SENTENCE DISPARITY AND ITS IMPACT ON THE NSW DISTRICT CRIMINAL COURT

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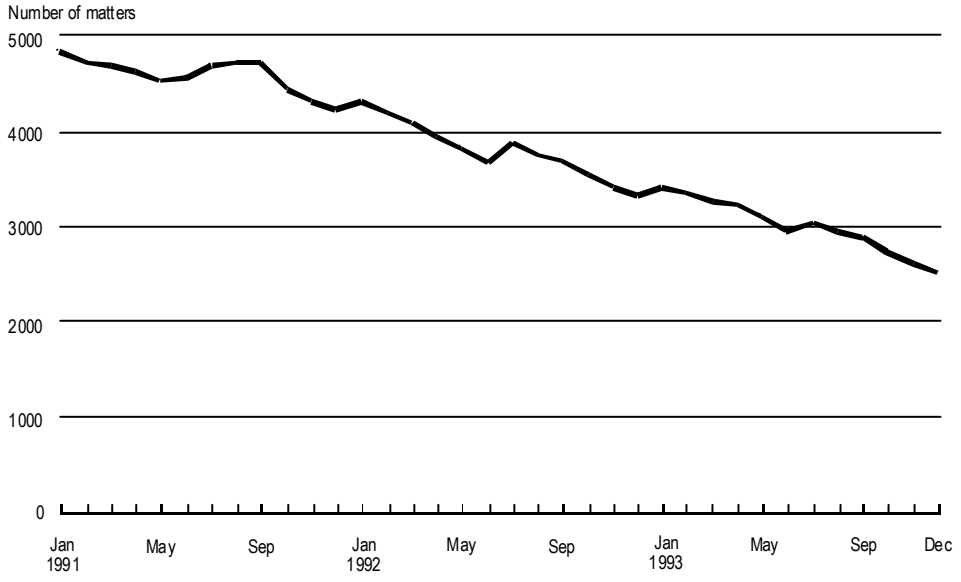
PART 1: INTRODUCTION

Delays in the New South Wales District Criminal Court have declined significantly over the last two years. The median delay between committal and finalization of trial for matters where the accused is on bail is now less than 450 days (15 months).[2] In 1991 the median delay for such cases was in excess of 575 days (19 months). Delays for cases where the accused is held in custody on remand while awaiting trial have also declined. In 1991 such cases took nearly 250 days (8 months) to finalize. They now take approximately 175 days (6 months). Thus delays for trial cases where the accused is on bail have fallen by 22%, while delays where the accused is held on remand have fallen by 30%.

These trends are encouraging but are less substantial than might have been expected given the size of the decrease in unfinalized matters registered for trial in the District Criminal Court. Figure 1 shows this trend.[3] At the beginning of 1991 there were 4,831 matters registered for trial awaiting finalization. By December 1993 this figure had fallen to 2,514, a decrease of approximately 48%. Changes in trial court delay naturally tend to lag behind changes in the backlog of matters registered for trial.[4] It seems likely, however, that factors other than the backlog are contributing to the problem of delay among trial matters in the District Criminal Court.

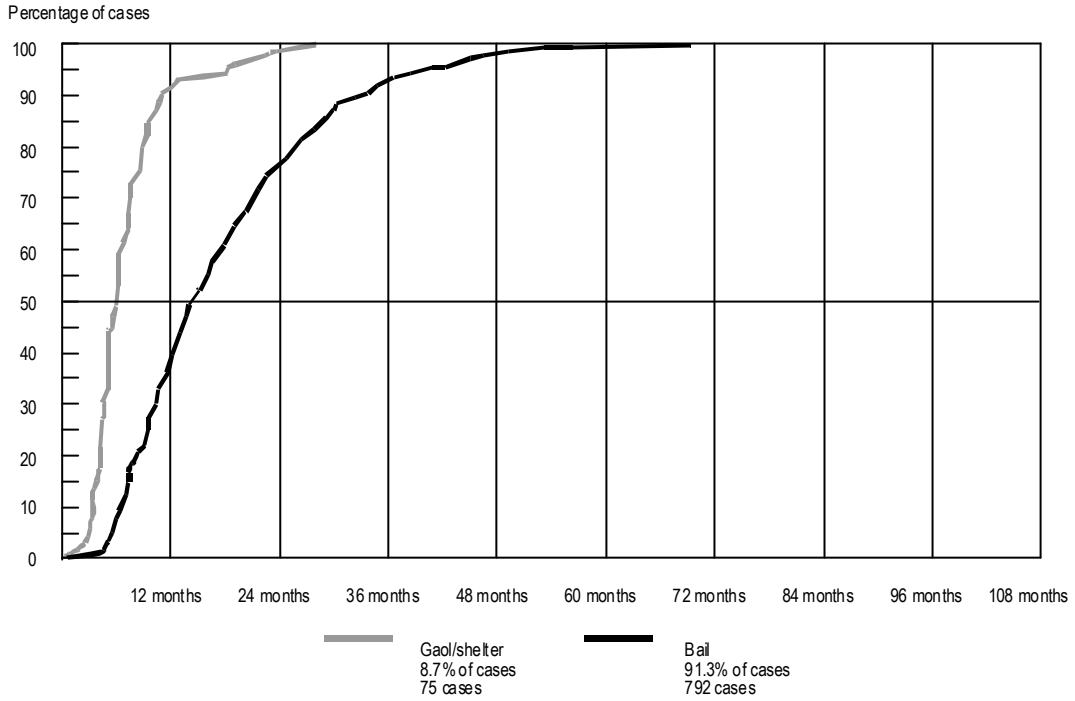
Figure 1: Backlog of matters registered for trial in the District Criminal Court, NSW, 1991-1993



A notable feature of the distribution of trial court delay is that it has a marked positive skew. In other words, although many matters ending in trial are disposed of relatively quickly, a large number take quite a long time to finalize. This can best be seen by examining the cumulative distribution of time between committal and finalization for trial cases where the accused is on bail.

