



## COURT DELAY AND PRISON OVERCROWDING

Of late, considerable public attention has been focussed on court delay. The causes of this delay were the subject of a recently released report by management consultants Coopers & Lybrand WD Scott<sup>1</sup>, which makes a number of recommendations designed to expedite the progress of cases through the justice system. Statistics compiled by the Bureau of Crime Statistics and Research for the purpose of that report reveal the dimensions of the problem for criminal cases.

The report notes that, in New South Wales, for indictable criminal matters, the delay between arrest and committal in the Local Courts ranges from 18 to 27 weeks for metropolitan courts and from 7 to 40 weeks for country courts.<sup>2</sup> Once these matters reach the Higher Courts the delays range from 14.5 to 26 months in the District Courts<sup>3</sup> and from 9 to 12 months in the Supreme Court.<sup>4</sup>

These delays are a matter of concern to everyone. The pithy maxim "justice delayed is justice denied" is poignantly true of criminal cases in which an accused person awaiting trial in custody may eventually be acquitted or given a non-custodial penalty. Long delays in the disposition of criminal cases also take their toll in the conviction rate. With the passage of time witnesses' memories fade and evidence may be lost, thereby reducing the chances of a successful prosecution.

"Overcrowding" in the criminal justice system is not limited to the courts. Though they have been the focus of less media attention, prisons in NSW have been experiencing considerable accommodation pressures for some time. The NSW prison population in July 1989 stood at 4656<sup>5</sup>, higher than it has ever been. Indeed, as shown in Table 1, although NSW does not have the highest imprisonment rate in Australia, its rate of imprisonment is over 50% higher than that of Victoria, a State which is demographically quite similar.

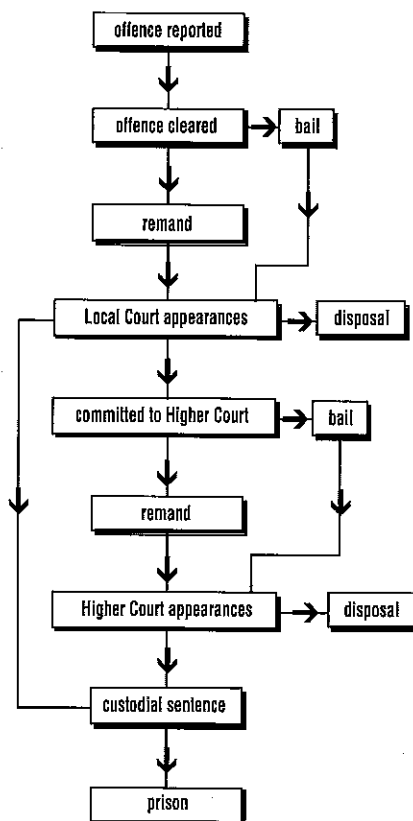
This bulletin seeks to shed some light on problems of court delay and prison overcrowding. Unfortunately, the quality of the data currently available do not allow us to identify precisely all of the factors which maintain the present long court delays and high level of prison overcrowding. The available data, nevertheless, do allow at least a partial glimpse of factors causing court and prison congestion. The effort to explain the data is also instructive in terms of the deficiencies it shows in the information currently available about the operation of the criminal justice system.

Table 1  
Number of prisoners per 100,000  
adult population by State, 1988

State	Imprisonment rate
N.S.W.	124.3
Vic.	80.9
Qld.	133.4
W.A.	156.0
S.A.	93.2
Tas.	84.2
N.T.	342.3
A.C.T.	51.7

Source: Australian Institute of Criminology  
'Australian Prison Trends' No.158, July 1989

Figure 1  
Schematic representation of  
the flow of cases through the  
criminal justice system



### THE CRIMINAL JUSTICE SYSTEM

How do we explain the present congestion of courts and prisons in NSW? Figure 1 shows a simplified diagram of the flow of cases through the criminal justice system. At a very general level, cases arrive at the court system when police arrest alleged offenders. Once arrested, people must be dealt with by courts which take a variable amount of time to dispose of their cases. A proportion of those dealt with are convicted and sent to prison where they are kept for varying periods before being released. Given this general model of the criminal justice system, it can be seen that there are several variables which may influence the flow of cases.

