISTERED AND FINALISED

As noted earlier, the pending trial caseload will grow whenever the number of new trials registered exceeds the number being finalised. This can come about as a result of growth in the number of trials registered, a fall in the number finalised, or both. Figure 5a shows the trend in total trials registered and total trials finalised in the DCC. It is obvious from this figure that trial registrations and finalisations fell between 2009 and 2011. In 2012 trial registrations jumped significantly, as did trial disposals from 2013 but by a smaller amount. In short, from 2010 onward, trial registrations exceeded finalisations and the gap between the two widened substantially from 2012 onwards.

The effect of this on the cumulative difference between trials registered and trials finalised is shown in Figure 5b. In 2011 the DCC moved from a slight excess of registrations relative to finalisations. By 2014, the cumulative gap between trials registered and trials finalised had grown to 690. One factor contributing to the growth in trial court delay, then, is a rapid growth in trial registrations.

Figure 5b. Cumulative difference between trials registered and trials finalised: NSW District Criminal Court (2007-2014)



Source: NSW District Criminal Court

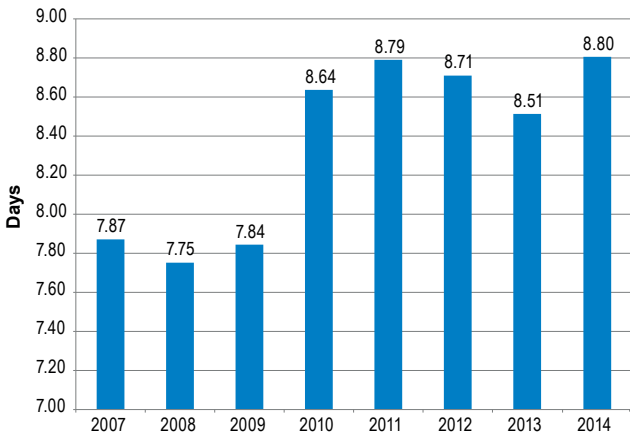
TRIAL DURATION AND PERCENTAGE OF MATTERS PROCEEDING TO TRIAL

The workload of the DCC will also increase if trial duration increases or if the percentage of cases committed for trial that are finalised as a trial increases. In this section of this report we examine these two possibilities.

Figure 6 shows the average annual trial duration (in days) in the DCC between 2007 and 2014. The data are drawn from records kept by the NSW District Court.

The average duration of trials was longer in the years between 2010 and 2014 (8.69 days) than it was between 2007 and 2009 (7.82 days)⁴. This (11%) change might not seem large but it represents a significant increase in demand for trial court time. In 2014, for example, the DCC finalised charges against

**Figure 6. Average trial duration (days)
NSW District Criminal Court (2007-2014)**



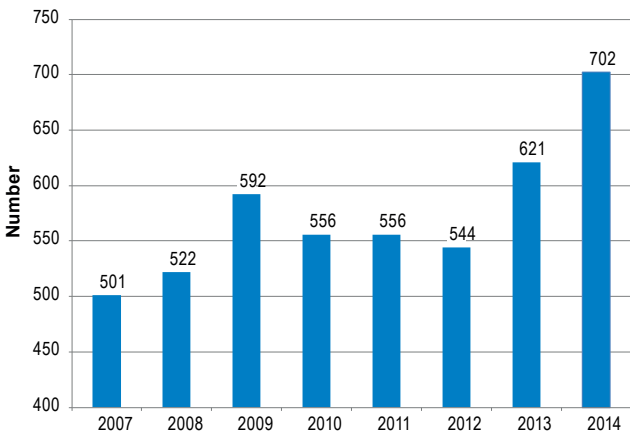
Source: NSW District Criminal Court

702 people by way of trial. If the average trial had lasted 7.82 days, the aggregate demand for trial court time last year would have been approximately (7.82 x 702 =) 5,490 days. In fact the average trial in 2014 lasted 8.80 days, thus resulting in an aggregate demand for trial court time in 2014 of 6,178 days; or approximately 688 days of trial court time more than would have been required in the preceding year.