Figure 2 shows this distribution for cases finalized in the first nine months of 1993. It reveals that, while about 40% of trial cases where the accused was on bail were finalized within twelve months of committal, it took more than four years to dispose of the remaining 60% of cases.

Figure 2: Cumulative frequency of time between committal and case finalization for matters ending in a trial, January-September 1993



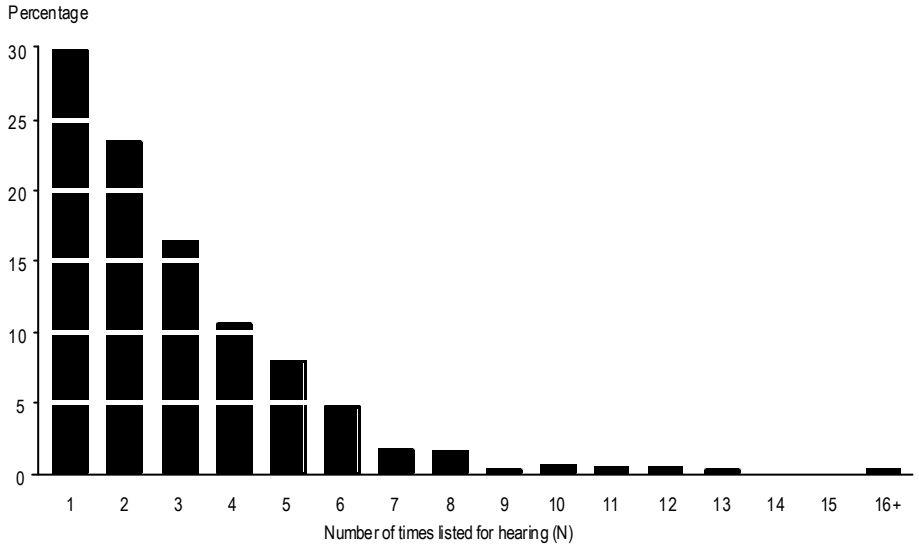
One possible explanation for this skew may be the high rate of adjournment[5] among matters ending in trial. Table 1 shows the frequency and cumulative frequency distributions of the number of times trial cases finalized in 1992 were listed for hearing.

Table 1: Frequency and cumulative frequency distribution of the number of times (N) trial cases were listed for hearing
(NSW District Criminal Court, cases proceeding to trial, 1992)

N	*Freq*	*%*	*Cum %*	*N*	*Freq*	*%*	*Cum %*
1	397	29.8	29.8	9	5	0.4	97.3
2	315	23.6	53.4	10	9	0.7	98.0
3	220	16.5	69.9	11	8	0.6	98.0
4	142	10.6	80.5	12	7	0.5	99.1
5	107	8.0	88.5	13	4	0.3	99.4
6	66	4.9	93.5	14	1	0.1	99.5
7	24	1.8	95.3	15	1	0.1	99.6
8	22	1.6	96.9	16+	6	0.4	100.0

Figure 3 shows the same frequency distribution in graphical form. Less than 30% of trial cases were heard on the date on which they were first set down for hearing. Many cases were listed for hearing several times before disposal. Nearly 20% of the trial cases, for example, were listed for hearing more than four times before being finalized.

Figure 3: Frequency distribution of the number of times (N) trial cases were listed for hearing



The impact on delay each time a case fails to be heard on the date listed for hearing is likely to be substantial. In 1991 the median delay between committal and finalization for trial cases where the accused was on bail and which were heard on the first date set down for hearing was less than 200 days. The median delay for trial cases listed for hearing three or more times, on the other hand, was nearly 700 days. Delays caused by trial cases which are adjourned could, in principle, be offset by earlier hearings for other trial cases.[6] The complexities of the trial listing process, however, make it difficult to ensure that this always occurs.

Uncertainties inherent in the trial listing process probably account for a large part of the problem of adjournments in the NSW District Court. A high proportion of individuals whose cases are listed for trial plead guilty before they get to trial. In an effort to prevent any wastage of trial court time, court administrators list 'back-up' trials, so that if one trial is adjourned for some reason, another trial is able to go on. This practice inevitably results in a significant proportion of the 'back-up' matters listed for trial being adjourned to a later date.

Listing uncertainty, however, is not the only factor which may contribute to the high rate of adjournments in the District Criminal Court. Another factor sometimes suggested as a cause of adjournments is the practice of 'judge shopping'. This refers to the tendency on the part of some accused persons (and/or their legal counsel) of deliberately seeking adjournments, either to avoid judges who are known or thought to sentence harshly or to increase their chances of being listed before a judge who is known or thought to sentence leniently.

Judge shopping constitutes a serious potential threat to the both the fairness and efficiency of a criminal justice system. The extent of judge shopping in the NSW District Criminal Court is difficult to gauge since it is not something parties to it would readily disclose. Judge shopping would only be likely to occur, however, if there were significant disparities among NSW District Court judges in the penalties they impose in legally similar cases. The question of whether such disparities exist is therefore important from an administrative as well as from a jurisprudential stand-point.