### POLICE

At the simplest level, the input to the system comprises alleged offenders arrested by the police. Any increase in the number of arrests will give rise to an increase in the number of cases to be dealt with by the courts. The NSW Police Department does not currently collect information on the number of people arrested each year in the State. However, we do know the number of offences

cleared by the police.<sup>6</sup> This can be used as an index of the number of people arrested each year.<sup>7</sup>

The clearance data suggest that arrests have been increasing over the last few years. From Figure 2 it can be seen that there has been a steady increase in the number of cleared offences between 1976 and 1988. In particular, there was a steep increase in cleared offences between 1982 and 1985 and again between 1986 and 1987.<sup>8</sup>

The increases in the number of cleared offences may arise because of an increase in crime or simply from an increase in the number of police available to arrest alleged offenders. As shown in Figure 2, the increase in cleared offences in NSW has closely followed the increase in numbers of police appointed over the same period. The number of police in NSW has increased throughout the period from 1977 to 1988. The most

notable increases in police strength occurred in the periods 1982-1984 and 1986-1988. If the increase in police strength is responsible for the increase in the clearance of offences, we would expect that the increase in cleared offences should be more marked at times when police numbers rise sharply. This calls for a closer examination of the data in Figure 2.

It can be seen from Figure 2 that cleared offences began to increase in 1982 at the same time as the first major increase in police numbers. Similarly, the second marked rise in cleared offences (1986-1987) coincides with the second major increase in police strength. It is interesting to note, however, that the continued increase in police numbers between 1987 and 1988 is not reflected in a continued rise in cleared offences. So, it appears that the number of offences cleared has risen with increases in police

numbers, at least to the level of police strength reached in 1987. Subsequent increases in police strength do not appear yet to have had any effect on the number of offences cleared.<sup>9</sup>

**LOCAL COURTS'**

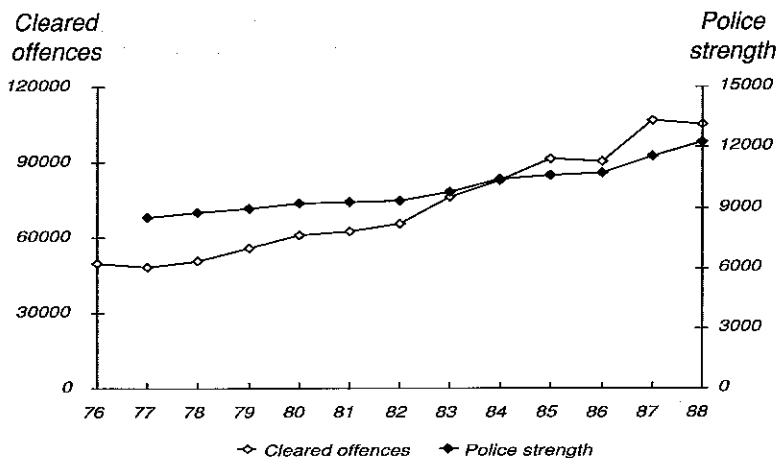
In the light of what we know from Figure 1 the evidence of a substantial increase in the number of cleared offences suggests that there will have been a corresponding but subsequent increase in the number of people appearing before the Local Courts - the first stage in the court system.<sup>10</sup>

Figure 3 shows the number of matters dealt with per annum in the Local Courts and the number of cleared offences from 1976 to 1988. As expected, there is an increase overall in the number of people appearing before Local Courts. It would appear, however, that the increase in Local Court appearances is both more irregular and less marked than the growth in cleared offences. The upward surge in the number of cleared offences which started in 1982 is followed by a much less dramatic and certainly less prolonged increase in the number of Local Court appearances (1983-1985), followed by a decrease (1985-1986), and a further slight increase (1986-1988). The only marked increase in Local Court appearances occurred between 1986 and 1987.

