



**International Centre for Criminal Law Reform
and Criminal Justice Policy**

Addressing Inefficiencies in the Criminal Justice Process

A Preliminary Review

Prepared for the
BC Justice Efficiencies Project
Criminal Justice Reform Secretariat

by
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1. Background

1.1. Introduction - Context and Purpose of this Review

British Columbia has an ongoing commitment to addressing justice inefficiencies and is preparing a proposal for a broad review of inefficiencies in the province's criminal justice system. The British Columbia Justice Efficiencies Project, led by the Criminal Justice Reform Secretariat, is attempting to identify steps which could be taken provincially or at the national level to address perceived justice inefficiencies and to improve the overall performance of the criminal justice process in the province.

At the national level, the Federal/Provincial/Territorial Meeting of Deputy Ministers Responsible for Justice in January of this year, Deputy Ministers agreed that they would review the criminal justice system to identify and address factors that impinge the ability of the Canadian criminal justice system to function efficiently.

The present review is only one part of the Justice Efficiencies Project. Based on local and international consultations as well as a survey of the literature, it attempts to identify promising practices and successful reform initiatives to improve the efficiency of the criminal justice process. Some of the key problems that affect the efficiency of the criminal justice system were identified in a preliminary consultation with local justice officials. These concerns have oriented the present review and focused its search for successful strategies to improve the system's overall efficiency.

The present report offers an overview of some of the key issues involved in improving the efficiency of criminal justice systems and the general approaches used in various jurisdictions to improve that efficiency. A more detailed review of the many reforms contemplated or implemented in Canada and in other jurisdictions will be necessary to assess which reforms may be most appropriate for British Columbia.

1.2. Inefficiencies

There are numerous signs that the criminal justice system is not functioning as efficiently as it should. Lengthy case processing time, for instance, have been a concern (Webster & Doob, 2004). In British Columbia, for example, the number of new criminal cases coming into the court system is decreasing, but the number of court hours is not decreasing at the same rate. The number of appearances per case, the number of days to disposition, and the number of pending cases over 240 days all show an increasing trend.²

Over the last several years, the problem of "system inefficiencies" has been the object of renewed attention in several jurisdictions in Canada and abroad. However, there is

² Source: CORIN database, 2004-05 RCC Data, Provincial Adult Criminal Data.

much less empirical research on this question than one might expect. Many of the core studies that are frequently quoted on the subject are fifteen and twenty years old and, quite frankly, have a fairly narrow empirical basis.

Some of the early efforts at improving the performance of criminal justice systems focused on improving case management, often by betting on the advantages of new communication and data management technologies. New technologies made better case tracking possible even if, at first, new case tracking systems did not always run as smoothly as they were intended to. New tracking systems were particularly weak when they attempted to track cases across different systems or agencies. Nevertheless, some improvements were produced and these information management and communication systems eventually supported the introduction of better and more sophisticated case management processes.

New technologies also strengthened court administration services and allowed some amount of rationalization and greater efficiencies in case scheduling and court time management. In spite of the promises they held, these new technologies only yielded some relatively modest improvements in the overall efficiency of the criminal justice process. Obviously also at play were other systemic factors which were not directly addressed by these technological innovations. Other early reforms to improve the efficiency of the criminal process focussed on distinguishing between cases based on their respective complexity. A number of differential case management practices were thus introduced into the criminal justice process, including the fast tracking of certain cases when appropriate. Again, the system's overall performance was improved, but only slightly. Reformers started to point at other factors, such as the legal culture, the police culture, or the lack of leadership, as matters that needed to be addressed before the criminal justice system's overall performance could be substantially improved.

Most of the promising new developments in the field, many of them as yet untested, come from our evolving knowledge and expertise in the areas of systems, organizational change, change management and organizational behaviour, as opposed to careful experiments within the justice system. One should not be surprised if much of the recent literature on criminal justice efficiency is focusing on concepts of leadership, goal and target setting, strategic planning, change management, performance monitoring and feedback loops, indicators of performance, and accountability.

The question of how to reduce system inefficiencies is getting a new momentum. This is true in Canada, in several provinces and at the national level, as well as in Australia, New Zealand, England, Scotland, Europe, and several jurisdictions in the United States. The Council of Europe, in particular, has established the European Commission for the Efficiency of Justice (CEPJ) which has taken a systematic approach to the issue and has framed some of the questions outside of the narrow framework of common law

practices. The Commission has attempted to identify some of the best practices relating to criminal proceedings.

Those who have attempted to deal with this complex issue have first had to cope with two practical challenges: (1) defining the issue of “system inefficiency”; (2) measuring its prevalence. British Columbia is no exception.

Defining the issue can be, in itself, quite a challenge. The issue is defined in a number of different ways, all of them revolving around the general theme of the perceived poor performance of the criminal justice system and its growing costs. Poor performance is generally identified by reference to several apparent symptoms of inefficiency such as: unnecessary delays within the process; unnecessary steps in the process (e.g. unnecessary adjournments; procedures mandated by law, policy or tradition which are counter-productive or constitute duplication; unproductive activities (e.g., unproductive court hearings); failed or aborted prosecutions (case withdrawals, dismissed cases, stayed proceedings); “collapsed” or “cracked” trials; and, the exorbitant costs associated with certain types of trials or procedures.

Everyone also recognizes that these symptoms are typically amplified when the system is processing large and complex cases and, as a result, some special attention is now given to the management of these complex cases and mega-trials. For instance, a report was recently prepared by Chief Justice LeSage and Professor Michael Code on large and complex criminal case procedures (Lesage and Code, 2008).

Interruptions in the normal flow of cases are a source of inefficiencies, but they may themselves result from any number of factors. Some often argue that the normal and effective flow of cases is both facilitated and impeded at times by the exercise of **discretionary authority** by various officials. This may suggest that the exercise of such discretionary authority needs to be better circumscribed, guided and monitored.

Some countries, like Austria and Finland, have decided to pay attention to so-called “standstill time” in the flow of cases. They set in place monitoring systems to track instances where a case seems to have remained inactive due to inactivity on the part of the prosecution, the defence or the court (Council of Europe, 2006, 11). A study conducted in Norway for the European Commission for the Efficiency of Justice separated case processing time into two major components: action time (time spent when someone is working on the case) and standstill time (time when nothing happens). The findings were “striking”: “While total average action time from the report of the crime to the prosecutorial decision varied between two and five days both between police districts and crime areas, standstill time varied between 43 and 309 days. Action time only constituted a minor part of the total processing time, while standstill time counted for more than 90%” (Smolej and Johnsen, 2006, 4).

Poor **collaboration** or **coordination** among the agencies involved is usually seen as a major source of inefficiency. In every country, the criminal justice “process” refers in fact to the activities of several agencies or institutions (police, prosecutors, judiciary, defence Bar) which, of course, all have their respective priorities, systems, objectives, procedures, and even culture. These various participants in the process all have different ways of approaching the issues of performance and efficiency.

Even if they serve complementary and often interdependent functions, the various components of the justice system must nevertheless operate independently from each other and maintain the integrity of the specific function they perform within the overall system. However, this does not preclude broad initiatives to promote greater coordination and synchronization of complementary processes and activities. In fact, the different components of the system must work together to increase both their respective and collective efficiency. Furthermore, it cannot be assumed that the main functions of the various components of that system are necessarily defined solely in relation to the criminal justice process. The police’s primary function, for instance, is not to process criminal cases through the courts. In fact, many modern police forces are moving in the opposite direction: finding effective and creative ways to prevent and reduce crime and increase public safety without reference to the justice process. This has obvious implications for any attempt to introduce system-wide performance enhancing measures.

It is often argued that what is needed is to take a **holistic approach** to enhancing the efficiency of the criminal justice process so that real innovation can take place instead of relying on small, isolated and often ineffectual changes. Looking at the experience of various countries, it would seem that the most promising initiatives have been those which have adopted a system-wide approach to reducing inefficiencies, have mobilized the various agencies involved, helped each agency develop and implement performance targets and objectives, and facilitated cooperation among the various agencies through the development of inter-agency cooperation protocols or other means. At the same time, the broad strategies themselves seem to be more effective when they focus on promoting coordination and collaboration at the local level.

At the level of broad **justice principles**, as soon as one raises the question of system efficiency, one can expect to be reminded of the need to improve the system’s efficiency in a manner which does not compromise its effectiveness and its fairness. Efficiency improvement measures must not compromise the effectiveness of the system or the “quality of justice”. It should be possible to identify measures which can improve both the effectiveness and the efficiency of the system. For example, the European Commission for the Efficiency of Justice (CEPJ) has adopted a new objective for judicial systems, “the processing of each case within optimum and foreseeable timeframes”, but it has also made it clear that its proposed framework for efficiency reforms must be based on three crucial principles:

- (1) the principle of balance and overall quality of the judicial system;

- (2) the need to have efficient measuring and analysis tools defined by stakeholders through consensus; and,
- (3) the need to reconcile the requirements contributing to a fair trial, with a careful balance between procedural safeguards, which necessarily entail the existence of lengths that cannot be reduced, and a concern for prompt justice (Council of Europe, 2006, 4).

The timeliness and efficiency of the criminal justice process need not be opposed to the quality of justice. There are several examples of reforms that have improved both the efficiency and the quality of justice. A gain in efficiency needs not come as a result of a loss in quality. For example, a review of reforms undertaken in nine State criminal trial courts, in the United States, concluded that timeliness in felony case processing occurred in court systems that promoted effective advocacy, an integral component of quality case processing (Ostrom and Hanson, 2000).

There are many ways to look at the efficiency of the criminal justice system. In Canada and elsewhere, there is a frequently expressed public impatience³ with the formal criminal justice process and doubts are often voiced about not only its efficiency, but also its effectiveness in preventing crime and ensuring public safety. In effect, some of the people consulted so far have argued that Canadian society might have reached a crossroad, a point at which choices must be made between competing visions of the purpose of the criminal justice system. This is perhaps nothing new. There probably was never a time when that system was effectively sustained by a single uncontroversial vision. Today, some of the tension apparently stems from opposing visions: one inspired by a desire for peace and public safety and focused on preventing crime, resolving conflicts, and “problem solving” generally, and a more traditional vision based on the affirmation of various legal rights and a reliance on a formal, adversarial adjudicatory process.