This report considers the magnitude of the sentence disparity problem in the NSW District Criminal Court. Evidence is presented which suggests that there are marked differences between individual District Criminal Court judges in their readiness to imprison convicted offenders. These differences do not appear to be explicable in terms of variations in the profile of cases dealt with by each judge. At the extreme, these differences also appear to affect important aspects of criminal court administration, such as the willingness of defendants to proceed to trial and the rate at which they abscond on bail.

The structure of the report is as follows. Section 2 considers some methodological issues involved in establishing evidence of sentence disparity and outlines the method adopted here. Section 3 presents the evidence of disparity. Section 4 provides evidence showing that the outcomes of cases dealt with by unusually severe judges differ systematically from those dealt with by unusually lenient sentencers. Section 5 discusses the results of the preceding sections and examines their wider implications.

PART 2: QUANTIFYING SENTENCE DISPARITY

Quantifying the extent of sentence disparity is more difficult than it might appear. The number of factors which are relevant to the sentencing decision (beyond the offence or offences of which a person has been convicted) is very large. Relevant factors include, for example, the factual circumstances surrounding the offence, the role and motivation of the offender in committing the offence and the offender s prior criminal record, plea, age and social ties. Any of these factors provides justification in law for imposing different sentences on offenders who have been convicted of the same offence. Thus it is impossible to infer sentence disparity simply from the observation that individuals convicted of the same offence have been sentenced differently.

Conscious of this, most researchers examining the issue of sentence disparity attempt to control for the influence of a variety of different sentence-relevant factors beside the offence committed by an offender. Typically a multiple regression or log-linear model of the observed sentencing variation across a group of cases is developed in which the relevant legal factors feature as explanatory variables. The amount of sentencing variation unable to be explained on the basis of the legal variables is then regarded as a measure of unjustified disparity.[7] Alternatively, the identity of the judge is admitted as an explanatory variable in the model after all relevant legal variables have been considered. The extent to which this improves the fit between the predictions of the model and the observed sentencing variation is then regarded as a measure of the level of sentence disparity.[8]

Despite their apparent sophistication, as techniques for exposing the extent of sentence disparity, multiple regression and log-linear analyses have significant limitations. To begin with, the conclusions reached about sentence disparity on the bases of such analyses are often far from transparent. It may suit a researcher to say that some proportion of the observed sentencing variation remains unexplained when the influence of legal factors has been taken into account and to attribute this 'unexplained' variance to sentence disparity. Those concerned about sentence disparity from a jurisprudential perspective, however, are generally looking for more blatant evidence of inconsistency in the way in which the courts deal with offenders.

A more serious problem concerns the credibility of statistical models of sentencing practice. This credibility is often placed in doubt by the difficulty of measuring certain sentence-relevant factors (e.g. the amount of remorse shown by an offender) in any objective way. The failure to explain all the relevant sentencing variation when only crude measurement of key variables is possible leaves open the possibility that more sophisticated measurement would reduce the amount of 'unexplained' sentence variation. One can attempt to deal with this problem by controlling for a broader array of factors or by introducing more elaborate measures of the key variables. Every increase in either the number of factors introduced in a statistical model or the number of levels of each factor, however, brings with it a requirement for additional data. This requirement can often render empirical assessments of elaborate models practically impossible.

Regression and log-linear analyses are not the only means by which one might seek to evaluate the issue of whether the courts are disparate in their treatment of offenders. Instead of introducing formal statistical controls for differences between cases, one might seek to compare the sentencing practices of judges who have dealt with similar types

of case. As long as the number of cases available for comparison is reasonably large, this is less difficult than it might appear. If cases are matched on the basis of plea and type of offence, there is little reason for expecting them to differ systematically in terms of other sentence-relevant characteristics. This is because, apart from plea and type of offence, most sentence-relevant case characteristics (e.g. prior criminal record, family ties etc.) are either unknown at the time at which cases are listed for hearing or do not normally affect the allocation of cases to particular judges for hearing.

The general strategy in the present study was to match cases on those sentence-relevant case characteristics (plea and type of offence) capable of influencing the process by which cases are assigned to particular judges. The remaining sentence-relevant case characteristics are assumed to vary randomly across cases dealt with by different judges. Wherever the number of cases involved in a comparison between judges is sufficiently large, differences in sentencing practices are interpreted as evidence of sentence disparity.

The specifics of the research strategy were as follows. Firstly, a group of judges was identified who had each sentenced at least 100 offenders on a plea of guilty over the period 1988-1992 (inclusive). The percentage of persons imprisoned was then calculated for each judge. The results of these calculations were then used to identify:

(a) five judges who appeared to sentence an unusually small percentage of offenders to prison

(b) five judges who appeared to sentence an unusually large percentage of offenders to prison.

The sentencing practices of each of the judges in (a) and (b) were then compared for a variety of different offence types to see whether the disparity in the use of imprisonment between judges in the two groups held up within categories of offence.

PART 3: SENTENCE DISPARITY IN THE NSW DISTRICT CRIMINAL COURT

Table 2 shows the percentage of convicted offenders imprisoned by each judge. Judges are listed in descending rank order in terms of the percentage of convicted offenders imprisoned. Table 2 also shows the number of cases on which the percentage calculation for each judge is based. Figure 4 shows the same percentage variation in graphical form, so that the differences between judges may more easily be discerned. As can be seen from Figure 4, there appears to be wide and continuous variation between judges within the District Criminal Court in their willingness to use the sanction of imprisonment. The percentage of convicted persons given a sentence of imprisonment ranges down in a steady progression from 61.2% in the case of Judge 1, through to 26.4% in the case of Judge 51.