Figure 7a shows the number of people committed for trial who actually proceed to trial. Figure 7b shows the percentage of people committed for trial who proceed to trial.

It is obvious that both the number and the percentage of persons committed for trial who actually proceed to trial have been increasing; in the former case by 40 per cent between 2007 and 2014, and in the latter case by 9.2 percentage points during this period. An increase in trial duration and in the proportion of matters proceeding trial are two other factors contributing to the growth in the trial court backlog and trial court delay.

**Figure 7a. Total trials held:
NSW District Criminal Court (2007-2014)**



Source: NSW Bureau of Crime Statistics and Research

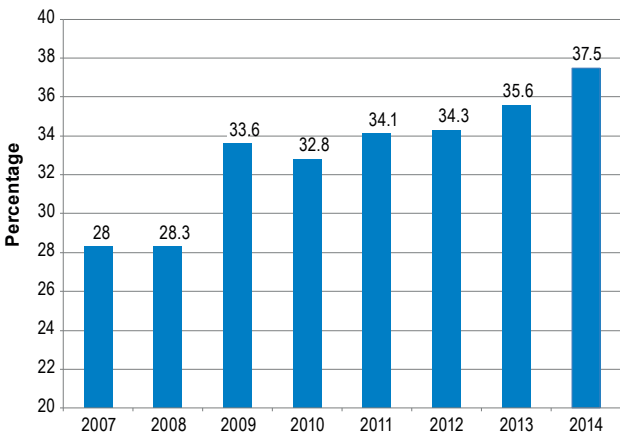
TRENDS IN ARRESTS FOR TABLE 1, TABLE 2 AND STRICTLY INDICTABLE OFFENCES

It will be recalled that the rise in trial registrations, relative to trials finalised, was responsible for the rapid build-up in the Court’s trial backlog (see Figure 5a). In previous sections we considered the role played in this process by increases in trial duration and the percentage of matters proceeding to trial. In this section we consider two other factors. In order to explain them, however, some preliminary comments about the NSW Criminal Procedure Act (1986) are necessary.

Under section 260 of the NSW Criminal Procedure Act (1986) certain indictable offences (i.e. offences that would normally be dealt with by the District Criminal Court) can be dealt with summarily by a Local Court. Offences listed in Table 1 of Schedule 1 of the Act (hereafter referred to as ‘Table 1’ offences) must be dealt with summarily by the Local Court unless the prosecutor or person charged elects to have the offence dealt with on indictment. Offences listed in Table 2 of Schedule 1 of the Act (hereafter referred to as ‘Table 2’ offences) must be dealt with summarily unless the prosecutor elects to have the offence dealt with on indictment.

The District Criminal Court also deals with a range of offences that do not fall into one or other of the categories just defined. Around a third of these are Commonwealth offences. The remainder include workplace health and safety prosecutions heard in the District Court’s summary jurisdiction⁵ and historical sexual offences that predate the NSW Criminal Procedure Act (1986) which established the distinction between Table 1 and Table 2 offences. In the present study there were also a number of cases where the status of the offence (vis a vis Table 1 or Table 2) could not be determined from the lawpart code used to identify the offence. In some cases, for example, the lawpart code identified the offence as supply prohibited drug but, without

Figure 7b. Percentage of persons committed for trial who proceed to trial: NSW District Criminal Court (2007-2014)



Source: NSW Bureau of Crime Statistics and Research

further information on the quantity allegedly supplied, it was impossible to determine whether the offence fell into Table 1 or Table 2. In what follows we simply refer to these offences as 'other offences'.