At the intersection point between these two competing visions, one finds a number of initiatives to create more efficient “problem solving courts” (Casey, 2005). In the same way that police forces have created some special squads to process certain types of investigations more effectively, or that prosecutions services have allowed the specialization of some prosecutors, some “problem solving courts” have been created to deal with the recurring complexity of certain types of cases and the apparent ineffectiveness of the justice system in addressing their underlying causes (drug courts, family violence courts, etc.).

Since the earliest efforts to improve case management in criminal courts, various schemes have been designed to segregate certain types of cases from others and to respond differentially to them. In the end, nonetheless, the effectiveness and efficiency of each one of these specialized streams must also be assessed.

³ See for example: Kari (2009), Ruby (2008).

The **symptoms** of the system's inefficiency are sometimes obvious, but they are not always easy to interpret. Several of them have been used to quantify the problem and guide reform strategies. They include:

Delays: Some delays are inevitable. Unnecessary delays should therefore be the focused of reform efforts, that is if one can clearly define the difference between necessary and unnecessary delays, or between unavoidable delays and those which can be avoided by better case management, improved procedures, and greater cooperation.

Unnecessary delays are not only a recurring source of inefficiency, but also a source of failed prosecutions and collapsed trials. Furthermore, they can also be an issue from the point of view of the rights of the defendants (affecting their ability to defend themselves) or the victims (Fabri and Langbroek, 2003). In fact, courts and human rights bodies have tried to impose time limits on the criminal trial process and to define the "reasonable time within which a trial must take place" concept found in article 11 of the *Canadian Charter of Rights and Freedoms* or in human rights instruments such as the *European Convention on Human Rights* (1950), article 6 (1).

Several jurisdictions have focused their reforms specifically on reducing time delays and identifying avoidable delays (see for example, Criminal Justice Inspection, Northern Ireland, 2006; Weatherburn and Baker, 2000; 2000a). They recognized that the timeliness of case progression through the justice system is an important indicator of effectiveness and efficiency.

The Council of Europe and its members are moving towards a different approach to defining effective case processing. Moving from the concept of "reasonable time" which finds its basis in human rights law, they have adopted the notion of "optimum and foreseeable timeframe" (Council of Europe, 2006, 4). While the former is still recognize as a "lower limit" drawing the line between a violation and non-violation of the law⁴, the latter is defined as an acceptable performance outcome. To prevent delays or reduce timeframes in the justice systems, information must be collected in order to understand where and why delays occur and to provide feedback to those who may be involved in creating unnecessary delays. A study of time management of justice systems in Northern Europe, conducted for the European Commission for the Efficiency of Justice, described the use and setting of timeframes in courts and a number of management strategies emphasizing court leadership (Smolej and Johnsen, 2006).

Unnecessary adjournments: The number of adjournments in a trial, particularly during the pre-trial period, is often a sign of poor case management (Whittaker et al., 1997). Adjournments, particularly unnecessary ones, have been shown for a long time to be responsible for substantial delays in the criminal justice process (Home Office, 1990) and for creating difficult case scheduling and case management challenges. There may

⁴ Article 6.1 of the *European Convention of Human Rights*.

be numerous reasons for multiple adjournments in a case, including some very valid ones. Determining which adjournments could be avoided is not necessarily easy.

In Australia, a recent study of trial delays showed that more than two thirds of the cases listed for trial were failing to proceed on the designated day (Payne, 2007). Half of these instances were due to either a late guilty plea or a case withdrawal by the prosecution. A detailed analysis found that the delays were most likely the result of inefficient practices than the actual complexity of the cases. The number of adjournments, many of them apparently unnecessary, was a major cause of delays and a significant cost burden on the system.⁵

Ineffective hearings: Ineffective hearings are linked in part to unnecessary adjournments. They often stem from some of the same issues, including poor case preparation, complicated procedures, or the inability of parties to resolve various issues without the intervention of the court.

Length of the criminal trial process: The length of the criminal justice process as a whole is often identified as a sign of the system's overall inefficiency. It is sometimes also argued that a lengthy process is not necessarily a symptom of inefficiency, because that lengthiness may be the normal result of a case's relative complexity. There is a perception among criminal justice professionals that, generally speaking, the complexity of the cases before the courts may be increasing steadily. The total length of the criminal trial process (time to completion) is sometimes used to assess the effectiveness of the criminal justice process. Many jurisdictions, including British Columbia, have observed a steady increase in the average time to completion of cases. That, however, is a very rough measure of the efficiency of the process and many factors may indeed be hiding behind that particular indicator. In fact, the "time to completion" indicator is more appropriately used in conjunction with other measures that can identify which elements of the process may responsible for the lengthy process. Few countries have developed the information management systems that could allow them to properly monitor such indicators on a routine basis.

The Council of Europe (2005) has introduced a time management checklist which consists of a list of indicators to analyse the length of proceedings in the justice system. The checklist enables an analysis of the proceedings on two levels: as the total duration of the proceedings from initial stages to the final decision and as the duration of individual stages of the proceedings (with particular attention devoted to the analysis of the periods of inactivity). The purpose of the checklist is "to reduce undue delays, ensure effectiveness of the proceedings and provide necessary transparency and foreseeability to the users of the justice systems" (Council of Europe, 2005).

Cracked trials, ineffective trials, or collapsed trials: Failed, cracked, or collapsed trials refer to instances where the overall criminal process apparently fails. These

⁵ See also: Government of Australia, 1999.

concepts are not usually well defined and, as such, are not usually adequately captured in existing management information systems.

1.3. Prevalence of the Problem

Countries which have resolved to address the issue of justice system inefficiencies all had to initially confront the problem of lack of baseline data. This, in spite of the fact that many of them had already set in place some fairly sophisticated information management systems. At first, most of these countries did not have readily available data that would allow them to assess the prevalence of the problem or the efficiency of the criminal justice process. Performance indicators had rarely been defined and the necessary monitoring processes had not been developed. To a certain extent, this is the problem that Canada and most of its provinces are currently facing. The Canadian Centre for Justice Statistics has developed databases that contain a lot of the relevant data, but the latter has not yet been prepared for the kind of analysis that would be required to produce some baseline data on the nature and prevalence of criminal justice inefficiencies. Several countries have conducted special studies to obtain and analyze that kind of data. They are trying to set in place the necessary monitoring mechanisms to measure any change produced by the reforms they are implementing to address the perceived problem. The Council of Europe, as was mentioned earlier, has developed a comprehensive framework for defining “timeframes” and relevant indicators as well as a time management checklist for justice systems (Council of Europe, 2005). In British Columbia, the process of developing and implementing the necessary performance indicators is just beginning. It will be quite some time before reliable baseline data are available on the justice system’s inefficiencies.

In British Columbia, a more comprehensive review of the available data on the relative efficiency of the criminal justice process is necessary and is currently underway as part of the present project.

1.4. Solutions - Performance Enhancement Measures

Part of the challenge is to better understand how systems reproduce themselves and adapt to change and how different attempts to improve the system’s performance can be expected to evolve over time. We know very little about how to influence complex systems, particularly when we are dealing with self-organizing yet highly regulated systems interacting with each other in complex and evolving ways.

One method consists of looking at weak points within the system, points which appear to be responsible for delays and inefficiencies. Some of the most useful work conducted to date seems to suggest that a fruitful analysis of such a complex process is often yielded by an examination of points in the process where actors are confronted with **uncertainty** or **unpredictability** about the process or its outcomes.

We may want to look for efficiencies at the points of “confluence” or “weak congruence” between different components of the justice system or parts of the criminal process: where information is not properly transferred from one part of the system to another; where uncertainties are responsible for delays; where discretionary powers make the system less predictable; where tensions exist between competing objectives; where cooperation between agencies and individuals is most critical; and, points at which the process has a regular tendency to become disjointed or disarticulated.

These problematic points are found at those moments when the normal flow of the process is interrupted, slowed down, or side-tracked. The Council of Europe (2006), for example, has recommended that “standstill times”, times at which the process is inactive, should be identified.

A cursory analysis of the criminal justice process is sufficient to understand that these weak points, or points of non-confluence, are typically found where:

1. the functions and activities of two or more agencies intersect within the criminal process without the necessary rules, protocols and leadership to support congruent action and effective cooperation;
2. the exercise of discretion by one or more participants is introducing an element of unpredictability in terms of the outcome of a particular decision or its implication for the remainder of the process;
3. the non-congruence between the objectives pursued by different participants and/or agencies manifests itself, leading to misunderstandings, poor cooperation, unpredictable decisions, unproductive frictions, and divergent activities;
4. the fundamental opposition between the goals of two main parties involved (e.g., the defence and the prosecution) engages them in antithetical or adversative actions that are not or cannot be (e.g. to preserve the overall fairness and integrity of the process) resolved efficiently or expeditiously;
5. the non-performance or ineffective performance of a particular activity or function by one of the interdependent components of the process interrupts the process flow and disrupts the activities of the other components;
6. deliberate actions or inactions by one or more of the components of the process (or even external actors) derails or slows down the process; or,
7. an interruption in the process flow is caused by an external element (a temporary lack of facilities or an physical interruption of communication) or by actors or events outside of the process itself.

So far, many if not most initiatives to reduce inefficiencies in the criminal justice process have focused mainly on addressing the main symptoms of the problem. They have attempted to reduce the number of adjournments and undue delays, the number of

failed prosecutions, the number of “cracked”, “collapsed” or “ineffective” trials, or the overall length of the process and their consequential costs. These are of course all valid goals for justice reform, but they do not provide a comprehensive framework for improving the performance of the system as a whole or even for understanding the reasons behind its current inefficiency. Focusing on **uncertainties** and **points of non-confluence** within that system in order to identify some of the main systemic factors behind the perceived inefficiencies in the criminal justice process may lead to a pragmatic system-wide approach for improving the system’s performance.

With respect to “ineffective trials” and collapsed or “cracked” trials, one can identify a number of specific **uncertainties** in the typical trial process which tend to affect its efficiency or even its success. A comprehensive study of criminal trial delays in Australia by the Australian Institute of Criminology has shown the role of these uncertainties as important contributors to trial adjournments or collapses (Payne, 2007).