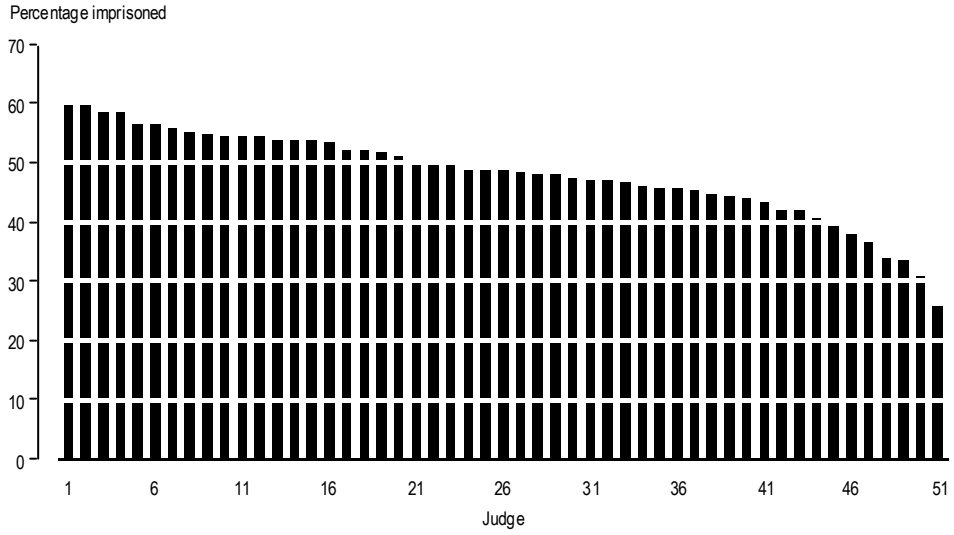
Table 2: Number of offenders sentenced on a plea of guilty (N) and percentage imprisoned, for each NSW District Criminal Court Judge, 1988-1992

Judge	*N*	*% Impr.*	*Judge*	*N*	*% Impr.*	*Judge*	*N*	*% Impr.*
1	129	61.2	**18**	477	52.4	**35**	417	46.3
2	295	60.0	**19**	161	52.2	**36**	102	46.1
3	166	59.0	**20**	176	51.7	**37**	143	45.5
4	257	58.8	**21**	170	50.6	**38**	260	45.0
5	374	57.2	**22**	173	50.3	**39**	236	44.9
6	250	57.2	**23**	550	50.0	**40**	201	44.3
7	407	56.3	**24**	327	49.5	**41**	230	43.9
8	158	55.7	**25**	311	49.5	**42**	202	42.6
9	540	55.2	**26**	565	49.2	**43**	174	42.5
10	153	54.9	**27**	834	48.9	**44**	733	41.2
11	585	54.9	**28**	163	48.5	**45**	331	39.9
12	177	54.8	**29**	236	48.3	**46**	244	38.5
13	204	54.4	**30**	274	47.8	**47**	132	37.1
14	644	54.3	**31**	477	47.4	**48**	206	34.5
15	201	54.2	**32**	264	47.3	**49**	138	34.1
16	130	53.8	**33**	115	47.0	**50**	471	31.2
17	152	52.6	**34**	506	46.8	**51**	329	26.4

The percentage variations in Figure 4 (and Table 2) are based on judges who had each heard a minimum of 100 sentence matters. Although such matters in NSW are not normally allocated to judges on the basis of the type of offence involved, variations between judges in the offence profile of cases dealt with could in theory account for the differences observed in Table 2 and Figure 4.

One could, in principle, compare the sentencing practices of all judges in Figure 4 controlling for type of offence. It is not our purpose here, however, to see whether all of the variation evident in this figure is reflective of sentence disparity. An incentive for judge shopping would exist if only a small number of judges tended to sentence very much more leniently or more harshly than the remainder. For this reason it suffices simply to see whether the most extreme differences in the use of imprisonment shown in Figure 4 are reflective of sentence disparity or whether they may be explained in terms of the offence profile of cases dealt with by the relevant judges.

Figure 4: Percentage of convicted persons sentenced to prison by each NSW District Criminal Court judge (guilty plea cases only)



Rather than examine the possibility of sentence disparity by comparing the sentencing practices of every judge, therefore, we compare the sentencing patterns of the top five and bottom five judges listed in Table 2. The range of offence types[9] in which comparisons can be made was restricted by the need to ensure that each judge examined had dealt with a reasonable number of cases of that offence type. There were three offences for which each of the ten judges had sentenced a minimum of ten offenders on a plea of guilty. They are assault; break, enter and steal; and fraud/misappropriation. There were two other offences for which at least eight of the ten judges had dealt with at least ten offenders on a plea of guilty. They are child sexual assault and robbery.

Table 3 shows, for each offence, the percentage of offenders sentenced to a term of imprisonment by each judge. For ease of comparison, the bottom five judges (i.e. Judges 51, 50, 49, 48, 47) from Figure 4 have been labelled L1 to L5, respectively, and the top five judges (i.e. Judges 1, 2, 3, 4, 5) have been labelled H1 to H5, respectively. The rows marked Number of Cases show the total number of cases dealt with by each judge in that offence category, that is, the number on which the percentage calculation for each comparison is based. Cells showing the letters 'ID'are those in which there were insufficient numbers of cases to justify the calculation of percentage rates of imprisonment.

