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The NSW Rolling List Court Evaluation: Preliminary Report

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Aim: *To determine whether greater efficiency can be achieved through application of the Rolling List Court (RLC) model to NSW District Criminal Court matters.*

Method: *A non-blinded randomised trial was initiated in which eligible District Criminal Court matters were randomly assigned, after committal, either to the RLC or to the general court list. Each matter had an equal chance of being assigned to the RLC. Between March 2015 and April 2016, 110 matters were entered into the ballot; 51 of these were assigned to the RLC and 59 were assigned to the general court list.*

Results: *By the end of July 2016 a significantly higher proportion of matters balloted to the RLC had been finalised compared with matters dealt with in the general court list (65% vs. 37%). Further, a higher proportion of matters dealt with by the RLC resulted in a guilty plea than matters dealt with by the control courts (63% vs. 41%). A guilty plea was entered within 3 months of ballot for nearly one in five (18%) of all the RLC matters. This compares with just 5% of matters dealt with in the control courts.*

Conclusion: *From these early results the success of the RLC to date is promising. Further analyses should be undertaken once all balloted matters have been finalised to confirm the interim findings presented here.*

Keywords: *NSW District Criminal Court, court delay, Rolling List Court, guilty pleas*

INTRODUCTION

The operation of an efficient and effective court system is fundamental to the administration of justice. A trial without delay is a crucial and widely accepted feature of a fair trial.[1] In Australia, the common law has considered the interests of the accused in obtaining a fair trial in the context of delay, and the right to a "speedy trial".[2] In *Jago v The District Court of NSW,*[3] Chief Justice Mason identified the interests of an accused, which may be circumvented in a system plagued by delay. These included:

> *(i) the prevention of oppressive pre-trial incarceration; (ii) the minimization of the anxiety and concern of the accused; (iii) the limiting of prejudice to the presentation of the accused's defence; and (iv) the protection of the reputation and social and economic interests of the accused from the damage which flows from a pending charge.*

In this pivotal case, Justice Brennan also underlined the important role courts have when it comes to reducing delay. He observed (at [20]):

> *Within the limits of their resources, the courts should mould their procedures as to avoid unnecessary delays in the disposition of cases.*[4]

The NSW District Criminal Court began to experience problems of delay more than three years ago. In 2012, Chief Justice Blanch warned the court would be unable to cope if the number of trials being listed continued to rise at such a rapid rate (The District Court of NSW, 2012). Within a year, the pending trial caseload in the District Court was higher than any time since 2000 (The District Court of NSW, 2013). In his keynote address at the end of 2014 Chief Justice Derek Michael Price AM expressed similar apprehensions.[5] In August last year, a study released

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by the NSW Bureau of Crime Statistics and Research (BOCSAR) revealed that between 2007 and 2014 the average time between committal for trial and case finalisation in the NSW District Criminal Court for accused persons on bail had grown by 34%. Where the accused was in custody, the average time between committal for trial and case finalisation had grown by 44% (Weatherburn & Fitzgerald, 2015).

One of the initiatives developed to reduce delays in the NSW District Criminal Court is the establishment of what has become known as a 'Rolling List Court' (RLC). The usual trial processing arrangement involves no dedicated judge and only limited contact between prosecution and defence. The RLC involves a dedicated judge (Judge McClintock) and two prosecution and defence teams; each with a Crown Prosecutor, Public Defender, Legal Aid solicitor and DPP solicitor. While one team is in court running a trial or sentence hearing, the other team prepares future matters. When not required to hear matters in the RLC, Judge McClintock attends to work in the general list in the NSW District Criminal Court. Adjournments in the RLC nevertheless, always result in the matter being re-listed before Judge McClintock. The hope is that this new arrangement will lead to more open communication between prosecution and defence, higher levels of informed pre-trial disclosure, earlier resolution of issues and less frequent adjournments.