Why has the rate of increase in Local Court appearances not kept pace with the rate of increase in cleared offences? One possible explanation is that the rise in cleared offences represents an increase in the number of offences allegedly committed per person arrested rather than an increase in the number of people who have allegedly committed offences. If this were the case there would be little change in the actual number of people appearing before the Local Courts. Though this must be admitted as a possibility, there is no independent reason for believing that the police have recently been laying more charges against the same number of individuals.

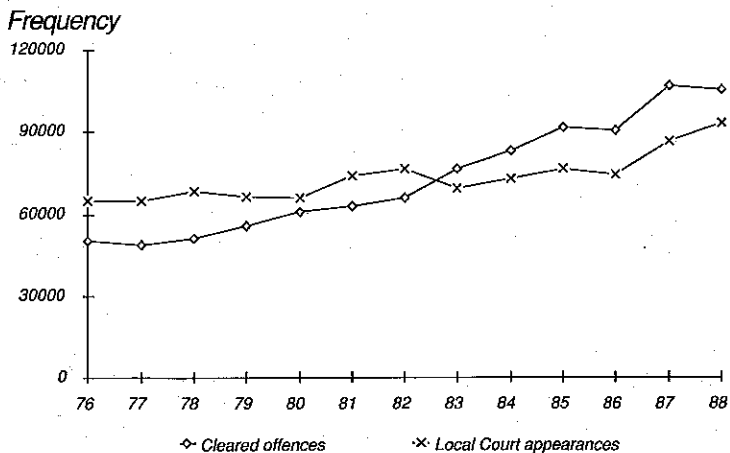
Could it be that a significant proportion of people arrested by police turn up in Higher Criminal Courts rather than in the Local Court? A glance at Figure 1 suggests that this should not be the case because all cases going to the Higher Criminal Courts must first pass through committal proceedings in the Local Court. We know, however, that the data shown in Figure 3 do not reliably include committal hearings.<sup>11</sup> It is possible, therefore, that the apparently slower rate of increase

**Figure 2**  
**Number of cleared offences 1976-1988 and police strength 1977-1988**



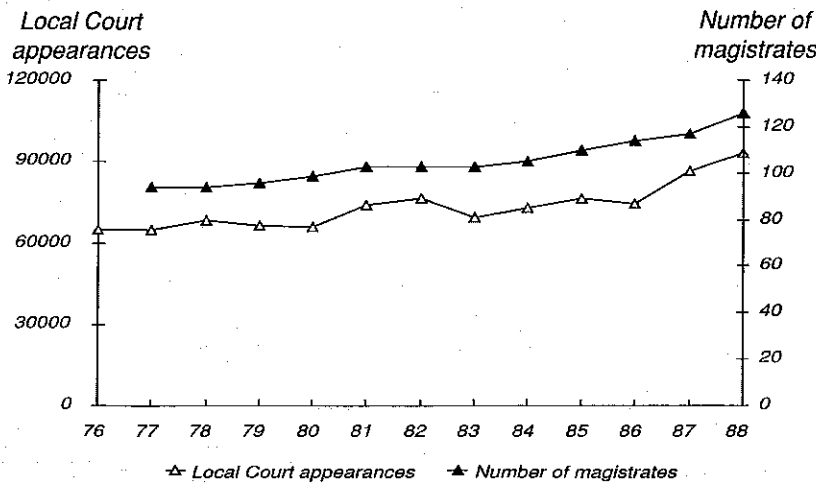
Source: NSW Police Department

**Figure 3**  
**Number of cleared offences and number of Local Court appearances 1976-1988**



Sources: NSW Police Department  
NSW Bureau of Crime Statistics and Research 'Lower Criminal Courts Statistics'

**Figure 4**  
**Number of Local Court appearances 1976-1988**  
**and number of magistrates 1977-1988**



Sources: NSW Bureau of Crime Statistics and Research 'Lower Criminal Courts Statistics'  
 NSW Attorney General's Department

of Local Court appearances when compared with the rise in cleared offences is due to undercounting of committals. However, given the relatively small number of committals (about 5000 per year) and that they have been undercounted consistently from 1976 to 1988, this is unlikely to have greatly affected the rates of change.