Table 3: Percentage of convicted persons sentenced to prison by NSW District Criminal Court Judges L1 to L5 and H1 to H5
(Cases involving guilty pleas, 1988-1992)

Offence	*L1*	*L2*	*L3*	*L4*	*L5*	*H1*	*H2*	*H3*	*H4*	*H5*
Assault										
%imprisoned	19.1	15.1	25.0	3.0	26.7	42.9	39.6	65.2	44.0	45.8
Number of cases	47	73	16	33	15	14	53	23	25	48
Break, enter and steal										
%imprisoned	40.6	34.9	36.8	51.4	54.5	70.8	85.2	90.5	73.3	72.4
Number of cases	32	63	19	35	11	24	61	21	30	58
Fraud/misappropriation										
%imprisoned	24.2	28.6	10.5	21.4	13.3	45.5	13.3	40.0	40.0	45.5
Number of cases	33	35	19	28	15	11	15	10	30	44
Child Sexual Assault										
%imprisoned	13.6	28.0	*ID*	38.5	16.7	60.0	60.0	18.2	*ID*	60.9
Number of cases	22	25	5	13	12	10	15	11	3	23
Robbery										
%imprisoned	44.1	49.1	70.0	78.9	*ID*	100.0	90.0	65.4	75.7	68.7
Number of cases	34	55	10	19	8	11	30	26	37	22

Close inspection of Table 3 indicates that, while on occasion a few judges in the group L1 - L5 might have imprisoned a higher percentage of offenders than one or two judges in the group H1 - H5, there is a clear tendency in each category of offence for Judges L1 to L5 to imprison a smaller percentage of convicted offenders than Judges H1 to H5. This fact is best shown by calculating the percentage of convicted offenders sentenced to a term of imprisonment separately for each group of judges and each category of offence. Table 4 shows the results of these calculations. The columns labelled 'No. of cases' show the number of cases on which each relevant percentage calculation was based.

Table 4: Percentage of convicted persons sentenced to prison by NSW District Criminal Court by offence and judge group
(Cases involving guilty pleas, 1988-1992)

	L1 - L5		*H1 - H5*	
Offence	*% impr.*	*No. of cases*	*% impr.*	*No. of cases*
Assault	15.8	184	46.0	163
Break, enter and steal	41.2	160	78.3	194
Fraud/misappropriation	21.5	130	39.1	110
Child Sexual Assault	23.6	72	52.6	59
Robbery	54.2	118	77.2	136

Table 4 shows that, in every category of offence, Judges L1 to L5 imprisoned a substantially smaller percentage of convicted offenders than Judges H1 to H5. The largest disparity concerns the offence of assault. A person convicted of this offence on a plea of guilty is nearly three times more likely on average to receive a prison sentence from one of the Judges H1 to H5 than a person convicted of the same offence on a plea of guilty and sentenced by one of the Judges L1 to L5.

The lowest level of disparity concerns the offence group robbery. A person convicted on a plea of guilty for an offence in this category and sentenced by one of the Judges H1 to H5 is nearly one and a half times more likely on average to receive a prison sentence than a person convicted of an offence within the same category and sentenced on a plea of guilty by one of the Judges L1 to L5.

It would appear, therefore, that the substantial disparities between the two groups of judges in their overall willingness to use the sanction of imprisonment are not due to differences in the offences with which they deal.

PART 4: THE IMPACT OF DISPARITY ON THE OUTCOME OF A CASE

The observation made in connection with Table 4 that Judges L1 to L5 were less likely to impose a sentence of imprisonment than Judges H1 to H5 was based on cases where the defendant pleaded guilty. It would also appear that, in cases where the defendant pleads not guilty and the case is disposed of by one of the Judges L1 to L5, the outcome of the trial is more likely to be an acquittal than if the defendant pleads not guilty and is dealt with by one of the Judges H1 to H5.

Table 5 shows, for cases which proceeded to trial, the relative likelihood of an acquittal or conviction on one or more charges, according to whether the presiding judge belonged to group L1 - L5 or group H1 - H5.10

Table 5: Offenders acquitted/convicted by judge group
(NSW District Criminal Court Trials, 1988-1992)

	Judge group	
Outcome	***L1 - L5***	***H1 - H5***
Acquitted of all charges	389 (67.2%)	278 (60.0%)
Guilty of at least one charge	190 (32.8%)	185 (40.0%)
Total acquitted/convicted	579 (100.0%)	463 (100.0%)

There is a statistically significant difference in outcomes between the judge groups (X^2=5.7, df=1, p<0.05). Inspection of Table 5 reveals that defendants dealt with by judges in the L1 - L5 group were more likely to be acquitted by about 7 percentage points than defendants dealt with by judges in the group H1 - H5. The difference **could** be due to differences between judge groups in the types of offences with which they dealt, since likelihood of conviction following trial is slightly higher for some offences than it is for others. The number of trial cases in each offence category was insufficient to test for acquittal rate differences within each offence category. It is worth noting, however, that in 10 out of the 14 categories of offence where the number of trials exceeded 20, the acquittal rate among cases dealt with by Judges L1 to L5 was higher than the acquittal rate among cases dealt with by Judges H1 to H5. The likelihood of this occurring by chance is 0.09.

By itself the significant difference between the two groups of judges in their willingness to impose a sentence of imprisonment arguably creates a strong incentive for defendants to seek adjournments, either to avoid coming before Judges H1 to H5 or to increase the likelihood of coming before Judges L1 to L5. If cases dealt with by Judges L1 to L5 are more likely to transpire in an acquittal then the incentive is even stronger. It does not

follow from the existence of such an incentive, however, that defendants actually do seek adjournments for the purpose in question. This conclusion could only be reached if one could show that the rate of adjournment among cases listed to be dealt with by Judges L1 to L5 is lower than the rate of adjournment among cases listed to be dealt with by Judges H1 to H5.