Given the distinction just drawn it is clear that a rise in trial registrations in the District Court can come about in one of two ways. Firstly, the absolute number of persons charged with strictly indictable, Table 1, Table 2 or other offences may rise, while the relative proportions of each remain constant. Secondly, the proportion of Table 1 and/or Table 2 offences being dealt with on indictment may rise, while the total number of strictly indictable, Table 1, Table 2 and other offences remains constant. In what follows we examine trends in the absolute number and relative proportions of strictly indictable, Table 1, Table 2 and other offences being finalised. For the purposes of this exercise we classify finalised defendants who were initially committed for trial in the District Criminal Court into one of four mutually exclusive offence groups:

Strictly indictable (SI): if the defendant has one or more strictly indictable offences

Table 1 (T1): if the defendant has no strictly indictable offences but has at least one finalised Table 1 offence

Table 2 (T2): if the defendant has no strictly indictable or Table 1 offence but has a finalised Table 2 offence

Other (O): if the defendant does not fall into any of the preceding categories.

Because the Director of Public Prosecutions has the power to change the charges facing a defendant, the offence profile of cases at the point of committal for trial (in terms of SI, T1, T2 and O) can differ from that at the point at which the same cases are finalised. Ideally we would like to examine the offence profile of cases committed for trial in the District Criminal Court at the point at which they are actually committed for trial. This is very difficult with existing data systems. As an alternative, we examine the offence profile of cases committed for trial at the point at which they are finalised.

Table 1 below shows the proportions of defendants committed for trial in the District Criminal Court whose matters were finalised between 2007 and 2014, broken down by the type of offence group to which the defendant belongs. The denominator on which the percentages in Table 1 consist of all persons charged with one or more strictly indictable, Table 1, Table 2 or 'other' offences (regardless of whether they were finalised as a trial or as a sentence matter and regardless of whether they were finalised in the District, Supreme or Children's Court). The entries in the first row labelled 'Strictly Indictable', for example, show the percentage of all persons charged with a strictly indictable offence that were committed for trial in the DCC. The remaining rows are read in a similar fashion.

Table 2 shows the number of defendants committed for trial in the District Criminal Court and finalised between 2007 and 2014, broken down by offence group. The final row in Table 2, however, is not the denominator for Table 1. Specifically, it does not

Table 1. Percentage of persons committed for trial in the District Court by offence group (finalised cases only)

Type of offence group	2007	2008	2009	2010	2011	2012	2013	2014
Strictly Indictable	33.0	30.3	29.2	30.1	28.3	30.4	32.7	34.8
Table 1 group	2.8	2.5	2.3	1.8	1.8	1.8	1.9	1.9
Table 2 group	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2
Other	0.2	0.2	0.1	0.1	0.1	0.1	0.1	0.3
Table 1 & Table 2	3.1	2.6	2.5	2	2	2	2.1	2.1

Table 2. Number of persons committed for trial in the District Court by offence group (finalised cases only)

Type of offence group	2007	2008	2009	2010	2011	2012	2013	2014
Strictly Indictable	1,253	1,366	1,336	1,319	1,299	1,240	1,380	1,395
Table 1 group	278	259	250	191	188	192	200	204
Table 2 group	86	64	66	83	61	53	62	65
Other	156	156	109	101	81	101	102	207
Total	1,773	1,845	1,761	1,694	1,629	1,586	1,744	1,871

Source: NSW Bureau of Crime Statistics and Research

NB. Table 1 shows the percentage of finalised persons in each offence group who were initially committed to trial in the District Court. The other people in each offence group could have been finalised in the Supreme, Children's or Local Court or have been committed to sentence in the District Court.

include persons charged with strictly indictable, Table 1, Table 2 or 'other' offences that were committed for sentence in the DCC. It is solely a count of the total number of persons charged with one or more strictly indictable, Table 1, Table 2 or 'other' offences who were committed for trial and finalised in the DCC.