A trial of the RLC model was launched in the NSW District Criminal Court on 13 April 2015. Initially the court only accepted matters committed for trial in the Downing Centre but later extended its reach to include committals from Parramatta and Campbelltown District Courts. The RLC only deals with matters that meet the following eligibility criteria;

1. The accused is represented by in-house Legal Aid NSW committal solicitors;
2. All charges are prosecuted by the DPP (NSW);
3. There are no co-accused (unless the co-accused in another jurisdiction or their charges have been finalised);
4. There are no issues of the defendant's fitness to stand trial;
5. The estimated trial length is two weeks or less;
6. A trial date has not yet been set;
7. The committal for trial was less than 8 weeks prior to referral.

BOCSAR undertook to evaluate the RLC to determine whether greater efficiency can be achieved through application of the RLC model to NSW District Criminal Court matters. The specific aims of the evaluation are to determine whether the RLC has led to:

1. Shorter trials
2. Reduced time between committal for trial and trial start date
3. An increase in the proportion of cases committed for trial that are finalised on a plea of guilty
4. Earlier guilty pleas

Given that the last matter referred to the trial was balloted at the end of April 2016, and that the average delay in finalising matters in the NSW District Criminal Court is close to 1 year, it is too early to consider most of these outcome measures. The current report therefore presents descriptive information on the number of referrals to the NSW RLC trial during its first 14 months of operation and presents preliminary data comparing the RLC and control courts on; (1) the percentage of guilty pleas (2) the percentage of guilty pleas before trial listing and (3) the percentage of matters finalised.

METHOD

To ensure that outcomes from the RLC were compared with a similar group of matters dealt with through the usual court process, a non-blinded Randomised Control Trial (RCT) was initiated. RCTs are considered the 'gold standard' in evaluation because this methodology (where successfully implemented) ensures that the group receiving the treatment is comparable to the non-treated (comparison) group both on observable and unobservable characteristics.

Figure 1 shows a broad overview of the pathway that criminal matters follow through the NSW District Criminal Court system and the point at which random allocation to the RLC trial occurred. Upon an eligible matter being committed to one of the participating District Criminal Courts and referred to Legal Aid NSW, the RLC Legal Aid solicitor assessed the matter against each of the above criteria and if eligible, entered the details of the matter into a purpose built on-line ballot system which assigned the matter to either the RLC or to the comparison group. Each matter had an equal chance of being assigned to either treatment condition. Matters allocated to the RLC were then assigned to one of the two RLC teams and case managed under the new model. Matters allocated to the comparison group through the ballot system were placed back into the general court list and dealt with in the usual way.

A small number of cases were dealt with by the RLC before the ballot commenced to allow the court to hear matters from the outset. Excess court capacity also led to the ballot being suspended for a 6-week period from 15 June 2015 to 23 July 2015. During this period all eligible cases were referred to the RLC. These 29 'non-balloted' matters dealt with by the RLC are not included in the results reported here as there are no comparative data for eligible cases proceeding through the normal court process during these periods.

RESULTS

As at 30 April 2016, 110 matters had been entered into the RLC ballot. Figure 2 shows the month in which these matters were balloted by the group to which they were randomly assigned. During the first 14 months of the trial, 51 matters were balloted into the RLC group and 59 into the control group. The average number of days from committal to ballot allocation was 13 days for RLC matters and 17 days for control matters. This difference between groups was not statistically significant.[6]

Figure 1. Process flow and ballot system for matters eligible for NSW Rolling List Court