The uncertainties in question included:

- Uncertainty about timing and the general time lines within which the process and its various components are expected to take place. This includes uncertainties resulting from court administration, rules of the court, scheduling and the effectiveness of the planning and communication technology supporting it, availability of judges, availability of courtrooms and courtroom hours available; and limited judicial and court resources.
- Uncertainties affecting the pre-trial process, including uncertainties about the plea bargaining process, the disclosure and preliminary hearing processes.
- Uncertainties about exactly when a trial is expected to proceed due to the number of adjournments, including unnecessary adjournments and ineffective hearings, which introduce problematic and unproductive delays within the process, or due to certain practices such as over-listing of cases.
- Uncertainties related to the prosecution function, including those caused by counterproductive practices and procedures within the charging process.
- Uncertainties related to the defence function and the availability of legal aid services or funding.

There may often be some very practical reasons why a trial cannot proceed as scheduled. Not all delays can be avoided. The lack of resources often puts a strain on the process (Payne, 2007, 70). The prosecutor and the defence counsel must manage multiple cases at a single time; evidence may not become available until late in the process due to backlog in processing certain type of forensic evidence; funding for legal assistance may not always allow for early preparation and effective interactions between the prosecution and the defence.

Some inefficiency may be attributable to the system's lack of resources. Yet, other uncertainties and inefficiencies appear to be entirely preventable by a more effective use of existing resources and a rationalization of existing procedure.

A limited court capacity or an unexpected reduction in capacity can affect scheduling and case management and create various uncertainties about whether or when a case will proceed. This, in turn, may affect several other factors and result in further delays, a backlog of cases, and other problems. Some courts are attempting to respond to the problem of lack of capacity by over-listing cases, a practice which tends to create further uncertainties about whether a case will proceed as planned and to dissuade the parties from preparing adequately for the hearing. Unnecessary adjournments and unproductive hearings often result from this practice.

The capacity of the courts is often the best statistical predictor of how many cases are heard within the system. Evidently, the system adjusts itself to itself and cases that cannot be processed within the limited capacity of the courts are either postponed to become part of a growing backlog of cases or are otherwise resolved, not necessarily in ways which enhance the credibility and the fairness of the system.

The length of time within which a case can be expected to be processed is hard to estimate or predict. It varies considerably depending on the nature and complexity of the case. Most systems do not have guidelines or targets to guide the participants in the process and to suggest a normal or optimal length of time within which that process ought to be completed. A relatively new strategy for addressing delays consists of setting targets and monitoring whether they are met.

Some of the critical factors in reducing delays and other inefficiencies in the criminal process were listed in a report prepared for the European Commission for the Efficiency of Justice (Fabri and Langbroek, 2003). They included: definition of goals and standards; judicial commitment, leadership and adequate accountability mechanisms; involvement of the different actors in the system; effective court supervision of case progress; the implementation of effective case management systems; case monitoring; and, education and training.

Many reformers have noted the need to bring about change in the legal culture in order to facilitate effective reforms (Government of Australia, 1999, 70; Raine and Wilson, 1993). The courts' working environment can promote or inhibit timeliness and effective advocacy. The expectations of lawyers and judges about how long it will take for cases to be resolved have "profound effects on how long cases actually take to resolve" (Ostrom and Hanson, 2000, 10).

A study of the organizational culture in eight U.K. magistrates' courts showed that it could influence the scheduling of cases (Raine and Willson, 1993). Based on interviews, observation and case records, the study showed that the organizational

culture of each court had a real impact on scheduling performance, particularly on the level of delay and collapsed trials. When they engaged in strategic negotiations with professional users, the courts used their time more efficiently, heard more trials in full, and disposed of more trial cases on the day they were listed.

In order to counter the debilitating resistance that reform efforts can encounter, it is important for a reform initiative to: (1) clearly define some concrete goals and standards; (2) delineate the respective responsibilities of each group of participants in implementing the reforms; (3) set in place adequate accountability mechanisms; and, (4) provide feedback to participants on the change that are being effected.

1.5. The Structure of this Report

This following parts of this report will summarize some recent initiatives to enhance the efficiency of the criminal justice process. It looks first at initiatives to improve court administration practices and case flow management, including initiatives that have relied in whole or in part on the introduction of new technologies. It also considers initiatives which have focused on improving the criminal investigation process and the communication between the police and the prosecutors. It then examines briefly some initiatives aimed at increasing the role of summary proceedings within the system and at encouraging the use of diversion and an early disposition of cases.

The bulk of the reform experiences reviewed in preparing this report did focus on the pre-trial process, including the disclosure process, and that explains why the report gives a fair amount of attention to these efforts and their apparent impact. Finally, the report refers to recent attempts to improve the attendance of witnesses and victims since their non-attendance has been revealed, in most countries, as a major source of inefficiency.

Finally, because it becomes quickly obvious that most reform attempts have suffered from a lack of reliable data on the justice system's performance, the report has a last short section on the role and importance of performance indicators.

2. Improved Court Administration

A number of significant improvements can be brought to the management of the criminal justice process as a whole by focussing on strengthening the court administration function. Clearly, no lasting improvements to the case management process can be seriously contemplated without looking also at strengthening court administration⁶.

⁶ See Canadian Judicial Council (2006) and Canadian Judicial Council (2007).

2.1. Automation, Scheduling and Case Tracking

Automation can offer effective support for case scheduling and management. It can support case tracking and “fast-tracking” systems as well as help create the databases that provide feedback to the main stakeholders. In doing so, it can help increase the efficiency of the overall system. Powerful and well-designed information management systems can help improve case management, but they need to be accompanied by other reforms so that they may yield their full benefits.

Case processing delays are rarely eliminated by automation (Butts and Halemba, 1996) but the latter can support broader case flow management initiatives. For example, the use of a case scheduling order, a time line agreement accepted by all parties, has sometimes been shown to produce a more efficient process (Davis, Smith, and Nickles, 1996).

A study of six sheriff courts in Scotland showed that scheduling policies and practices, late pleas and changes in pleas all influenced scheduling in summary trials and produce case management challenges that technology alone cannot resolve (Benneth and Miller, 1990).

3. Improved Case Management

Case-flow management consists of actively monitoring, supervising and managing the flow of cases through the system so that each case moves through the process without undue delay. Some best practices have been identified regarding the basic steps that can be taken to identify caseflow management issues within a system and address them (Justice Management Institute, 2000). Everyone who has had experience in this area would most likely recommend a careful analysis of existing data and the development of locally appropriate measures which take into account the local legal culture, the availability of resources, and the existing legal framework.

In 2001, as a result of a growing concern for the rising numbers of “cracked”, ineffective” or “vacated” trials, a pilot program involving nine areas was designed in the U.K. to reduce delays and increase the performance of the case management process. Joint Performance Management Groups were established in each site and local strategies were developed. The JPM approach was designed to enable local officials to identify trends and allow courts and other agencies to address any performance issue thus noticed. According to participants in the project, the major benefit of the JPM approach was that it brought together the various agencies involved and provided them with the feedback they needed on their performance and opportunities to take action to correct performance issues as they were being identified (Lord Chancellor’s Department, 2001).

Also in the U.K., a detailed criminal case management framework has recently been introduced, based on best practices, to guide participants in the criminal justice process and help them prepare and conduct cases in compliance with the Criminal Procedure Rules (Home Office, 2007a). The framework encourages cooperation among the different agencies involved in the criminal justice system and with the legal profession.

Still in the U.K., a national scheme for “delivering simple, speedy, summary justice” has been introduced in 2006 in England and Wales after being piloted in magistrates’ courts in four sites (Coventry, Camberwell, Thames and West Cumbria) (U.K. Department of Constitutional Affairs, 2007). The evaluation of a pilot project in magistrates’ courts demonstrated that significant results could be achieved, through enhanced inter-agency collaboration, by improving prosecution preparation and defence readiness for first hearings, establishing a more effective process for the conduct of first hearings, and facilitating the out of court case progression. The scheme allowed for local variations in the process and encouraged local ownership over the reforms.

3.1. Differentiated Case Management

At the heart of most criminal case management processes is the function of differentiating among different kinds of cases calling for different kinds of action and directing them to specialized processes. This includes provisions for fast-tracking certain types of cases, usually the simplest ones. The idea of differential treatment for certain types of cases has led to the establishment of various specialized courts, including early disposition courts (Kelly and Levy, 2002) and problem solving courts (Davis, Smith, and Nickles, 1996) about which more will be explained later.

3.2. Judicial Management / Leadership

It is part of the responsibility of judges to manage court proceedings (Muller and Van der Merwe, 2005)⁷. Judges are expected to play a more proactive role during various pre-trial hearings. In British Columbia, judges have wide discretion in granting an adjournment. Summarizing part of the relevant case law, Libman explains that:

In determining whether to grant an adjournment, a trial judge exercises his/her discretion respecting the conduct of the trial and is not bound by prior adjournment orders of other judges. It is also within the judge’s discretion to refuse to grant further adjournments having already granted numerous adjournments to an accused (Libman, 2006, 168).

⁷ Muller and Van der Merwe (2005) also point out that this role assume greater significance when the witness is a child or otherwise vulnerable. See also a U.K. Home Office *Consultation Paper on Improving the Criminal Trial Process for Young Witnesses* (Home Office, 2007).

There are several other areas (e.g., change of venue under s. 599(1) of the *Criminal Code*) where a judge can exercise his or her discretion in a way which may prevent unnecessary delays and increase the efficiency of the criminal justice process.

In New Zealand, most judges interviewed during an evaluation of the status hearings process perceived their role at status hearings as being different from their role in other court hearings. They saw their role as “interventionist and proactive” (Searle et al., 2004, 88).

A relatively old study of eight magistrates’ courts in the UK showed that courts that took control and demanded that professional users be accountable to the court experienced less delays and fewer collapsed trials (Raine and Willson, 1993). The more efficient courts were those that engaged in strategic negotiation regarding scheduling. Other studies have also shown that early court control over scheduling of case events is critical to reducing the number of adjournments, the number of trials, and the duration of the trial (Michels, 1995).