Comparisons of this sort are not possible on the basis of the available data. It is possible, however, to examine the impact of sentence disparity on the likelihood of a defendant proceeding to trial. This is significant because, if defendants sometimes seek adjournments to avoid being sentenced by judges perceived as harsh, they may be more willing to proceed to trial before judges perceived as lenient, especially if there is also an increased chance of acquittal. After all, the consequences, even if convicted, of pleading not guilty before a lenient judge are likely to prove less onerous than the consequences of pleading not guilty before a judge who is harsh. Thus we might expect either a higher proportion of cases dealt with by Judges L1 to L5 to be finalized by way of a defended hearing or a higher proportion of cases dealt with by Judges H1 to H5 to be finalized on a plea of guilty.

Table 6 shows the relative frequency of different case outcomes, according to whether the judge who dealt with the case was in the group L1 - L5 or in the group H1 - H5. Cases in the 'proceeded to trial' category are those where the defended pleaded not guilty to one or more charges. Cases in the 'sentence only' category are those where the defendant pleaded guilty to all charges. Cases in the 'no charges proceeded' category are those where the charges were 'no-billed'. Cases in the category 'accused absconded/ died' category are those where the accused person absconded or died after being listed for trial or sentence but before the trial or sentence hearing actually took place.

Table 6: Outcome of criminal proceedings by judge group
(NSW District Criminal Court Trials, 1988-1992)

	Judge Group			
Outcome	***L1 - L5***		***H1 - H5***	
Proceeded to trial	597	(29.6%)	470	(23.9%)
Sentence only	1,277	(63.2%)	1,222	(62.2%)
No charges proceeded	28	(1.4%)	8	(0.4%)
Accused absconded/died	118	(5.8%)	264	(13.4%)
Total	2,020	(100.0%)	1,964	(100.0%)

There are statistically significant differences between the two groups overall (X^2=82.5, df=3, p<0.001). Though the effect cannot be regarded as especially strong, there appears to be a greater tendency for cases dealt with by judges in the group L1 - L5 to be finalized as defended matters. In fact, when categories of outcome not involving a trial are combined and compared with the category 'proceeded to trial', the resulting chi-square value is statistically significant (X^2=16.1, df=1, p<0.001).

Interestingly, Table 6 also suggests that, although defendants are more likely to plead 'not guilty' before Judges L1 to L5, they do not appear to be more likely to plead 'guilty' before Judges H1 to H5. Instead, it would appear that the greater tendency to proceed to trial before Judges L1 to L5 is counterbalanced by a greater tendency for the defendant to abscond or die when listed to appear before Judges H1 to H5. There were twenty-one cases listed before Judges H1 to H5 and eight cases listed before Judges L1 to L5 in which the accused person died before their case could be heard. When these cases are excluded from Table 6, the differences remain statistically significant.

PART 5: DISCUSSION

Of all the findings presented in this report the last finding is perhaps the easiest to understand. Given that Judges H1 to H5 were generally much more likely than Judges L1 to L5 to impose a prison sentence on a defendant pleading guilty, the higher absconding rate among defendants listed before Judges H1 to H5 hardly needs explanation. Even though non-appearance at trial may only postpone the inevitable, for some defendants the consequences of absconding may appear less frightening than the consequences of appearing before a judge known to be a tough sentencer.

Rather more difficult to understand at first sight is the finding in connection with Table 5 that defendants who plead 'not guilty' are more likely to be acquitted when their case is disposed of by a judge in the group L1 - L5 than defendants who plead 'not guilty' before a judge in the group H1 - H5. This might appear puzzling in light of the fact that juries rather than judges are generally thought to be responsible for determining the verdict in defended matters dealt with on indictment.

As it happens, there are a variety of ways in which the judge may either determine the verdict in a trial or influence its outcome. The verdict will be determined by the judge where he or she directs a verdict of 'not guilty'. It will also be determined by the judge where the accused person elects a trial by judge alone. The verdict may be influenced by a judge through the summing-up he or she gives at the conclusion of the trial or through the decision to admit or refuse to admit evidence during the course of a trial.

The finding that defendants were more likely to be acquitted by Judges L1 to L5, therefore, suggests that Judges L1 to L5 are either (a) more likely to direct a verdict of 'not guilty' (b) more likely to find a verdict of 'not guilty' when hearing a defended case in the absence of a jury (c) more likely to give a summing-up which disposes a jury to bring in a verdict of 'not guilty' (d) more likely to admit evidence which is exculpatory to an accused person (e) more likely to exclude evidence which is incriminating to a defendant or (f) some combination of (a) to (e).

The observation that a higher proportion of defendants dealt with by Judges L1 to L5 pleaded 'not guilty' could have arisen in one of two ways. Firstly, as suggested earlier, defendants may see more incentive in maintaining a plea of 'not guilty' when listed for trial before a judge known to sentence leniently than when listed for trial before a judge known to be a tough sentencer. On the evidence presented here this would be a reasonable judgement to make. Given that judges in group L1 - L5 were substantially less likely to send a defendant to prison on a guilty plea, it would not seem unreasonable to suppose that they are also more lenient when sentencing those who are convicted on a plea of not guilty. If, as seems possible, cases disposed of by Judges L1 to L5 are also more likely to transpire in an acquittal there would be even more incentive for proceeding to trial before these judges.