There is no sign in Table 1 of any increase in the percentage of persons charged with Table 1 and 2 offences who are committed for trial in the District Criminal Court. The SI counts in Table 2, however, show a sharp jump between 2012 and 2013 in the number of cases finalised that involved persons charged with a strictly indictable offence. This is shown graphically in Figure 8, which bears a similar pattern to the trend in trial registrations shown in Figure 5a.

The only other point of note in Table 2 is that there was a sharp increase in persons charged with 'other' offences and committed for trial between 2013 and 2014 (see Figure 9). This increase was the result of a surge in the number of workplace health and safety prosecutions (NSW Bureau of Crime Statistics and Research 2015). This growth probably has little effect on the capacity of the DCC to hear and dispose of criminal cases because judges who hear workplace health and safety prosecutions do not deal with criminal trials.

CHANGES IN OFFENCE PROFILE OF CASES COMMITTED FOR TRIAL

Figure 10 shows trends in the number of cases committed for trial in the District Criminal Court, broken down by offence type and year. Only the major contributors to the growth in trial committals since 2011 are shown. It can be seen from Figure 10 that there has been significant growth in a number of offences since that year; including, most notably, cases involving aggravated sexual assault, drug offences and burglary/break and enter.

Figure 8. Number of persons with Strictly Indictable charges committed for trial and finalised in the District Criminal Court (2007-2014)

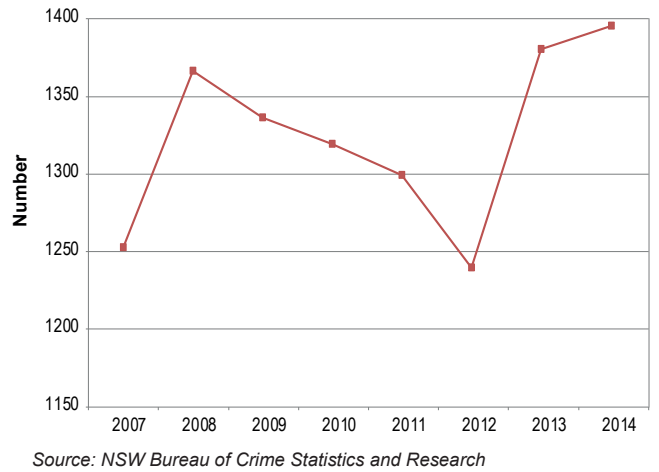


Figure 9. Number of persons charged with 'other' offences committed for trial and finalised in the District Criminal Court (2007-2014)

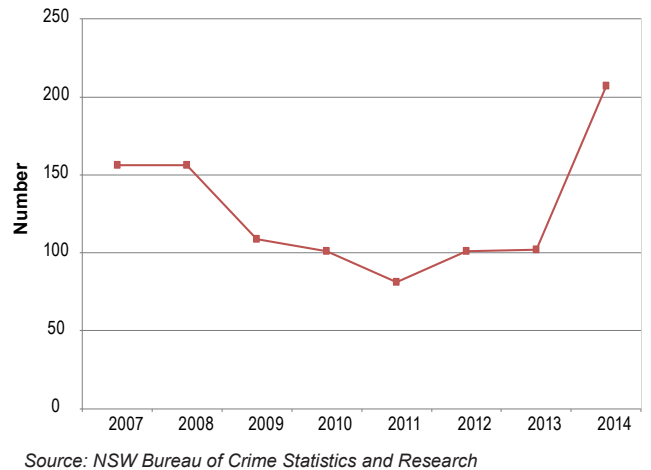
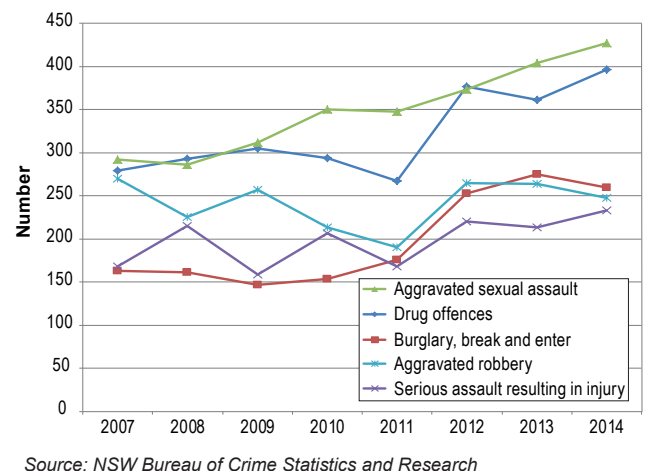