The criminal case management framework introduced in the U.K. (Home Office, 2007a) is an effort to promote the active pre-trial case management by the court, as well as tight control over the conduct of the trial itself. The framework provides for trial management to be handled by the court, with the explicit assistance of prosecution and defence counsel. A system of pre-trial hearings will be used to ensure that criminal matters are prepared and conducted properly and in accordance with the relevant statutes, rules and practice directions. The court has the authority to set a timetable for the preparation of the trial and completion of the case and to inquire into and take action in relation to any hearing which is wholly or partly ineffective or unnecessary; the court may continue with the pre-trial hearing in the absence of the defendant, if appropriate, and take action against any party in relation to any failure to prepare or conduct the case properly (Payne, 2007, 68; Home Office, 2007a).

In Tasmania, the *Justices Amendment Act 2007*⁸ was adopted in order to limit delays in the court and confer case management powers upon the Supreme Court for indictable offences. Under the Act, the Supreme Court can set and control the timetable for disclosure of prosecution witnesses at committal proceedings. The new procedures apply to indictable offences dealt with by the Supreme Court. The objectives of the new procedures include:

- Reduction of time elapsed between first appearance in a court of petty sessions and final disposition in the Supreme Court.
- Elimination of unnecessary committal hearings.
- Early identification of crime or crimes to be charged by indictment.
- Early identification and disposition of pleas of guilty.
- Elimination of unnecessary remand appearances.

⁸ *Justices Amendment Act 2007*, Act No. 22 of 2007.

- Certainty of trial date and elimination of adjournments.
- Reduction of costs. (Supreme Court of Tasmania, 2007, 2)

The new procedures involve:

- early file disclosure to defendants by police for all indictable offences;
- early involvement of the Office of the Director of Public Prosecutions with respect to those indictable offences where there is no right of election and those indictable offences where an election is made to be sentenced or tried by the Supreme Court so that the charges are settled without delay;
- preliminary proceedings for the taking of depositions only occurring at the order of a Judge and being conducted by Crown counsel instead of police prosecutors; and,
- increased case management by the Supreme Court. (Supreme Court of Tasmania, 2007, 2).

The impact of these procedural changes on the overall management of the process has not yet been evaluated.

Some jurisdictions have looked at the issue of encouraging compliance and discouraging non-compliance with the pre-trial regime (Government of Australia, 1999, 49). The management of the pre-trial process is typically left to a judge and the experience of some jurisdictions seems to have demonstrated that not all judges are equally suited to supervise that process. They must not only be able to appreciate the difficulties from the perspective of the defendants, but also be able to firmly insist on appropriate compliance. A number of difficult issues arise during these pre-trial proceedings and future compliance with the outcomes of that process cannot always be taken for granted. Difficult defendants and uncooperative counsel exist.

A system of incentives and disincentives can be designed to improve compliance with the pre-trial regime (Government of Australia, 1999, Sulan, 2001). The range of possible sanctions is quite wide, including costs against defendant, or counsel, exclusion of evidence, restriction of cross-examination, crown re-opening, or adverse comments (Government of Australia, 1999; Loukas, 2001).

Notwithstanding the importance of fostering cooperation in the management of cases, there are several issues associated with the imposition of sanctions for non-compliance against a defendant. Non-compliance with the pre-trial regime and poor cooperation is difficult to address. Once systemic barriers to cooperation have been addressed, one has to focus on counter-productive habits and behaviour patterns among those who must participate in the process. The latter requires a change of practice, of habits learnt early and often well ingrained in the practitioners. As Sulan (2001) noted, these habits have evolved for many reasons, including heavy workloads, poor management, and limited funding. What is really needed to make practices comply with new requirements, he adds, “is either tangible incentives and/or real penalties”. “In both cases”, he suggested, “it would be wise to tread carefully” (Sulan, 2001, 5).

Improved communication between the judicial case managers and both the Crown and defence counsel regarding potential case collapsing, downsizing of cases, and changing time estimates can strengthen the overall case management process. In Vancouver, the Main Street Criminal Procedure Committee noted that “it is not unusual for counsel to voluntarily offer this information well before the trial date” (Main Street Criminal Procedure Committee, 2005, 10).

Within court administration services, the pro-active "monitoring" of cases for last minute changes that may affect forthcoming trials is part of the responsibility of case managers. The latter may contact Crown counsel assigned to specific cases and contact all defence counsel as the trial date is approaching. Counsel can help by providing important information and this information can assist the daily balance of cases and free up judicial resources. Case monitoring can also encourage Crown and defence counsel to renew discussions that can lead to less time being required for trial or outright resolution of the matter.

3.3. Case Preparation

When looking at delays, many reviews have pointed at the problem of the lack of preparedness of the prosecution, although the same issue exists for defence counsel. A recent Australian study revealed that many of the matters withdrawn from prosecution or delayed were the result of limited or late preparation on behalf of the prosecution (Payne, 2007). In some jurisdictions, frequent last minute changes in the prosecutors assigned to cases dissuade them from preparing in advance. Since they are uncertain about whether a case will fall within their own responsibilities, they tend to wait until the last minute to prepare for it. The late transfer of a brief to a private counsel, a Crown agent, or a senior counsel is sometimes referred to as the main reason for poor or late case preparation by the prosecution. Some jurisdictions have therefore developed some “local prosecution teams” to address this question and cases are assigned to a team to ensure that a prosecutor will be available as soon as the case is ready to proceed. Others have experimented with schemes to support case ownership throughout the process by an individual prosecutor or a small team of prosecutors.

Payne, in Australia, suggested that underlying many of the issues of inefficiencies are systemic and habitual factors which result in late or limited preparation of criminal trials;

“Underlying many of the issues highlighted in this report are systemic and habitual factors that result in late or limited preparation of criminal trials. The habitual factors are those that relate to the attitudes and work practices of the key participants. They may be modified by promoting more intensive pre-trial supervision by the court, or through the imposition of incentives for defendants to plead guilty earlier and disincentives for legal practitioners to delay. Habitual factors are not exclusive of systemic factors that may promote tardiness in the trial system.” (Payne, 2007, 70).

3.4. Role of Prosecutors

The prosecution can play a crucial role in facilitating the case management process and avoiding unnecessary delays.

How prosecution services are organized and resourced, the extent to which they centralize prosecutorial decisions and how they manage their relationship with the police and the investigation process can all have an impact on court delays and the overall efficiency of the criminal process. One question that has been raised at times is whether the centralization of the prosecution function can help or hinder the case management process. Some observers have argued that the centralization of the prosecution function produces waste, inefficiency and delays (Frazer, 1993). Others have emphasized the importance of close coordination between the prosecution and court administrators at the local level.

3.5. Collaboration between Different Stakeholders

In the UK, the “Working Together” program included a number of initiatives introduced in the *Crime and Disorder Act* (1998). Some of them had been previously piloted and were rolled out in 1999. The emphasis of the initiative was on providing a framework for collaboration among the different stakeholders.

3.6. Technological Support

The use of information and communication technologies is often seen as one of the main pillars of a successful case management system. Technological developments have opened new opportunities to significantly improve the administration of justice. These technologies can help reduce delays, improve access to justice, and increase the timeliness, fairness, transparency and accountability of the criminal justice process. However, the introduction of new technologies does not necessarily lead to greater efficiency and effectiveness. As was observed by Marco Velicogna, “the interaction between technology and highly regulated organizations, such as courts, may lead to unexpected negative results” (Velicogna, 2008, 2).⁹

4. Improved Criminal Investigation and Communications between the Police and the Prosecutors

Timely and successful completion of investigations by the police and submission of accurate and complete reports to the prosecutors can certainly go a long way in supporting speedy and effective case processing. Many of the failed or delayed

⁹ See also: the report prepared for the European Commission for the Efficiency of Justice on the use of information and communication technologies (ICT) in European judicial systems (Velicogna, 2008).

prosecutions can be attributed to poor investigation and poor police reporting, as well as the fact that the evidentiary requirements of a case may not have been adequately addressed at the investigation stage.

Improving communications between the prosecution and the police helps avoid a number of uncertainties and errors which contribute to the inefficiency of various aspects of the criminal justice process. Better communication can ensure that the required evidence is gathered and available, that missing evidence is identified, that charges are formulated in an appropriate way, and that witnesses are identified and, if necessary, protected.

Improved communications and simple inter-agency protocols can help ensure that police officers are available throughout the process when required to testify and provide evidence, thus avoiding unproductive hearings. The protocols can also help ensure that the police are not unnecessarily spending time in court when their presence is not required, thus realizing substantial cost savings. Interagency protocols, police training, and clear lines of communication between the agencies involved can all help reduce misunderstandings, errors, and miscommunication.

Some jurisdictions have set in place systems to offer pre-charge advice to the police and to provide feedback to the agencies and officers involved when cases are threaten or delays are caused by poor communication or collaboration. In some complex cases, it is now a fairly common practice to create joint police/prosecution teams at an early stage of the investigation or prosecution (Dandurand, 2007, 231). Indeed, some of these teams are even international so as to support the close coordination of international investigations and prosecutions across borders (Dandurand et al., 2007, 281).

In many countries, the “investigative” role and responsibilities of prosecutors is evolving¹⁰. As it is defined and refined, it creates new possibilities for greater coordination between law enforcement agencies and the prosecution at the pre-charge stage. That closer coordination may translate into efficiencies for the whole of the criminal justice process. This is an area where greater clarity about the respective role of the different agencies is often sought after. The American Bar Association, for example, recently adopted a new set of standards on prosecutorial investigation (American Bar Association, 2008).

¹⁰ In some civil law countries, the prosecution can play a direct supervisory role over the investigation conducted by the police (e.g.: Verrest, 2000). In common law countries, the legal framework guiding the collaboration between the police and the prosecution is somewhat more complex.

4.1. Charge Screening and Approval Process

It is important to have procedures in place to enable the prosecutor to screen the charges laid by the police at the earliest possible stage. It is quite clear from the experience of various jurisdictions that the involvement of an independent prosecuting authority from the outset dramatically increases the opportunity for identification of matters that should not proceed. The early involvement of the prosecution, even when an investigation is ongoing, is to be encouraged. It can assist in ensuring that the evidentiary requirements of a particular case are met through the investigation and maximize the chance that the prosecution will be efficiently conducted and successful. This has proven to be particularly important in complex cases or in cases involving international law enforcement cooperation and mutual legal assistance (Dandurand, 2007, 230). It can also lead to substantial savings in investigation and prosecution resources, not to mention the overstretched court resources.