There is one other reason why Local Court appearances may not have increased at the same rate as cleared offences. If we want to examine the load placed on Local Courts by the increase in cleared offences, ideally we should examine the rate at which cases are arriving at Local Courts for disposal. As we have said, police data on cleared offences are only an approximation to this.<sup>12</sup> The Local Court appearance data in Figure 3 are for cases disposed of in Local Courts in a given year.

Increases in the number of cleared offences will be matched by increases in cases disposed of by Local Courts only if the Local Courts have been able to dispose of cases at roughly the rate at which they arrive. If the courts cannot deal with the cases at the rate at which persons are being arrested, then a backlog of cases waiting to be dealt with will begin to build up.

A backlog of cases will normally cause defendants to wait longer for a hearing. If this occurs we would expect an increase in the total time cases take to get through the court system. For practical purposes, most cases may be regarded as entering the court system with the first appearance of the defendant in court, usually immedi-

ately after arrest. Thus, if there is no increase in time between this date and the date of each defendant's final court appearance one can reasonably assume that the Local Courts have been able to absorb the increasing demand for their services without suffering a growing backlog of uncleared cases.

Table 2 shows that, although the majority of cases are disposed of within one month, the percentage of cases taking longer than one month to disposal has increased from about 30% in 1982 to about 40% in 1988. It would appear, therefore, that although Local Courts have largely been able to meet the increase in demand for hearings, nevertheless, the disposal time of cases has increased.

**Changes to Local Court capacity**

How would the Local Courts have dealt with the increase in demand? One

**Table 2**  
**Percentage of cases - time between first and final Local Court appearance**

Year	Under one month	One month & over
1982	71.6	28.3
1983	67.7	32.3
1984	66.2	33.8
1985	64.4	35.5
1986	63.3	36.6
1987	65.2	34.9
1988	61.5	38.5

Source: NSW Bureau of Crime Statistics and Research 'Lower Criminal Courts Statistics'

obvious way is to increase the efficiency with which cases are listed, heard and disposed of. Fewer adjournments, pleas of guilty at an earlier stage of court proceedings and more complete use of the available court time, for example, will all result in an increase in the number of cases which can be disposed of in a given year without any change in the number of cases awaiting a hearing.

Additions to court capacity will have the same effect. There has, in fact, been an expansion of the Local Courts specifically to meet the increase in demand for court services shown in Figure 3. Figure 4 shows the 34% increase in the number of magistrates from 94 in 1977 to 126 in 1988.<sup>13</sup> This increase in court capacity would have allowed the courts to accommodate, at least in part, the growth in the number of cases resulting from increased numbers of arrests.

It is noticeable, however, that the 44% increase in the number of cases disposed of by Local Courts between 1977 and 1988 exceeds the 34% growth in that period in the number of magistrates available to hear them. Unless there has been a drop in the number of civil cases dealt with in Local Courts<sup>14</sup>, this suggests either that Local Courts originally possessed unutilised capacity or that they have become more efficient in disposing of criminal cases.

**HIGHER COURTS**

To what extent has the increase in cleared offences increased the demand on the Higher Court system? This can be determined from an examination of the number of people committed to the Higher Criminal Courts for trial or sentence. As noted above, however, we do not have any reliable measure of the number of persons committed for trial or sentence. The closest approximation which we can obtain is data on the number of people committed for trial in the period 1977 to 1986 compiled for the purposes of a special report on court delay published by the Attorney General's Department.<sup>15</sup> Those data, shown in Figure 5, reveal a doubling of the number of people committed for trial in the Higher Courts between 1977 and 1982. The number of persons committed to trial then declines until 1984<sup>16</sup>, whereupon it appears to settle at a little under 5000 persons per year.