Figure 10. Number of cases committed for trial by offence type and year



SUMMARY AND DISCUSSION

The object of this report was to examine some of the factors responsible for the increase in trial court delay in the District Criminal Court. Looking at the overall picture, it would appear that the increase in trial registrations in the District Criminal Court from 2011 onwards is not the result of a change in the proportion of Table 1 and/or Table 2 offences being committed for trial in the Court. It is the result of a growth in the number of persons charged with strictly indictable or 'other' offences. Put simply, trial registrations increased because the number of arrests for serious offences increased.

Three factors, therefore, appear to have caused or contributed to the growth in the District Court backlog. The first is a growth in trial registrations (relative to disposals). The second was a growth in trial duration. The third was a growth in the number (and percentage) of cases proceeding to trial. The last two factors would have contributed to the slowdown in trial finalisations. The growth in trial registrations does not appear to be a result of a change in the proportion of Table 1 and/or Table 2 offences being committed for trial in the Court. It appears to be due to growth in the number of persons charged with strictly indictable or 'other' offences.

Two questions arise out of these results. The first is how to deal with the problem of congestion in the District Court. There is no space here to engage in a full discussion of options for reducing delay in the District Court but some discussion is in order, if only to outline the possibilities. There are three options for reducing trial court delay; expand the capacity of the District Court; increase the efficiency with which existing capacity is utilized; or reduce the demand for trial court time in the District Court. In general, the measures that would have the most immediate effect are those that involve an expansion of the capacity of the District Court or the efficiency with which it uses its current capacity, since these would allow the court to immediately boost its output. Measures that influence the demand for trial court time may have a larger effect but they will not reduce trial court delay until the number of new cases registered falls below the number of cases being finalised.

Increases in capacity can be permanent or temporary. A permanent increase in trial court capacity would make sense where existing capacity is being fully and efficiently utilized and where there are no indications that demand for trial court capacity will fall. We will discuss the issue of efficiency shortly but the evidence on demand is mixed. On the one hand there is no sign in Figure 5a that the growth in trial registrations will continue (although it may plateau at its current high level). On the other, Figure 6 suggests that trial duration has increased over the last few years. A permanent increase in capacity would seem hard to justify at this stage without clearer evidence of a

permanent increase in demand for trial court time. A temporary increase in capacity would help quickly reduce the pending trial caseload but is likely to be expensive.

An alternative option is to reduce demand for trial court time. Courts have no control over the number of persons arrested but Parliament can determine which classes of case are dealt with in the Local Court as opposed to the District or the Supreme Court. One demand reduction option, therefore, is to shift some less serious types of offence from the jurisdiction of the District Court to the jurisdiction of the Local Court. Since the Local Court is more restricted in the penalties it can impose than the District Court, this may appear to entail a restriction on the penalties imposed on certain classes of offender. Past research, however, suggests that many of the cases dealt with in the District Court involve penalties that could have been imposed by the Local Court, had the matter been heard by a magistrate (Weatherburn & Nguyen da Huong (1992).