British Columbia's charge approval process is sometimes quoted as an example of a rigorous process. A review of the approval process and data on charges amendments, withdrawals and stays would make it possible to determine how effective the process really is.

4.2. Other Sources of Complexity

How prosecutors deal with criminal offences involving multiple accused, co-accused at large as well as their decisions concerning joinder and severance of counts and accused can all have an impact on how effectively certain matters are dealt with. However, prosecutors rarely receive systematic feedback about the impact of these decisions on the efficiency of the process.

How prosecutors deal with cases involving mentally ill defendants (availability of assessments; expert witnesses; monitoring changes in the condition of the accused) and how they deal with various issues related to the application of the *Youth Criminal Justice Act* (e.g. when a juvenile offender is involved as one of the accomplices) presumably also have an impact on the efficiency of the system. There is very little information available on the nature and extent of that impact.

5. Summary Proceedings

One of the ways to improve efficiency of the system is to encourage a simplified procedure. In the United Kingdom, since the changes introduced by the *Criminal Justice Act* (2003) and the *Courts Act* (2003), the general organization of the summary justice system has been significantly altered. The magistrates' courts' jurisdiction has reaffirmed and expanded and their sentencing power has been increased. Part of the objective of the reform was to reduce the number of committal to trial and sentencing and, ultimately, a reduction in jury trials (Bell and Dadomo, 2006). Efficiency and

consistency were the major stated aims of the reforms. The impact of the initiative has apparently not yet been systematically assessed.

The “hybridization” of *Criminal Code* offences allows prosecutors to proceed by the summary conviction process. The hybridization of offences that are strictly indictable allows the crown to choose a trial by summary conviction in suitable cases, avoiding the more complicated procedure related to indictable offences (including, pursuant the defendant’s election, a preliminary hearing and a trial before judge and jury). Hybridization offers a way to simplify and accelerate the trial process in cases which are less serious and warrant a trial by summary conviction.¹¹

6. Encouraging Diversion and Early Disposition of Cases

Early resolution of cases in a manner which benefits both victims and defendants and achieves both greater efficiency and cost savings should be encouraged and facilitated. Diversion strategies may help reduce the number of cases the criminal justice system must deal with. It is a way of dealing with offenders in a way which does not require that they be processed through the justice system. Encouraging the development of diversion programs at both the police and the prosecution levels is very likely an effective way to improve the overall efficiency of the criminal justice system. Criminal mediation and various restorative justice programs can offer an opportunity for structuring such diversion programs (UNODC, 2006). However, most of the evaluations conducted to date of diversion programs have not systematically assessed the impact of these programs on the justice system.

As mentioned previously, the early and ongoing disclosure of evidence by the prosecution can greatly encourage the early disposition of cases. Furthermore, the early examination of key prosecution witnesses, including expert witnesses, can also encourage early resolution of cases.

In Australia, the directors of public prosecution noted that the opportunity to cross-examine key prosecution witnesses prior to trial often assists in the early resolution of matters. They also expressed the view that some limited opportunity for pre-trial cross-examination of prosecution witnesses can improve the system’s overall efficiency (Government of Australia, 1999, 28).

The establishment of early disposition courts in order to conclude minor cases in a timely manner has been considered in one way or another by several jurisdictions. It would seem that the efficiencies thus created are relatively minor unless this new mechanism is accompanied by other significant reforms and more robust case

¹¹ The CCSO Working Group on Criminal Procedure is currently developing some recommendations for the hybridization of *Criminal Code* offences. Some amendments to the *Criminal Code* implementing some of these recommendations are currently before the Canadian Parliament (see: Bill C-31, 2009).

management processes and procedures. An evaluation of an early disposition court in Baltimore showed how difficult these mechanisms are to implement and how dependent they remain on other related improvements to the case management system (Kelly and Levy, 2002).

6.1. Defence and Availability of Legal Aid

When there are doubts about whether or not defendants will be eligible for legal aid or when the system is slow in confirming the defendants' eligibility and helping them secure the services of a legal counsel, uncertainties, delays and inefficiencies inevitably result. The grant of legal aid may be structured in a way which does not encourage or even permit the early resolution of matters, or a resolution before a matter is committed for trial. Legal aid rules and eligibility criteria may themselves be counterproductive and at the origin of various process inefficiencies. Late plea negotiations may often be the result of the inability of a defendant to secure the services of counsel in a timely manner or of frequent changes in the designation of the counsel of record.

Legal aid assistance must definitely encourage continuity of representation so as to avoid unnecessary uncertainties, unnecessary delays and adjournments, and unproductive hearings. Untimely changes in defence counsel can affect the overall flow of the criminal process and the effective management of the case.

Legal reforms affecting the pre-trial process and the trial itself must consider how they affect the way in which legal aid services are provided and funded. A study conducted for the Legal Services Research Centre in the U.K. provides an example of how the effectiveness of case management reforms is intrinsically linked to the availability of and funding for legal aid services (Plesence and Quirk, 2001).

As is the case for prosecuting counsel, the relative inexperience, preparedness or unavailability of defence counsel can also be a cause of process uncertainties and delays. The reluctance of defence counsel, for whatever reason, to proceed expeditiously with a case is a source of delays and major inefficiencies.

It is often assumed that the length and complexity of the disclosure and pre-trial processes can be significantly shortened by requiring practitioners to identify the issues which they proposed to resolve prior to trial in respect of issues which have been resolved or are no longer in dispute (Government of Australia, 1999, 34). Measures must be in place to encourage trial counsel to become involved with the prosecuting counsel in confining the issues in dispute at an early stage, by either personally conducting the committal or pre-trial negotiations, or at the very least by supervising that process. When the counsel is remunerated by a legal aid program, the latter must remunerate trial counsel for properly preparing the case and identifying issues prior to committal; this in fact may lead to a corresponding reduction in the amount of preparation required later in the process.

The pre-trial resolution of issues can lead to more accurate assessments of the duration of trials, better estimates of the time required by both counsel, and more efficient scheduling of court time and resources. Eventually, it can lead also to shorter, less costly trials.

Many providers of legal aid services have set in place some procedure for evaluating the complexity of cases and for making advanced budget decisions. In British Columbia, the Legal Services Society has a strategic case assessment programs that helps the Society develop budgets and predict costs and preparation needs for lengthy cases. While the objective of the program has always been quality assurance, it is design to introduce the discipline of early and detailed planning to the development of the criminal defence and to incorporate peer dialogue in that process.

6.2. Improved Early and Ongoing Communication between the Defence and the Prosecution

Many practical difficulties can hinder effective communication between the defence counsel and the prosecutor regarding a particular case. However, a review of best practices in the field suggests that the earlier this communication is initiated and the least amount of interruption it suffers from, the better the case is managed and the more the parties are able to prevent ineffective hearings and unnecessary adjournments.

One of the ways that is used to improve formal communications and to encourage early resolution of cases is to require the prosecution to supply a case statement to the court and the defence at the earliest possible stage. The statement is expected to outline the acts, facts, matters and circumstances being relied upon by the prosecution and, if appropriate, to reveal the manner in which the prosecution intends to present its case against the defendant (Government of Australia, 1999, 35). In theory, this requirement can also encourage the early case preparation by the prosecutors. Where there is a requirement to produce a case statement, it is generally recognized that the statement may need to evolve and be amended as additional evidence may become available or previously available evidence can no longer be used.

As was noted in the U.K. by the House of Commons Committee on Public Accounts (2006):

Not all parties involved in a trial have an interest in seeing justice administered quickly. It has often been perceived to be in the interests of the defendant to delay proceedings in the hope that witnesses would not turn up or the case would collapse before it went to trial. Only by improving its own processes and working more co-operatively with the other criminal justice agencies, can the Crown Prosecution Service counter this perception. As the number of successful prosecutions increases, so should the number of defendants pleading guilty earlier in the process in the expectation of a successful prosecution (House of Commons Committee on Public Accounts, 2006, 8).

6.3. Improving the Use of Prosecutorial Discretion

Guidelines are necessary to support the exercise of discretionary authority by prosecutors. They should focus on reducing delays without in any way compromising a principled approach. These guidelines must address the question of choice of charges and require prosecutors to ensure that the charges laid reflect the criminal conduct disclosed by admissible evidence and will provide the court with an appropriate basis for sentencing" (Temby, 2001).

In the United Kingdom, some observers have suggested that the *Criminal Procedure and Investigations Act 1996*, which introduced a new approach to pre-trial disclosure, also introduced a level of discretion in matters of disclosure which undermined the effectiveness of the process at all levels (Taylor, 1996). The greater the discretion allowed, the more importance should be attached to close supervision of the process and to monitoring all instances of delays or cracked trials caused by flaws in the disclosure process.

Changes in the working practices of prosecution services can help reduce the number of ineffective hearings, reduce the number of delays and unnecessary adjournments, and make the whole process much more efficient. In England, a recent study by the National Audit Office focussing on the effective use of magistrates' courts hearings¹² identified problems in the prosecution process which were partly responsible for unnecessary court hearings. They included lack of preparation by the prosecution, inadequate prioritization of cases, poor case tracking, mislaid files, and incomplete evidence on file. The study recommended a better process for prioritizing certain cases and preparing them to ensure that they are ready when they come to court, making more lawyer time available for review and preparation, improving technology, and implementing measures to increase collaboration between the prosecution and other criminal justice agencies (National Audit Office, 2006).

A recent review of the Crown Prosecution Service in England focused on the effective use of magistrate's courts hearings (House of Commons, Committee on Public Accounts, 2006). The report noted that in 2004-05, in 38 percent of the cases where the trial did not go ahead, the case did not proceed because the prosecution was not ready or the charges were being dropped on the day of the trial. The report suggested that most delays caused by the Crown Prosecution Service were avoidable: files are mislaid, urgent action is not completed before trial because insufficient time is allowed for the preparation of cases and there is an inadequate prioritization of cases. The report offers a number of suggestions on how the prosecution service can improve its case management practices.