To assess whether the Higher Courts were able to absorb the increase in new cases which occurred between 1977 and 1982 we need information on the number

of cases they disposed of over the same period. Unfortunately, we have this information only up until 1983, the last year that the Australian Bureau of Statistics published statistics on Higher Criminal Court appearances.<sup>17</sup> Up to that point, as may be seen from inspection of Table 3, there was a steady increase in cases disposed of by the Higher Courts. There

on remand give us some indication of the number of cases waiting to appear before the Higher Courts (although a small proportion of those on remand are awaiting a committal hearing, or the outcome of a Local Court matter). If people are being committed to trial faster than the courts are able to dispose of trials, more people will be remanded in

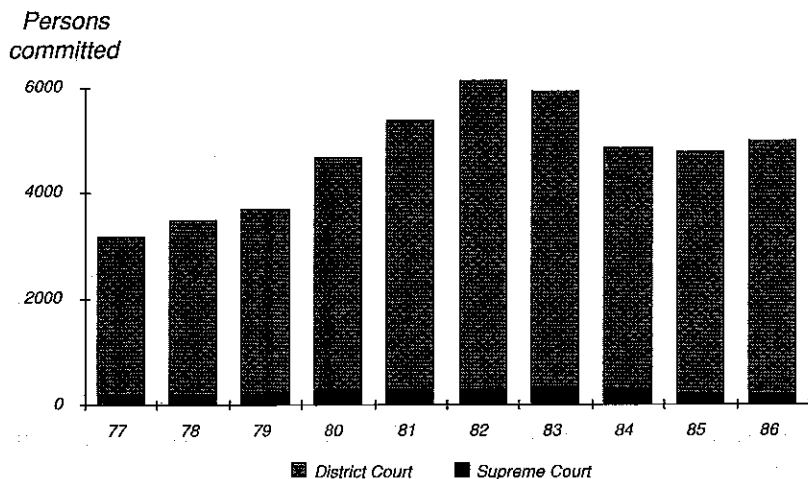
since 1984. This is also evident in the percentage of the total prison population who are remandees, which has risen from less than 12% in 1977 to over 23% in 1988 (see Table 5). These figures suggest that the increase in demand on Higher Court services, evident before 1983, continued through the years which followed. Before accepting this conclusion, however, it should be noted that increases in the number of people held on remand may represent an increase in the likelihood of being detained on remand rather than being granted bail.

In addition, if there is excess demand on Higher Court services, we might expect that people would spend longer on remand awaiting appearance. Table 6 shows the median time already served on remand by those remandees who were in prison on the night of the annual prison census between 1982 and 1988. From the table it appears that there has been little change in the length of time spent on remand over this time period. It could be, though, that the span of years covered in these data is not sufficient to expose any trends in length of remand. On the other hand, the lack of any increase in the length of time spent on remand may reflect the priority given to those on remand in the listing of cases to appear before the courts.

**Changes to Higher Court capacity**

One factor which may be helping to maintain the average length of remand at a constant level is the increase in capacity in the Higher Courts in the form of an in-

**Figure 5**  
**Persons committed for trial from Local Courts to Supreme and District Courts 1977-1986**



Source: NSW Attorney General's Department, 'Court Delays', October 1987

is no direct method of assessing changes in the number of cases disposed of after that. We can, however, make an indirect assessment of whether the Higher Courts were able to keep pace with the increase in work by examining trends in the prison remand population.

We do this in the following way. A proportion of those people appearing before the Higher Courts are held (remanded) in custody until their trial begins. Both the number of people on remand and the length of time they spend

custody waiting for their trial to begin. This will cause the remand population within the prison system to build up.