An alternative explanation would be to suppose that the listing authorities place a disproportionate number of defended matters before Judges L1 to L5 in order to enhance the likelihood that those contemplating a change of plea to 'guilty' will in fact change plea. The attraction of such a strategy would be that it would help to minimize the level of demand for trial court time in the District Criminal Court. Table 6 shows, however, that cases eventually finalized by the lenient judges in this study did not include a disproportionately high percentage of matters finalized on a guilty plea.

Thus if listing practices were held to be the explanation for the differences in Table 6, it must be assumed that, whatever the intention of listing authorities, a large number of trial cases listed for hearing by lenient sentencers do not in fact result in a change of plea.

Neither explanation can be regarded with equanimity. A defendant s plea ought not to depend upon the judge before whom they are listed for hearing. Indeed, the existence of significant disparity between judges in their willingness to use the sanction of imprisonment is itself a matter of concern, whatever effects it might have on the willingness of defendants to plead guilty or abscond from bail. As the Chief Justice of New South Wales recently remarked:

> There is no aspect of the administration of justice in which public acceptance of judicial decision-making is more important, or more difficult to sustain, than the sentencing of offenders.[11]

It might be thought that some of the sentence disparity observed here may have been rectified on appeal. The process of appellate review in sentencing, however, is not an effective means of dealing with a situation where some judges persistently use the sanction of imprisonment much more frequently or much more sparingly than their colleagues. To begin with, the NSW Court of Criminal Appeal rarely substitutes a non-custodial for a custodial sentence in a successful appeal.12 Secondly, even if it reliably did so, the belief among accused persons and/or their legal counsel that certain judges are much more lenient or harsh in their sentencing practices would continue to act as an incentive for judge shopping.

The existence of significant sentence disparity is not only a threat to public confidence in court administration. It is also capable of undermining initiatives designed to improve its efficiency. Under the recently introduced sentence indication scheme, for example, judges (on request) can give defendants whose cases have been listed for trial an indication of the likely penalty consequent upon a plea of guilty. The scheme is intended to attract more frequent and earlier guilty pleas. To date, the scheme does not appear to have affected the proportion of matters registered for trial in which the accused decides to enter a plea of guilty or the time at which a plea of guilty is entered.13 This may be because defendants believe they have a better chance of obtaining a sizeable sentence 'discount' simply by preserving their plea of 'not guilty' until listed before the 'right' judge.

There are two ways in which one might seek to overcome the problem of judge shopping. The first involves preventing defendants and/or their legal counsel exploiting the adjournment process in order to secure a hearing before a particular judge. The second involves reducing sentence disparity and thereby removing the incentive to seek unwarranted adjournments.

The first strategy could be pursued by ensuring that cases which are adjourned are always relisted before the same judge. Although seemingly straightforward, in the short term this strategy would probably increase trial court delay and reduce the level of trial court utilization. The reason for this is that the listing authority would be unable to take maximum advantage of the available judge time. A judge whose trial ended early or did not proceed, for example, could only be assigned to hear either a trial not yet listed for hearing or a trial which he or she had previously adjourned. Trial cases not yet listed for hearing are unlikely to be ready to proceed. On the other hand, cases previously adjourned to a future date are not likely to be ready to proceed before that date.

The strategy of seeking to reduce adjournments by reducing sentence disparity does not suffer from these weaknesses. Sentence disparity, however, is not easy to reduce in any system of sentencing which places a premium on the importance of allowing judges discretion to tailor the sentence for an offence to the circumstances surrounding that offence. In response to earlier concerns about sentence disparity in NSW the Judicial Commission of New South Wales was established. Section 8 of the Judicial Officers Act 1986, which established the Commission, permits it, inter alia, to:

> (a) monitor or assist in monitoring sentences imposed by courts; and
>
> (b) disseminate information and reports on sentences imposed by courts.

The Commission is not empowered to do anything under section 8, however, which could be construed as limiting the sentencing discretion of the courts.

Since its establishment, the Commission has sought to discharge its obligations in relation to section 8 principally through the development of a computerized sentencing information system (SIS). In brief, the SIS allows a judicial officer, when dealing with a particular case, to examine the range of penalties imposed in similar cases previously disposed of by other judges. It also permits the sentencing judge to retrieve information on both the common-law principles intended to guide judicial sentencing discretion and the statute law limiting the exercise of that discretion. All judges and magistrates have access to the SIS, either on-line or by telephoning the Judicial Commission. It is regularly refreshed with new information on recent changes to sentencing law and practice.

The SIS has been heralded as one of the most sophisticated systems of its type in the world.[14] Its capacity to reduce significant disparity in the use of imprisonment by NSW District Criminal Court Judges remains unknown. It should be noted that the penalty statistics component of the SIS did not come 'on-line' until 1990. The sentencing law component came on-line in 1993. It may be that the effect of the SIS in promoting greater sentencing consistency will improve over time. We cannot ignore the possibility, however, that the scope for reducing sentencing disparity through the SIS is limited; either because judges do not use it sufficiently or because the provision of detailed information on sentencing law and practice is insufficient by itself as a means of promoting reasonable uniformity in the use of imprisonment by NSW District Criminal Court judges.

Both of these issues clearly warrant further examination. If judges do not use the SIS the reasons for this need to be explored with them and, if necessary, changes made either to the SIS and/or greater emphasis placed by the Commission or the NSW Court of Criminal Appeal on its importance as an aid to sentencing. If, on the other hand, the provision of information on sentencing law and practice is inherently insufficient to promote adequate uniformity in sentencing, con tion needs to be given to other options for reducing sentencing disparity.