¹² According to the study, in 2004-05, 28% of magistrates' courts hearings, other than trials, were ineffective and 62% of magistrates' courts trials did not go ahead as planned.

7. Focusing on the Pre-trial Process

The trial should not be the focal point for resolving all issues that the parties cannot resolve on their own. A number of pre-trial process reforms have been considered in various jurisdictions, including: assigning cases to pre-trial judges who are informed of the facts of the case such that they can effectively mediate and resolve issues; the creation of mechanisms to argue and resolve pre-trial issues; or, establishing procedures to resolve disputes over the disclosure process.

The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System (Department of Justice Canada, 2006) summarized the task as follows:

In summary, to bring about meaningful change and defeat systemic delay at the early stages of the trial process, all participants in the criminal justice system must closely examine and, if necessary, modify the way they go about their work. Police and prosecutors must adopt more focused charging practices and be in a position to provide defence disclosure at the earliest stages of the process. Prosecution and defence counsel must reject a culture of last-minute decisions that sees cases warehoused between hearings and be more receptive to reasonable pre-trial resolutions. Finally, judges must be willing to play a greater leadership role by becoming engaged earlier in the life of a file and assuming more “ownership” of its progress through the system.” (Department of Justice Canada, 2006, 7).

In the 1970s and 1980s, several jurisdictions experimented with setting time limits to specified stages of criminal proceedings up to the start of the trial. One of the objectives of these “speedy trials” initiatives was to reduce the time defendants spent in custody while awaiting trial (Morgan and Vennard, 1989). Time limits are also imposed in some jurisdiction in youth court proceedings. For example, an evaluation of the Statutory Time Limit Pilot Schemes in the Youth Courts in the UK was conducted which shed some light on the challenges associated with the implementation of such schemes (Shapland et al., 2003).

The American Bar Association’s Criminal Justice Standards on Speedy Trial and Timely Resolution of Criminal Cases suggest that a “defendant’s right to a speedy trial should be formally recognized and protected by rule or by statute that establishes outside limits on the amount of time that may elapse from the date of a specific event until the commencement of the trial or other disposition of the case. The time limits should be expressed in days or months (American Bar Association, 2004, 3).

In Vancouver, since September 2004, dedicated senior Crown counsel have been assigned to the pre-trial stages of the court process. Each Crown has taken a portion of the caseload from the initial appearance through to the fix date hearing. The Court and Crown are working together to keep files with the assigned Crown Counsel so that file

review, disclosure, and discussions with defence counsel are enhanced (Main Street Criminal Procedure Committee 2005).

In New Zealand, the Law Commission (Law Commission of New Zealand, 2004, 2005) produced a most comprehensive study of the criminal pre-trial process. It carefully studied a number of inefficiencies in the pre-trial process: an outdated legislative framework; overcrowded and inefficiently managed lists, unnecessary adjournments, and trials that do not proceed on the scheduled day. The Law Commission's recommendations included: (1) broadening the scope of early disclosure of prosecution evidence and a greatly expanded role for the Police Prosecution Service, particularly early charge scrutiny and screening; (2) a range of steps to be taken to encourage meaningful discussions at an early stage between defendants and their counsel, and between the defence and the prosecution; (3) establishing formalised case management processes involving a required case discussion between the parties, as well as status hearings and sentence indications and, as part of the case management process, a requirement for defendants proceeding to trial to disclose prior to the trial the issues in dispute in order to facilitate case progression. The Commission also proposed the adoption of a range of sanctions for procedural non-compliance by prosecutors and defence counsel (Ministry of Justice, New Zealand, 2006).

In Manitoba, a successful program has been introduced to improved the processing of criminal charges at the "front end" of the criminal justice system, that is from the accused's first appearance in court to the day of a plea is entered. The project was initially developed for domestic violence cases but, after it demonstrated some impressive results, it was applied to all criminal prosecutions involving adults in the Provincial Court (Winnipeg Centre). The project involved an effort on the part of the police to impose strict disclosure deadlines. It also involved the management of certain administrative matters by court personnel¹³, by pre-trial coordinators who are limited jurisdiction Justices of the Peace. These pre-trial coordinators have no discretion to deviate from a pre-trial coordination protocol. They perform their function in a manner which does not involve the attendance of a judge or the lawyers, as well as the establishment of timelines (a three month ceiling on how long a matter can be remanded before requiring a plea before a judge).

The project ensures that a judge's time is used on significant acts, such as trials and sentencing. According to the *Pre-trial Coordination Protocol* that guides the new process, the only time that a matter is to appear before a judge is when: (1) there is a contested motion, (2) for a bail application, (3) for contested bail variations, (4) for hearings and a trial; and, (5) for sentencing. A single Crown attorney is assigned to each case when it enters the system and many procedural remands are avoided by setting court dates only when it is legally necessary and a judicial decision is required in a case.

¹³ This is possible because section 482.1(1) of the *Criminal Code* gives the courts the power to delegate certain administrative tasks to court personnel.

The pre-trial coordinators must ensure that:

- 1) an accused person has been informed of the right to be represented by counsel;
- 2) the defence has received sufficient disclosure to enter a plea. This does not include external reports, such as laboratory reports, medical reports, fire commissioner reports, etc.
- 3) any bail variation issues have been addressed;
- 4) the Crown has reviewed the evidence and considered its position;
- 5) meaningful discussions between counsel have occurred;
- 6) counselling or diversion issues have been addressed;
- 7) a pre-plea comprehension inquiry has been conducted; and,
- 8) the Certificate of Trial Readiness has been completed (Provincial Court of Manitoba, 2008, 2).

The coordinators have the authority to: (1) adjourn matters as required provided the matter has not exceeded its timeline; (2) endorse a stay of proceedings upon being provided with a Crown Stay of Proceedings Form; (3) issue, cancel or hold warrants; (4) allow counsel to withdraw provided counsel seeking to become counsel of record is present or if the coordinator issues a warrant for arresting the accused and counsel is asking to be removed as counsel of record; and, (5) allow legal aid duty counsel to be removed as counsel of record (Provincial Court of Manitoba, 2008, 2).

The impact of the new process was quite impressive. The following is a quote from the evaluation of the initial project which focused on domestic violence:

- 1) The system is no longer crumbling under its weight. Prior to the Project, new charges were coming into could be disposed. Since the Project, more matters have been disposed than new charges have been laid;
- 2) Since the Project began, there is an 11 % increase in the Disposition Rate for out-of-custody matters;
- 3) The clearance rate has increased by 20% since the Project began;
- 4) The out-of-custody charges in the Front-End of the system are being dealt with within 3 months of the first appearance rather than the 7 to 8 month average prior to the Project;
- 5) The trial delay has been cut down significantly from a 19 to 21 month trial delay to an 11 to 13 month trial delay;
- 6) It was thought the Project would have caused the number of remands to be reduced, but this has not happened
- 7) The overtime hours and overtime costs with respect to court personnel have been reduced considerably;
- 8) Moving a prisoner is not only costly, it also creates important safety concerns. The Project has succeeded in reducing the number of prisoner movements significantly (Provincial Court of Manitoba, 2005).

7.1. Improving the Disclosure Process

A complete and early prosecution disclosure of all relevant evidence, whether relied upon by the prosecution or not, promotes a fairer and more efficient criminal justice process.

The Canadian *Charter of Rights and Freedoms* guarantees the right of an accused to the disclosure of all relevant information in the possession or control of the Crown, with the exception of privileged information. A consultation paper prepared by the Department of Justice Canada noted that:

While the principle of disclosure is key to the proper functioning of our criminal justice system, the obligation can present significant challenges. The burden of managing large quantities of information can be considerable, especially in complex criminal matters, for both the Crown and the defence. Furthermore, disputes can arise over which information is relevant and over what fits within the categories of privileged information. Disputes over what information has to be disclosed, along with delays in transmitting it, can impede trials themselves, and sometimes result in proceedings being stayed due to unreasonable delay. A further area of concern is that information contained in the disclosed materials is sometimes misused.” (Department of Justice Canada, 2004)

Promoting the early disclosure of evidence by the prosecution can help reduce unnecessary delays and adjournments and avoid unproductive hearings. It can also improve the plea negotiation process and favour the early disposition of cases. Disclosure should take place at the earliest point possible¹⁴ unless the requirement for disclosure is waived by the defence. Ongoing disclosure, as new evidence becomes available, is also crucial to the efficiency of the process. Recognition should be given to the on-going nature of the disclosure obligation.

The Standing Committee of Attorneys-General Working Group on Criminal Trial Procedure (Government of Australia, 1999) summarized the principles involved as follows:

In our view, disclosure by the prosecution should commence prior to the committal proceedings. We recognise that investigations often continue after arrest and that disclosure in many cases will be an on-going process. In our opinion, however, the commencement of disclosure at the earliest possible opportunity has the potential to encourage early pleas of guilty and to assist, at an early stage, in identifying issues in dispute. The well-informed defendant and adviser are well placed to make decisions on these issues, but will often

¹⁴ The Standing Committee of Attorneys-General Working Group on Criminal Trial Procedure (Government of Australia, 1999, 27) recommended that disclosure should take place before the committal proceedings.

hesitate to do so if left to await disclosure at some time following conclusion of the committal proceedings (Government of Australia, 1999, 26).

The trend seems to be to try to equip prosecution services with the information management systems, the training, and the procedures to manage the disclosure process more effectively. The management of the disclosure process, at least in common law countries, is an important part of the overall case management process. It is of course related to the evidence management and protection process, and to a certain extent to the witness management process. The prosecution service plays a crucial role in all of these aspects of case management. The amount of evidentiary material to be managed in large, complex cases and in many transnational cases can be overwhelming. Technological advances and dedicated databases, together with sufficient and properly trained support staff, can support these processes. Evidence management and disclosure management are two areas where proper technical support and the services of well-trained paralegal staff can increase the performance of the system as a whole (Dandurand, 2007, 233).