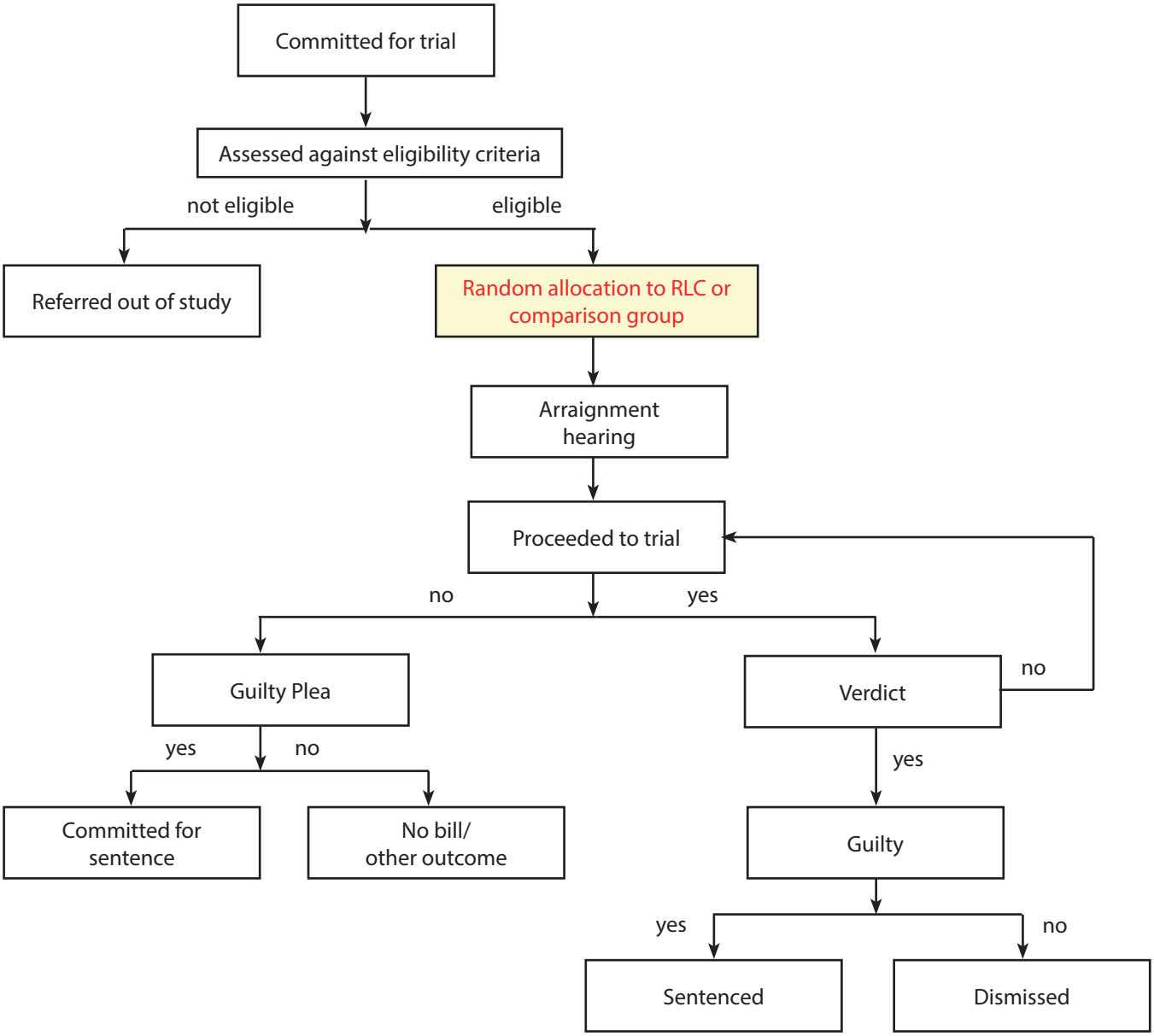

Figure 2. Referrals by month of ballot and group

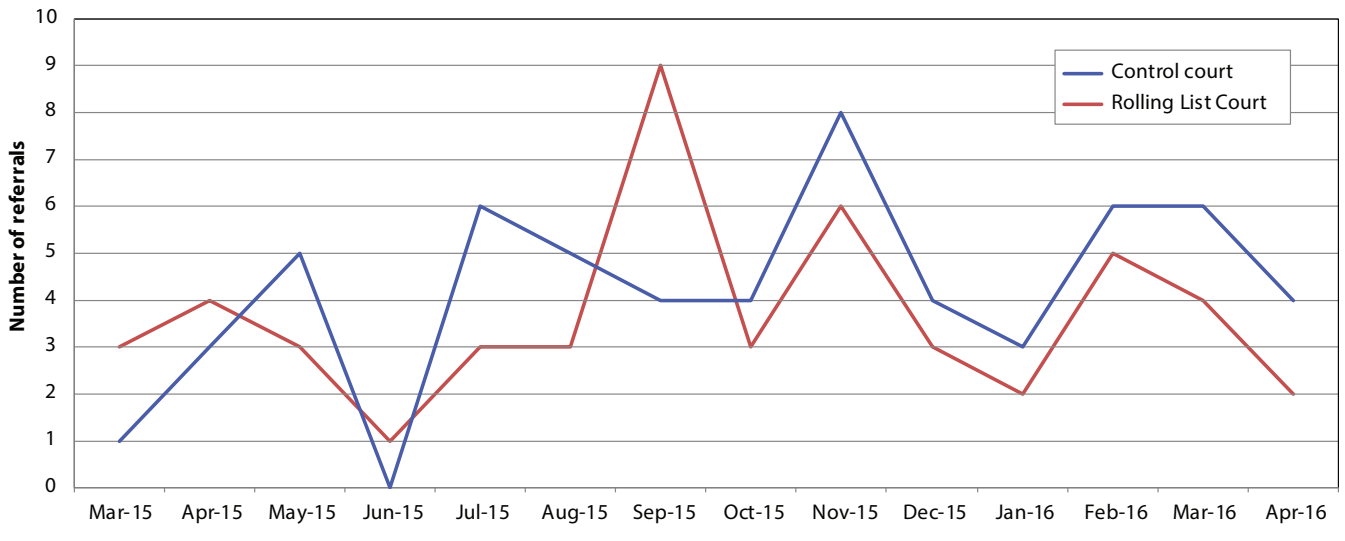

Figure 3. Number of referrals by Committal Court and group

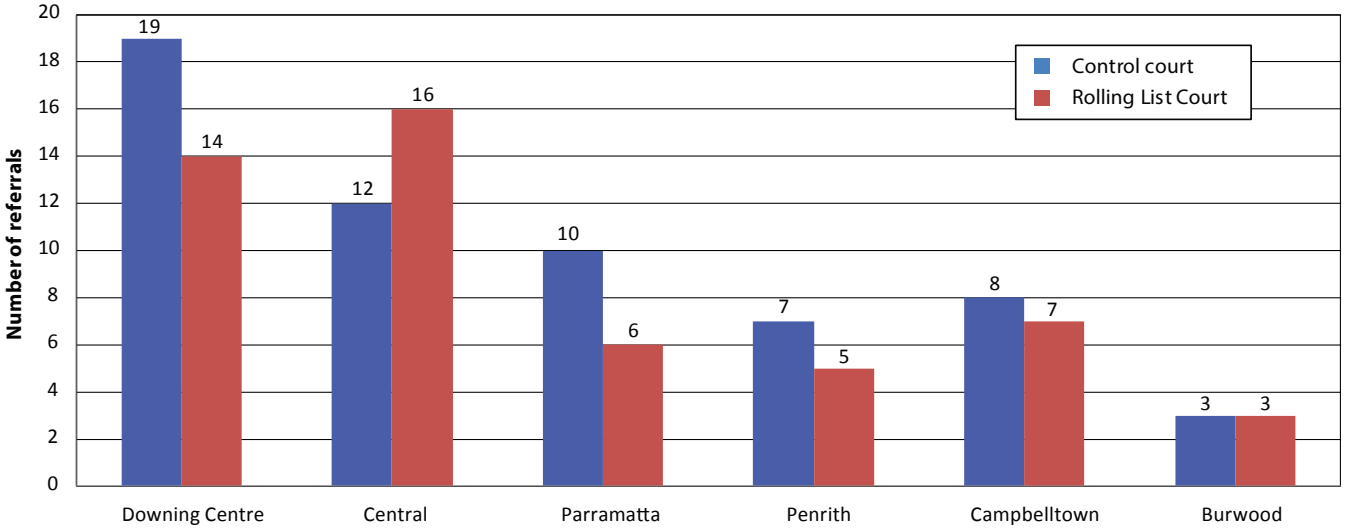

Figure 4. Outcome of matter by group

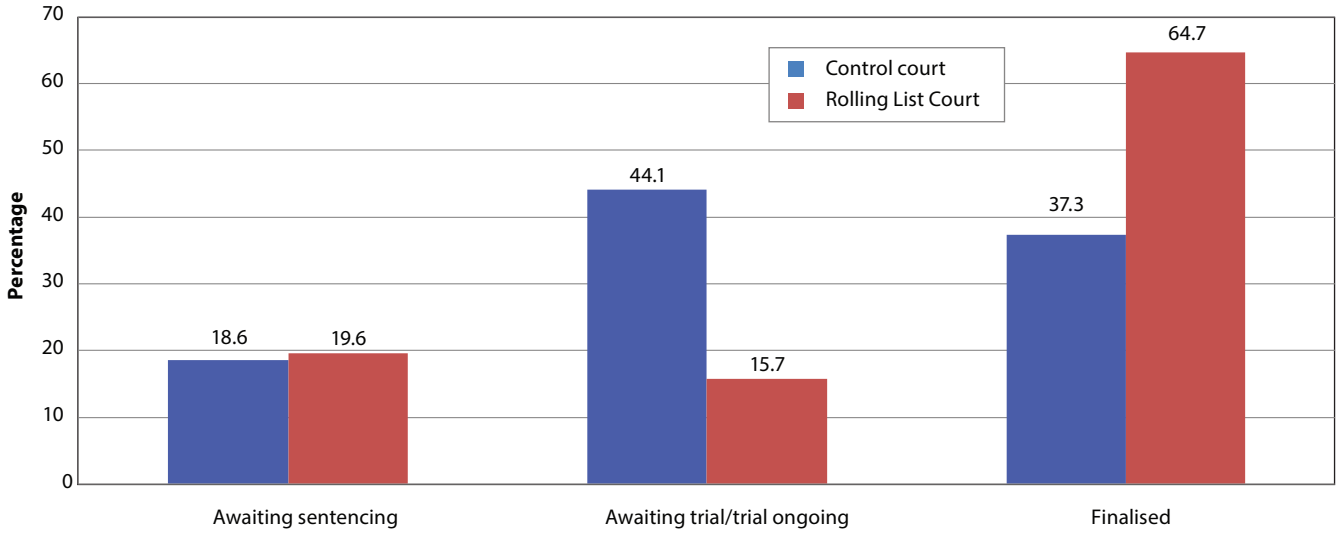

Figure 5. Percentage guilty pleas (of all matters) by timing of plea and group

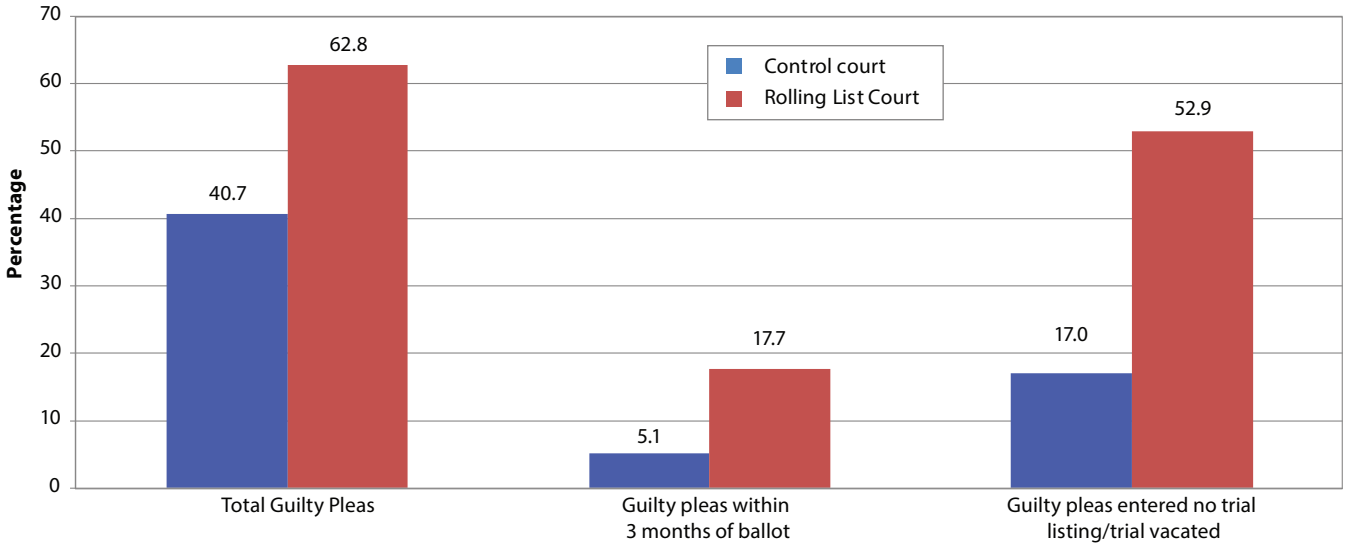

Figure 3 presents the number of matters balloted by the court in which the matter was committed for trial. Most matters had been committed for trial in either the Downing Centre (30%) or Central Local Courts (25%) prior to entering the ballot. A smaller proportion came from Parramatta (15%), Penrith (11%), Campbelltown (14%) and Burwood (5%) Local Courts. Again, no group differences were evident here.[7]

By 31 July 2016, one-half (n=55; 50%) of the 110 matters included in the ballot had been finalised either by way of sentence or No Bill/no further proceedings/dismissal. A further 34 matters were still awaiting trial or the trial was ongoing, and 21 matters were awaiting sentencing.

Figure 4 presents the proportion of matters in each group by outcome. As seen here, a much higher proportion of matters balloted to the RLC had been finalised by the end of the observation period compared with matters dealt with in the general court list (65% vs. 37%). Conversely, a much smaller proportion of RLC matters were still awaiting trial or were currently being tried (by the end of July 2016) compared with control group matters (16% vs. 44%).[8]

There are also significant group differences when examining guilty plea outcomes (see Figure 5). Overall, a higher proportion of matters dealt with by the RLC resulted in a guilty plea than matters dealt with by the control courts (63% vs. 41%).[9]

Perhaps the most notable effect is the difference between the two groups in terms of the timing of these guilty pleas. A guilty plea was entered within 3 months of ballot for nearly one in five (18%) of all the RLC matters. This compares with just 5% of matters dealt with in the control courts. In over half of the RLC matters, a guilty plea was entered before the trial had been listed or commenced. In the control group, nearly one in four matters resulted in a guilty plea on the first day of the trial or after the trial had begun. For matters where a guilty plea was entered, the average number of days from ballot to plea was 144 days (median 114 days) in the case of matters assigned to the RLC, compared with 174 days (median 184 days) for matters assigned to the control courts. The latter difference is not statistically significant.[10] However, this is potentially an unfair comparison given that there are currently a large number of cases in the control courts still awaiting trial, many of which could result in a late plea.