The demand for trial court time could also be substantially reduced through earlier guilty pleas. This is an area with considerable potential. The NSW Law Reform Commission (NSWLRC) report on late pleas (NSW Law Reform Commission 2014) cites data obtained from the NSW Office of the Director of Public Prosecutions, indicating that, at present, nearly 30 per cent of defendants committed for trial change their plea to guilty on the day of the trial. If this figure is accepted, substantial amounts of District Court time is probably being wasted as it is not always possible to list a new trial for hearing on the day a previously scheduled trial fails to proceed. If more of those who ultimately plead guilty were persuaded to do so at committal, the demand for trial court time would fall substantially.

The precise causes of late pleas have not been investigated for a number of years but an earlier survey of defence lawyers by the Bureau (Weatherburn & Baker 2000) found the three top reasons given by defence lawyers for a late change of plea on the part of their clients were:

- A late decision by the Crown to accept a plea to a lesser charge, another or fewer charges in full discharge of indictment
- Counsel or advocate was not able to discuss the matter with the Crown until late in the process
- Counsel or advocate had difficulties getting in contact with the client in this matter.

The NSWLRC report on late pleas suggests that the first two of these three factors both remain significant causes of late pleas and puts forward a comprehensive plan for encouraging earlier guilty pleas which deserves close attention. A key feature of the report is its recognition that demand reduction in the District Court may require significant reform to processes in the Local Court. It argues, for example, that late pleas in the District Court

would be far less frequent if there were more certainty as to the charges the accused will eventually face. This, it argues, could be achieved if the Office of the Director of Public Prosecutions formalised the process by which it takes responsibility from police for charging offenders.

It is difficult to determine whether and how the District Court could be made more efficient without a close examination of the way cases progress through the court. This is an area where shortage of data makes research very difficult. There are no routinely collected data, for example, on the number of times trial cases are listed for trial; the percentage that proceed to trial at first listing; the time required to obtain the results of forensic testing or transcripts of tape-recorded evidence; the duration of trials involving different times of offence; or the amounts of time spent by the District Court hearing trials, sentence matters and appeals. A study of this process would be expensive and time-consuming but would provide a valuable basis on which to identify potential efficiencies in criminal case processing.

We turn, then, to the question of how to prevent the problem of trial court delay recurring. Once delays in trial case processing become entrenched, they become very difficult to remove because participants in the trial process adjust their practices to suit. Early warning of court congestion is critical to prevent this occurring. The best way to obtain such early warning is to closely monitor the ratio of trials registered to trials finalised. If this ratio exceeds unity (one) for any length of time, a growth in trial case backlog and court delay is inevitable unless corrective action is taken immediately. The Secretary of the Department of Justice has established a Board (the Criminal Justice Transformation Board) which now monitors this ratio closely, along with a number of other key criminal justice parameters, including the number of persons arrested and the number of juvenile and adult offenders entering custody.

It is one thing to set up an early warning indicator of congestion in the District Court. Accurate diagnosis of the cause of the congestion is quite another. Accurate diagnosis requires a range of indicators that currently do not exist. The most important of these are: the percentage of trials that proceed on the date they are first listed; the cause of any failure to proceed when listed (adjournment, late plea, no-bill, etc.) and trial duration broken down by offence type. Data on the first two items would help identify any reduction (or improvement) in the efficiency with which trial cases are being processed. Data on trial duration broken down by offence type would make it much easier to investigate the cause of any growth in demand for trial court time that arises from an increase in the length of trials.

NOTES

1. The time taken to finalise a case in this report is the time from committal for trial to finalisation of the case, regardless of how the matter is finalised (i.e. plea, trial, no bill etc.).
2. Though it is not our focus in the present report, it is worth noting in passing that this increase in the time taken to finalised custody matters has no doubt affected the time spent on remand and thus the size of the remand population.
3. Note there is wide variation in the workload of the various registries
4. The NSW District Criminal Court was unable to provide the length of each individual trial on which its averages were based. Calculations of mean trial length over several years are the mean of annual averages.
5. Note: Workplace health and safety prosecutions add to the workload of the District Criminal Court but are not counted in trial registrations.

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