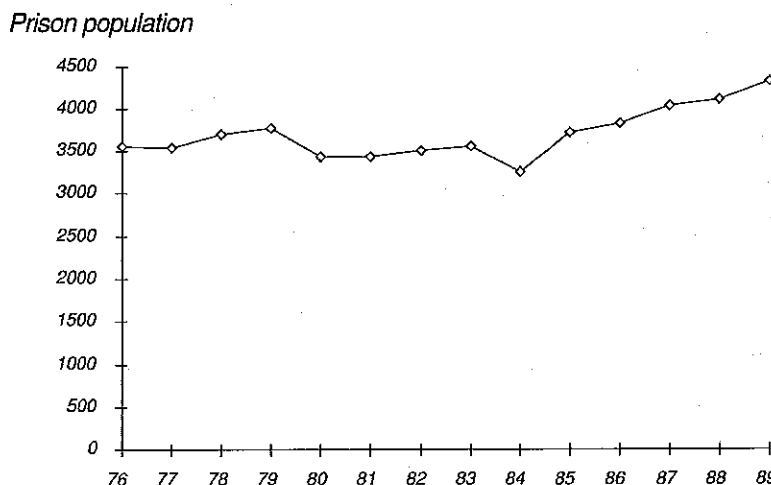
Table 4 shows the average monthly remand population in NSW prisons for the years 1977-1988. There has been a dramatic increase in the number of people held on remand, especially in the years

**Table 3**  
**Number of Higher Court appearances 1976-1983**

Year	Higher Court appearances
1976	3418
1977	3425
1978	4076
1979	4255
1980	4591
1981	5422
1982	5693
1983	6597

Source: Australian Bureau of Statistics 'Higher Criminal Courts New South Wales'

**Figure 6**  
**Average monthly prison population 1976-1989**



Source: Australian Institute of Criminology

crease in the number of judges.<sup>18</sup> When the District Court and the Supreme Court are considered together, there has been an increase in the number of judges from 65 in 1977 to 91 in 1988. All but two of these judges were added to the District Court bench.

**Table 4**  
**Average monthly remand population in NSW prisons 1977-1988**

Year	Remand population
1977	411
1978	521
1979	528
1980	488
1981	530
1982	637
1983	620
1984	624
1985	758
1986	805
1987	909
1988	977

Source: Australian Institute of Criminology 'Australian Prison Trends'

**Table 5**  
**Percentage of the total prison population in NSW who are remandees 1977-1988**

Year	Remand percentage
1977	11.4
1978	13.9
1979	14.1
1980	14.3
1981	15.1
1982	18.2
1983	17.5
1984	19.3
1985	20.3
1986	21.0
1987	22.6
1988	23.7

Source: Australian Institute of Criminology 'Australian Prison Trends'

**Table 6**  
**Median time already spent on remand 1982-1988**

Year	Weeks
1982	9
1983	7
1984	6
1985	9
1986	9
1987	9.5
1988	10

Source: Australian Institute of Criminology

Increases in the number of judges, however, do not necessarily produce automatic increases in the case disposal capacity of the courts. Sufficient numbers of courtrooms and ancillary staff to make full use of the additional judge time are also required. Whether increases in these areas have been sufficient for this purpose is impossible to determine from the available statistical information.

**PRISONS**

Since a proportion of all those appearing before the courts go to prison (for example, 35% of people appearing on criminal matters before the Higher Courts in 1988 received custodial sentences<sup>19</sup>), an increase in the number of court appearances must ultimately show up in a growth in prison numbers, all else being equal. Figure 6 confirms this expectation in showing that there has been a steady increase in the average monthly prison population since 1984. Comparison of Figures 3 and 6 also suggests that prison congestion has been somewhat slower to develop than the increases in cleared offences and Local Court appearances. This would be expected because of the time it takes defendants to pass from arrest, through the stages of committal, trial and sentence.

It is possible, nonetheless, that the growth in the prison population comes not from more people being sent there, but from people being sent there for longer periods. Table 7 shows the median actual expected sentence (taking account of all extant remissions) to be served by those sentenced prisoners present on census night from 1982 to 1988.<sup>20</sup> There is no obvious increase in the actual expected sentence being served by prisoners and for this reason we can rule out longer gaol terms as the explanation for current levels of prison overcrowding.