Making better use of available technology is one way in which the disclosure process can be streamlined and supported in an attempt to prevent it from creating unnecessary delays. The prosecution must often rely on materials from multiple sources that may not be in written format. The disclosure process can be an onerous and resource-intensive process. Electronic disclosure of materials relevant to a prosecution can be particularly useful in long and complex cases where evidence can be voluminous, detailed and intricate. It facilitates the transmission of evidence and can be accompanied by research and information management tools that allow for better classification and organization of evidence. There is some perceived resistance to the introduction of electronic disclosure methods, particularly within the legal profession. Proposals for legislative reforms are being considered to introduce a legislative framework to guide the court in its determination of whether disclosure in an electronic format would impair the ability of the accused to make full answer and defence.¹⁵

The disclosure process itself can be quite complicated. When poorly managed, it is the source of delays and complications that can threaten the success of the overall prosecution and cause major delays and significant additional costs. Many jurisdictions have developed inter-agency “disclosure protocols” to streamline the process and improve the timeliness and completeness of the disclosure. In some jurisdictions, prosecutorial services have delegated prosecutors and staff to work directly with the police to form “disclosure units” and thus help manage the process more tightly and efficiently (Dandurand, 2007, 232). The success of these units does not appear yet to have been formally evaluated. The Toronto Disclosure Project (Department of Justice Canada, 2002) is still being evaluated. A mid-term evaluation was undertaken at a stage where none of the cases processed at the various specialized units had reached the

¹⁵ The CCSO Working Group on Criminal Procedure has been working on a proposal for consideration by the F/P/T/ Meeting of Ministers Responsible for Justice.

point where it could be determined whether the new units had contributed to more effective and efficient prosecutions. Differing opinions were expressed on the extent to which less time was being spent on disclosure as a function of the project. Some prosecutors were of the view that early involvement may not save time because large and complex cases necessarily require a great deal of vetting. Other prosecutors apparently believed that earlier Crown involvement and on-going editing could produce efficiencies. The police's easy access to Crown counsel allows for on-the-spot advice and training that is expected to reduce the risk of problems down the road (Department of Justice Canada, 2002).

In Australia, the Standing Committee of Attorneys-General Working Group on Criminal Trial Procedure (Government of Australia, 1999) identified a number of measures capable of improving the prosecution disclosure process. This included giving a statutory basis for the obligation of prosecutors and investigators to disclose and developing clear and uniform guidelines for prosecutors and investigators. The Working Group noted that internal disciplinary sanctions should apply to investigators who fail to comply with their statutory obligations:

"Statutory recognition of the responsibility imposed upon investigative agencies, including internal disciplinary sanctions for non-compliance, will improve the understanding of investigators as to their responsibilities and assist in overcoming a culture of resistance to disclosure that exists in some investigators." (Government of Australia, 1999, 25)

Providing for the possibility to waive the requirement for disclosure and encouraging its use by defence counsel, sometimes as part of the plea negotiation process, can also reduce the burden that this requirement places on the criminal process and the resources of the agencies involved. When a defendant intends to plead guilty or could be encouraged to plead guilty at an early stage, the obligation to provide full disclosure should be subject to a possible early waiver by the defendant of the requirement for full or specific disclosure.

Another aspect of the whole issue is the question of whether to impose a disclosure requirement on the defence, and not just on the prosecution, in order to reduce delays in complex criminal trials. In Canada, the current requirements for defence disclosure are set out at subsection 657.3(3) of the *Criminal Code*. They do not always allow the Crown to respond to the expert testimony presented by the defence.

Disclosure (and some forms of admissions) can allow the process to focus on issues that are in contention instead of having to prepare evidence in relation to issues that are not in dispute. This can enable a more efficient use of court time and the time of counsel and reduce the need for certain witnesses, whose evidence will not be challenged, to testify. In New South Wales, the *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001* enabled the court, on a case by case basis, to impose a pre-trial disclosure obligation on both the prosecution and the defence (Loukas, 2001).

The consultations conducted by the New Zealand Law Commission as part of its project on juries in criminal trials, revealed that there was little support from practitioners in that country for further changes to disclosure requirements as they relate to the defence (Law Reform Commission, New Zealand, 2001). There may be support, however, for a process allowing for the early identification of disputed issues which may impede the process. Under the British Columbia Criminal Caseflow Management Rules the defence counsel is required, among other things, to indicate (in the trial readiness report) whether it is expected that a *Charter of Rights* application will be brought for a remedy and to confirm that all required Charter notices have been provided or will have been provided within applicable time limits (Libman, 2006, 182).

Disputes over disclosure issues often arise. Judicial rulings are often required to resolve disclosure issues even if the informal resolution of such disputes is usually encouraged. Delays in obtaining a judicial determination on a disclosure matter are not uncommon. These delays are often caused by difficulties to gain early access to a court to resolve the issue. Looking for effective ways to resolve disputes over the disclosure process can also help reduce inefficiencies and delays. Such disputes over what information has to be disclosed, along with delays in transmitting it, can impede the normal flow of the process, delay trials, occasioned unnecessary adjournments and sometimes result in failed prosecutions or collapsed trials. As suggested earlier, specialized court proceedings to allow parties to deal in an expedited way with all matters related to disclosure, including relevance, privilege, and the adequacy and form of disclosure can help reduce some of the delays created by disclosure issues. The consultation paper released by the Department of Justice Canada (2004) suggested that it might also be advisable to provide some legislative encouragement for the parties to use the early dispute resolution mechanism for disclosure issues:

“For example, the amendments could require a trial judge, in considering any remedy sought with respect to disclosure, to consider whether the remedy could have been sought earlier through specialized court proceedings.”
(Department of Justice Canada, 2002).

Many jurisdictions, including Canada, have embarked on initiatives to codify and review criminal procedures as it relates to disclosure. In many instances, this was as a result of landmark court decisions which had clarified the nature of the legal requirements for full and timely disclosure.

Many jurisdictions have also adopted some formal guidelines for prosecutors (and sometimes also for the police) to provide a framework for the disclosure process. What is often lacking, however, are mechanisms to monitor the application of these guidelines and review their effectiveness.

Caseflow management rules are sometimes adopted by the courts to provide guidance and impose some discipline on the process (e.g., Main Street Criminal Procedure

Committee, 2005, Searle et al., 2004, 7). In British Columbia, the Provincial Court Criminal Caseflow Management Rules were adopted in 1999. They govern, among other things, Crown disclosure and the defendant's initial appearance in court. Caseflow management rules and guidance are sometimes also developed by prosecution services.¹⁶ The monitoring of compliance with these rules is rarely done systematically and often poorly supported by information management systems. The enforcement of the rules can of course also raise a number of practical issues.

Some resistance sometimes exists within police and prosecution agencies to the obligation to disclose fully. Persistent negative attitudes toward the disclosure process can jeopardize it and create issues that will later compromise the success of the prosecution or the progress of the trial. These are difficulties that are not easily resolved, but can nevertheless be addressed by effective leadership, clear policies, adequate training, guidance and supervision, and when necessary by disciplinary measures.

7.2. Improving the Plea Negotiation Process and Increasing the Likelihood of a Guilty Plea

Discussions about pleas occur in every common law jurisdiction. Their ultimate goal is to determine the appropriate manner in which a case should proceed, the correct offence to be charged, if any, and the basis upon which a plea should be entered (Temby, 2001). As was pointed by Judge Sulan from Australia, their effectiveness in achieving these goals depends largely upon the relationships that have developed between prosecutors and defence counsel: "The more that the lawyers involved trust each other, the more chance there is that a satisfactory outcome for both sides will be achieved" (Sulan, 2001).

In most jurisdictions, the process is an informal one and may be criticized for its lack of effectiveness in promoting early and appropriate pleas, its lack of accountability, the possibility that uninformed choices are being made, and the potential for undue pressure to be applied on defendants. In the case of plea discussions where the parties are unable to resolve certain issues, the participation of the court where it is allowed can lead to an early resolution of the matter (Sulan, 2001). In many jurisdictions, the active involvement of the court in that process is discouraged as it is thought to compromise the impartiality and the integrity of the role of the court.

Several studies have revealed noticeable differences between jurisdictions in the rates of guilty pleas and the time at which guilty pleas are typically entered (Government of Australia, 1999, 36; Payne, 2007). This has obvious implications for the efficiency of

¹⁶ See: Department of Justice Canada: "Guiding Principles for Effective Case Management". See also: American Bar Association's Criminal Justice Standards on Speedy Trial and Timely Resolution of Criminal Cases (ABA, 2004).

the criminal process and the related costs. It also suggests that the same rules and procedures can yield different results based on local factors.

Delays in conducting plea discussions between the defence and the prosecution can occur for a variety of reasons. Many of them are related once again to various uncertainties and degrees of unpredictability within the process. Plea negotiations can be stalled or delayed by a poor management of the disclosure process or late and limited disclosure from the prosecution to the defence, late or multiple changes to the charges and indictment, late collection of evidence and deposition of victims and witnesses, late or limited contacts with the defendants, or even by physical distances hindering communication between the various parties.

Some of these uncertainties may be exploited by defence counsel for the benefit of their clients. They may try to prolong the case in the hope that some of the evidence may prove unavailable and that the case may collapse. Defence counsel, for a variety of reasons, may feel that they have a responsibility to advise their client not to negotiate a plea too early in the process. If the defendant is awaiting trial on bail or is being investigated for other crimes, there may be few incentives for him to plead guilty at an early stage. If the defendant has been remanded in custody, there may be some unsuspected incentives for him/her to delay the plea; for example, the defendant may be planning to benefit from the credit he/she will receive at the time of sentencing for time served up to that point. Finally, some defence counsel may deliberately attempt to prolong the process in order to increase their fees or improve the remuneration prospects of legally aided matters (Payne, 2007).

Some difficult, apathetic or mentally and otherwise challenged defendants may not communicate with their own counsel, disappear for prolonged period of time and refuse or be unable, despite their legal counsel's best efforts, to communicate or negotiate a plea until the last minute.

The prosecutors responsible for case screening and charge approval are not always the same prosecutors who will ordinarily be expected to carry the matter to its conclusion. If these functions are carried out by junior prosecutors who lack the experience to properly assess the likelihood of success of a particular prosecution or to anticipate the issues which will arise during the rest of the criminal process, early plea negotiations will be less likely to occur.