There are, in fact, a large variety of other options for reducing sentencing disparity. There is no space here to review them in detail but, in general, they vary according to the degree by which they seek to constrain the exercise of judicial discretion. Appeal judges, for example, have sometimes recommended greater use of so-called 'guide-line judgements' by appeal courts.[15] These judgements involve appeal courts in providing more specific guidance on what they regard as an acceptable range of sentence for specified classes of case with which they deal. Such judgements are not binding[16] but arguably do more to reduce sentence disparity than appeal court judgements which observe that the sentence in question is 'outside the normal range'[17] but do not provide any indication of the range.[18]

In the United States, where the system of appellate review in sentencing is in many respects less well developed than in England and Australia, sentencing guide-line schemes have often been introduced to combat problems of disparity. Some of these are mandatory but most are presumptive or voluntary.19 The key difference between presumptive and voluntary guide-lines is that the former have a legislative mandate and integrated within a system of appellate review.20 Under such schemes a range of acceptable sentencing variation for different classes of case is stipulated under statute. These classes are usually delineated by type of offence and prior criminal record of the offender. The choice of sentence within a specified range is then meant to be determined by the unique features of the case confronting a particular sentencing judge.

Other options have been proposed as a means of dealing with sentence disparity, including the creation of sentencing panels in which judges disposing of a case team up with other judges when it comes to determining sentence.21 It would be premature to consider the merits of these alternatives from a NSW perspective until some further judgement is made about the extent to which the SIS influences judicial sentencing decisions. Of crucial importance when making this assessment is the extent to which judges of the District Criminal Court actually use the system when considering what sentence to impose.

Whatever course of action is taken to deal with sentence disparity in NSW it is important to remember that, as long as judges are given the discretion to adjust the sentence to suit the particular facts of each case, some systematic variation between judges in the use of sanctions such as imprisonment is to be expected no matter how much information on sentencing practice and principle is available. Naturally, if providing information on sentencing law and practice does not produce a satisfactory level of uniformity in sentencing it may be necessary to adopt some legislative expedient to deal with the problem. The imposition of overly stringent constraints on judicial sentencing discretion, however, could result in offenders deserving of different penalties receiving the same sentence. This would do no more to instil public confidence in the sentencing process than the present problem of disparity in their use of imprisonment.

NOTES

1 Director, NSW Bureau of Crime Statistics and Research. My thanks to Bronwyn Lind, Maria Gojski, Theo Groenestein and Christine Coumarelos for assistance in the preparation of this report.

2 Unless otherwise indicated, all data in this report are drawn from the NSW Bureau of Crime Statistics and Research database on criminal court appearances in NSW. This database includes information on the outcome of all appearances in NSW criminal courts.

3 The data in Figure 1 were kindly provided by the office of the NSW Director of Public Prosecutions. It should be noted that they do not include trials involving Commonwealth prosecutions. Such prosecutions are small in number relative to prosecutions under State laws and would not alter the gen al trend depicted in Figure 1.

4 Weatherburn, D. 1993, Grappling with Court Delay, Crime and Justice Bulletin Number 19, NSW Bureau of Crime Statistics and Research, Sydney.

5 The term adjournment here refers to any failure to dispose of a case on the date on which it was set down for hearing.

6 Weatherburn, op.cit. (See Note 4.)

7 See, for example, Potas, I. & Walker, J. 1983, Sentencing the Federal Drug Offender: An Experiment in Computer-Aided Sentencing, Australian In tute of Criminology, Canberra.

8 See, for example, Grabosky, P. & Rizzo, C. 1980, Dispositional Dis ties in Courts of Summary Jurisdiction: The Conviction and Sentencing of Shoplifters in South Australia and New South Wales , Australian and New Zealand Journal of Criminology, Volume 16, pp.147-162.

9 For details of the offence classification rules see: NSW Bureau of Crime Statistics and Research 1993, New South Wales Criminal Courts Statistics 1992, NSW Bureau of Crime Statistics and Research, Sydney, p.66. In essence those rules state that, among persons convicted of more than one offence, the principal offence is that offence which attracted the most severe penalty.

10 Cases involving other outcomes (e.g. absconding, death of the defendant or a no-bill have been excluded from the table).

11 Gleeson, M. 1993, The Sydney Morning Herald, 19 Nov.

12 Ruby, V. 1993, Sentencing in the Court of Criminal Appeal, Sentencing Trends, Number 4, February 1993, Judicial Commission of New South Wales, Sydney, p.4.

13 NSW Bureau of Crime Statistics and Research (unpub.), Higher Criminal Courts Proceedings, September Quarter 1993, Figures 12 and 17, pp.14 and 19.

14 Potas, I. 1992, Judicial Officers Bulletin, Volume 4, No.11, Ju cial Commission of New South Wales, Sydney, p.88.

15 For a discussion of guide-line judgements in the Australian context see: The Report of the Victorian Sentencing Committee, Volume 1, April, 1988, at section 4.14, p.192.

16 Fox, R. 1987, Controlling Sentencers , Australian and New Zealand Journal of Criminology, Volume 20, p.227.

17 Report of the Victorian Sentencing Committee, op. cit., p.175. (See Note 15.)

18 cf. Weatherburn, D. 1987, Sentencing Principles and Sentence Choice , Criminal Law Journal, Volume 11, Number 4, pp. 213-228.

19 Report of the Victorian Sentencing Committee, op. cit., pp. 168, 173, 175. (See Note 15.)

20 Report of the Victorian Sentencing Committee, op. cit., p.175. (See Note 15.)

21 Fox, op. cit., p.228. (See Note 16.)