The high proportion of the prison population held on remand awaiting trial might

suggest that, were it not for court delay, the prison population would be much lower than it is. To some extent this is true, but it is important to remember that a significant proportion of those held on remand, ultimately, will be convicted and given a sentence of imprisonment. It has been the practice of the courts when sentencing prisoners held on remand to take the period on remand into account by backdating the sentence which is imposed. This means that many (though by no means all) prisoners now held on remand will stay in the prison system once their case is finalised.

**DISCUSSION**

The preceding analysis shows that the activities of police, courts and prisons are very closely interrelated. Over the period since 1976, NSW has witnessed a rapid growth in the total number of persons arrested, followed by congestion in courts and prisons.

Though there have been increases in court capacity at both Local and Higher Criminal Court levels, the increases may not have been sufficient to meet the demand on court services. This has led to increasing delays in the hearing of criminal cases. Prisons, which have no real option but to accept immediately those sent there by the courts, necessarily suffer congestion in the form of too many prisoners per cell with all the attendant administrative and human problems this brings.

Court congestion can be reduced by increasing the speed and efficiency with which cases are moved through the courts. Recommendations directed at increased efficiency were the primary focus of the earlier mentioned report by Coopers & Lybrand WD Scott and of recent initiatives announced by the Attorney General.<sup>21</sup> Clearly, though, rising rates of arrests ultimately will cause the demand for court services to exceed the capacity of any court system, no matter how efficiently it is run. At this stage it will be necessary to build new courts and appoint new judges and ancillary staff.

Prisons, unlike courts, can do very little to meet increases in demand for prison accommodation. The rate of arrival of prisoners may be slowed only if they spend longer periods in police custody awaiting transfer to prison. This is really only shifting the problem. On the other hand, it is unlikely that the Australian community would accept the Dutch

**Table 7**  
**Median actual expected sentence 1982-1988**

Year	Months
1982	21
1983	16
1984	15
1985	14
1986	17
1987	15
1988	16

Source: Australian Institute of Criminology

solution to prison overcrowding of making "prisoners" wait at home until a place in prison is available.<sup>22</sup> For practical purposes the prison system in NSW has virtually no option for dealing with congestion other than the building of new prison accommodation.

Whatever strategy is deployed to deal with court and prison congestion it is obvious that close monitoring of the demand on and the capacity of the court and prison systems is crucial if congestion is to be avoided altogether. Once it has developed, the time required to organise and implement changes to prison and court system capacity means that it will remain for some time. Investments in law enforcement or changes in law enforcement strategies which are implemented without due regard to the inevitable increase in demand on court and prison services run the risk of creating congestion, especially when the capacity of courts and prisons has been reached.

Of course it is impossible to monitor closely the demand on and the capacity of the court and prison systems without the requisite information systems to assess these things. As the earlier discussion shows, historically there has been an acute shortage of reliable, accurate and timely data on such things as rates of arrest, the number of cases arriving at different levels of the court system and the number of cases disposed of at each level of the court system. This sort of information is not always easy to collect. Without it, though, it is impossible to tell when courts and prisons have reached their capacity or when that capacity should be expanded.

New criminal justice information systems are not the only prerequisite to avoiding criminal justice system congestion. If policy makers had to wait until arrests were occurring faster than courts and prisons could cope with them before planning to expand court and prison capacity, periodic congestion would remain a chronic feature of the criminal justice system. Better information might enable remedial action to be taken earlier, but if such action involves the building of new courts and prisons, the earliest possible warning of court and prison congestion is necessary.

What is required to avoid congestion, then, is the ability to *forecast* demand on the criminal justice system. We can do this using what we know about crime and arrest rates on the one hand and how long it takes people to move through the

court and prison systems on the other. It is possible, in fact, to build a criminal justice system computer model which uses this information. There is nothing novel about this process. It has been successfully implemented overseas.<sup>23</sup> The techniques are not markedly different from the way in which the Federal Government forecasts such things as rates of inflation, the budget deficit and so on.