SUMMARY AND CONCLUSION

From these early results the success of the RLC to date is promising. Matters assigned to the Rolling List Court result in more early guilty pleas and are finalised sooner than matters which go through the normal court system. Overall, a higher proportion of matters dealt with by the RLC resulted in a guilty plea than among matters dealt with by the control courts (63% vs. 41%). The pleas that did occur were generally entered much earlier in the RLC than in the control court and, in a number of cases, before any trial date had been set. The fact that these results were obtained in a randomised trial (commonly known as the 'gold standard' in research designs) gives unqualified assurance the results are genuine and not the result of extraneous factors or selection bias.

If the increase in the proportion of cases ending in an early plea were able to be replicated across all District Criminal Courts, the result would be a substantial reduction in the number of trials required to be held. Indeed, even limited expansion of the RLC would be expected to significantly reduce the overall demand for criminal trial court time. There are, however, some impediments to expansion of the RLC in its current form.

The first is that it requires defence and prosecution counsel specifically assigned to the court. This would present a problem where defence lawyers are drawn from the private legal profession rather than from the public sector. A second impediment is that, whereas there is no financial incentive for defence counsel paid a salary by the State to prolong a matter or seek adjournments, the private legal profession is paid according to the amount of work they perform for a client. There is, therefore, no incentive to bring a matter to an early resolution. On the contrary, there are financial benefits to be had from seeking adjournments and prolonging matters beyond the point where they could be resolved. This is not to say such practices are widespread or common. It would be unwise, however, to ignore the fact that the current legal system creates no financial incentive for private practitioners to bring criminal matters to an early resolution.

It is also worth remembering in this regard that under the RLC arrangement, the same defence and prosecution teams are responsible for carriage of a matter from committal for trial until the charges have been finalised. It is thus not possible (as it is in the general trial court arena) to attempt to avoid work by having a matter adjourned in the hope that it will end up being dealt with by different prosecution or defence counsel. The fact that the same trial judge is employed throughout the proceedings likewise removes any incentive to seek an adjournment in order to have the matter dealt with by a different judge. Further, in the RLC the Crown Prosecutor who finds the bill (determines the appropriate charges) is always the same Crown Prosecutor who will be running the trial. This ensures that consideration of appropriate charges, charge negotiations and no bill applications is undertaken by a person who has thorough knowledge of the brief and an ongoing professional relationship with investigating police and any victim(s). There is an incentive to resolve those matters which can appropriately be resolved rather than leaving them to the trial Crown to try to resolve later since failure to do so will only delay in additional work later on in the proceedings. Once again, however, some of these factors make expansion of the RLC difficult.

There may be scope for expansion to include matters currently dealt with by the Aboriginal Legal Service. It may be possible to use the RLC model in locations where there is a particular problem with the pending trial caseload. It is also possible that the key elements of the RLC—experienced defence and prosecution lawyers, early briefing of defence and prosecution counsel, absence of financial incentive to prolong matters—may be able to be introduced throughout the District Criminal Court, without having dedicated defence and prosecution teams and a permanently assigned judge.

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NOTES

1. Delay for our purposes refers to the amount of time between the beginning and end of proceedings, which exceeds the time necessarily spent in the preparation of a case for trial, the conduct of its hearing and the determination of the final outcome; that a trial should not involve undue delay is enshrined in article 14 of the International Covenant on Civil and Political Rights (ICCPR).
2. See, eg, *R v Jago* (1989) 168 CLR 23 ('*Jago*'); *Adler v District Court of New South Wales* (1990) 19 NSWLR 317; *R v Forsyth* [2013] ACTSC 179.
3. (1989) 168 CLR 23.
4. Ibid per Brennan J [20].
5. Chief Judge Price AM, 'The Director of Public Prosecutions 17 December 2014' (Keynote Address: the District Court 2015 and Beyond – Quo Vadis?).
6. $t_{107} = 0.62, p = .534$
7. $\chi^2_5 = 2.16, p = .827$
8. $\chi^2_2 = 11.25, p = .004$
9. $\chi^2_1 = 5.33, p = .021$
10. $t_{54} = 1.30, p = .200$

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