There is one other strategy which would be very useful in the allocation of resources both to and within the criminal justice system. The input to the criminal justice system obviously comes from police law enforcement activity. At present the decision to increase investment in law enforcement is often based on an assessment of trends in reported or recorded crime. Trends in reported or recorded crime, however, are often highly unreliable guides to trends in the actual incidence of various sorts of offence. Reported incidents of assault can go up, for example, not because assault is becoming more common but because people are more willing to report it. Reliance on trends in reported crime can, for this reason, lead to errors in judgment as to when additional police resources are called for.

In the United States and Britain, police statistics on reported and recorded crime are now supplemented by household crime victimisation surveys.<sup>24</sup> These surveys, rather like those carried out by the Australian Bureau of Statistics to measure unemployment rates, are designed to see what proportion of households have been touched by crime and which sorts of crime they have experienced. By conducting these sorts of surveys regularly, a picture can be built up of trends in crime which is both more accurate and more stable than that which may be gathered just from reported and recorded crime. The results of the surveys can then be used both to guide investment in law enforcement and to assist in predicting future demands on the court and prison systems.

## NOTES

1. Coopers & Lybrand WD Scott, *Report on a Review of the New South Wales Court System*, May, 1989.
2. op. cit. p.54
3. op. cit. p.51
4. op. cit. p.49

5. Australian Institute of Criminology, *Australian Prison Trends*, No.158, July 1989.
6. An offence is cleared when police have preferred charges against at least one offender or an information has been laid against at least one person.
7. The number of offences cleared will overestimate the number of arrests to the extent that each person arrested is alleged to have committed more than one offence.
8. Police data were measured for calendar years from 1976 to 1982 and for financial years from 1982/83 onwards. For the sake of convenience, all police statistics in this bulletin have been displayed against calendar years with, for example, the financial year 1982/83 shown as calendar year 1983.
9. The increase in police strength since 1987 may, however, have resulted in a reduction in the number of offences committed.
10. Over 90% of criminal cases are disposed of in Local Courts.
11. Court clerks often send committal papers to a Higher Court before completing the Bureau of Crime Statistics and Research statistical return on Local Court appearances. This makes it impossible to complete a statistical return on the committal case.
12. Arrangements have now been made by the Attorney General's Department to collect Local Court arrivals information.
13. In addition to the increase in full-time magistrates, there have been 13 part-time magistrates appointed since 1987.
14. Discussions with senior Local Court administrators suggest that this is not the case.
15. See: NSW Attorney General's Department, *Court Delays* October, 1987, p. 2.
16. The Attorney General's Department credits the decrease which occurred at this point to the Government's decision to allow magistrates to deal with a wider variety of less serious criminal matters.
17. The Bureau of Crime Statistics and Research commenced producing annual statistical reports on appearances before Higher Criminal Courts in 1989.
18. There are other ways in which the load on the Higher Criminal Courts may be reduced. See note 16, above.
19. NSW Bureau of Crime Statistics and Research. *Higher Criminal Courts Statistics 1988*.
20. These figures have been adjusted to account for the undercounting of people serving short sentences which typically occurs in Prison Census data.
21. Attorney General's Department. *Discussion Paper on Reforms to the Criminal Justice System*, May, 1989.
22. Downes, D. The Origins and Consequences of Dutch Penal Policy since 1945. *The British Journal of Criminology*, 1982, 22, 325-362.
23. This has been done in both England and the United States (see, for example, P.M. Morgan, *Modelling the Criminal Justice System*. Research and Planning Unit, Paper 35 (London, HMSO, 1985) and J. Belling, A. Blumstein, and W. Glass, *JUSSIM II: An Interactive Feedback Model for Criminal Justice Planning*. (Pittsburgh, Carnegie Mellon University, Urban Systems Institute, 1973).
24. See, for example, J.M. Hough and P. Mayhew, *Taking account of crime: Key findings from the second British crime survey*, London, HMSO, 1985.

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