The initial committal and early plea negotiations are sometimes conducted by prosecutors with insufficient experience who are not always able to anticipate the issues likely to arise at trial. The inexperience of the defence counsel may also prevent successful plea negotiations at an early stage of the process. When both counsel do not have the ability or authority to make decisions or are unable to expeditiously obtain instructions regarding the ultimate resolution of the case, it causes uncertainties about the process and produces unnecessary delays. In Australia, a formal consultation

revealed that it was often only when a brief was transferred to or reviewed by a senior prosecuting counsel that issues and problems were identified that warranted charges withdrawal or a different plea negotiation strategy (Payne, 2007).

Ideally, of course, both counsel should actively canvass the possibility of resolving matters in dispute prior to the case being committed for trial, including the potential for diversion. When a guilty plea is anticipated, an early agreement on the facts constituting the offence should be finalized and produced expeditiously by counsel.

7.2.1. Increasing the Likelihood of a Guilty Plea

It is evident that guilty pleas, particularly when they are entered early in the criminal process, can significantly speed up the process, eliminate the need for many adjournments and a trial, reduce the need for costly and complicated disclosure processes, and reduce the overall costs of the system. Many jurisdictions have explored ways of increasing the likelihood that accused individuals will not only plead guilty, but also do so at an early stage in the process. Fast track procedures have been developed which seem to have improved the efficiency of the criminal process and reduced the workload and costs of several of the agencies and institutions involved.

A “fast track system” has been instituted in Western Australia since 1992. It is a successful procedure for dealing more effectively and expeditiously with defendants who are willing to plead guilty to an indictable offence as the earliest opportunity without going through the full normal process. It is an innovative way to streamline the procedure for dealing with offenders who have no intention of defending a charge and who wished to plead guilty at the earliest opportunity. The “fast track” procedure is more easily chosen by defendants if an incentive which is clear and well understood by the defendant can be offered for pleading guilty at an early stage of the criminal process (Government of Australia, 1999, 39).

One of the purposes of the Criminal Caseflow Management Rules introduced in Vancouver in 2004 was to encourage earlier guilty pleas and thus reduce backlogs in the adult criminal court. This had already been encouraged through a disposition court. Additional initiatives were taken, such as changing the guilty plea scheduling policy, and establishing a front-end team of prosecutors to identify matters for disposition earlier in the process (Main Street Criminal Procedure Committee, 2005). These measures have apparently not decreased the trial collapse rate, but they may have resulted in having fewer matters scheduled for trial.

7.2.2. Addressing the Lack of Incentives

There are often disincentives for early guilty pleas. When the charges are not clear or are being amended, when the likely sentencing outcome is ambiguous, or the prosecution case is uncertain or weak, defendants will understandably hesitate to enter a

plea of guilty or will wait before to decide to do so. Measure which can neutralize these disincentives will most likely help obtain early pleas for defendants.

The question of the lack of incentives (or the presence of disincentives) for early guilty pleas has been the object of the attention of several jurisdictions (World Bank, 1999). Many of them have adopted systems of sentence discounts for pleading guilty. Some of them even have a statutory requirement for the sentencing judge to take into account the plea of guilty (Government of Australia, 1999, 39). The level of “discount” varies according to the circumstances of each case and each offender, but it is generally greater if the plea is entered early. The discount is generally specified explicitly by the court¹⁷. This kind of incentive has the potential to encourage defendants to plead guilty and thus simplify the criminal process.

To our knowledge, the effectiveness of the practice of sentence discounting has not been systematically evaluated. It also has many critics. According to Judge Sulan,

(t)he practice of sentence discounting receives public criticism because there is a perception that the offender is not getting his just desert. There is defence criticism of the practice because of a perception that in many cases the discount is more imaginary than real, the head sentence having been increased to allow for the discount. The practice can be criticised in that harsher penalties can be inflicted on an offender as a result of poor, or no legal advice with respect to pleading (Sulan, 2001, 4).

Some authors have also noted how discounting practices and pre-conviction delays can be a source of sentencing disparities (Listokin, 2007).

In New Zealand, the provision of judicial sanction and sentence indications is a key part of a status hearing (or preliminary enquiry). This involves a form of "sentence discount" which is meant to encourage early entering of guilty pleas. There is no fixed formula for calculating sentence discounts, but discounts are generally in the area of a third to a quarter off the sentence. The level of discount, which depends on factors such as the nature of the offence, and the history of the offender, gradually decreases as the entering of the plea gets nearer to the defended hearing (Searle et al., 2004, 99). During an evaluation of the impact of these status hearings, several key informants were concerned about the practice of giving sentence discounts at status hearings when this is not the earliest opportunity for a defendant to plead. This could mean that earlier

¹⁷ An example of a statutory provision requiring that a sentencing judge specify the sentence discount accorded for assistance to the authorities is found in the *Commonwealth Crimes Act, 1914*. Section 16A requires the court to take into account the fact that a person has pleaded guilty to an offence if that is the case, and requires the court to take into account the degree of cooperation offered by the person to law enforcement authorities in the investigation of that offence or of other offences. Section 21E (1) requires the court to specify the reduction in sentence or non-parole period that a court allows for assistance to law enforcement authorities.

dispositions of matters may not be taking place as defendants may be waiting until the status hearing to receive a sentence indication. The evaluation did not demonstrate that the discount had a real impact on the pleas, although the practice is certainly central to the plea bargaining process. The evaluation also noted the possibility that undue pressure may be placed on innocent defendants, particularly if the discount is substantial and is used as an inducement to plead guilty (Searle et al., 2004).

At the commencement of the first law term in 1992, the NSW Parliament adopted legislation which allowed the Chief Judge of the District Court to introduce a 'sentence indication scheme' which was meant to encourage more frequent and earlier pleas of guilty. The scheme allowed defendants committed for trial in the NSW District Court to elect to receive an indication of the sentence which would be imposed on them if they changed their plea to guilty (Matka and Lind, 1995).

An evaluation of the sentence indication scheme in Australia showed that the introduction of the scheme may have encouraged earlier guilty pleas, but that it had apparently not altered the proportion of persons proceeding to trial. The proportion of persons committed for trial but changing their plea to guilty was significantly higher after the introduction of the sentence indication scheme than before and this called for some explanation. The author of the evaluation argued that, if the scheme reduced the number of cases where a plea change occurs too late for court administrators to make effective use of the vacated trial court sitting time, it may have resulted in a more efficient use of trial court and judge time (Weatherburn, 1995).

Regrettably, the scheme does not appear to have been generally effective in encouraging either earlier or more frequent guilty pleas. Only one court exhibited any sign of a reduction in the number of matters proceeding to trial and that effect was transient. Court delays for cases where an accused person committed for trial changes their plea to 'guilty' were found to be lower after the introduction of sentence indication than before. The decline, however, began before the introduction of the sentence indication scheme and did not appear to accelerate after it. (Weatherburn et al., 1995, 3).

An unintended consequence of the sentence indication scheme was that those who accepted a sentence indication seemed to be treated as, if not more, leniently than those who plead guilty at committal (Weatherburn et al., 1995, 3).

7.3. Preliminary Inquiries and Case Conferences

There are several models for requiring that a pre-trial conference of some sort be held in advance of the trial. The purpose of such hearings or conferences can vary widely. While the process may be intended to help the flow of cases through the justice system, it is often criticized for introducing more complexity and delays within the process.

Several jurisdictions have looked at replacing it with a simple process that can improve the efficiency of the system as a whole.

In Canada, section 625.1 (1) of the *Criminal Code* provides the authority to hold pre-hearing conferences or pre-trial hearings. These meetings are often of practical value, particularly when there are multiple charges or numerous co-accuseds (Libman, 2006, 213). According to Libman, it is the practice in many Canadian jurisdictions to require that a pre-trial meeting be held prior to setting a date for trial or where it is estimated that more than a few hours of court time will be required for the trial (Libman, 2006, 213). The Martin Report, in 1993, considered at length the utility of pre-hearing conferences and the manner in which they should be conducted. The report concluded that when properly conducted, the conferences can be essential to the proper administration of criminal justice.¹⁸

The pre-hearing conference should take place as soon as possible after all participating counsel have had a reasonable opportunity to familiarize themselves with the case (Libman, 2006, 213), but it should not take place until disclosure has been obtained or waived. Early scheduling of pre-trial conferences is recommended. It may be useful also to set some guidelines or limits of the length of time scheduled for them (Main Street Criminal Procedure Committee, 2005). Rules of Court sometimes provide specific guidance on how the pre-hearing conferences are to be conducted.¹⁹ Crown ownership over the process and better preparation at the arraignment and trial confirmation hearings is a pre-requisite to effective case management at the pre-trial stage.

The Department of Justice Canada has carried out research to determine the current role of the preliminary inquiry in the criminal justice system and the impact of amendments, if any, made by Bill C-15A to the *Criminal Code* provisions on the preliminary inquiry.

Status Hearings (New Zealand)

Status hearings were introduced on the initiative of judges in the Auckland District Court in New Zealand, in 1995, as a type of pre-trial conference designed to reduce the number of adjournments to a minimum, to reduce the time taken to hear each case, and to ensure that a proper plea is entered at the first opportunity. An evaluation of status hearings was conducted which revealed that the majority of stakeholders interviewed for the study believed that status hearings were not achieving their main aim of ensuring that a proper plea was entered at the first opportunity. This, they thought, was because delaying entering a plea until the status hearing was part of the negotiating process, or it was used as a tactical manoeuvre (Searle et al., 2004, 87).

¹⁸ Martin, G.A. (1993). *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Disclosure Discussions*. Toronto: Queen's Printer.

¹⁹ For example Rule 27 (Pre-Hearing Conferences) of the *Ontario Rules of Court in Criminal Proceedings*.

According to the key informants interviewed for that evaluation, status hearings seem to have a number of advantages, including increasing the likelihood that matters would be resolved quickly, permitting a better use of resources, affording a chance to victims to have an input in the process, and leading to better outcomes (Searle et al., 2004, 118). The hearings serve to set a point in time at which all parties are expected to be prepared and to have everything ready. It thus encourages greater diligence in case preparation. The provision of judicial sanction and sentence indications also facilitated the process. In fact, it became clear, that an indication of sentence is a key component of the status hearings process. At the status hearing, a defendant can request an indication of the type of sentence (prison, community sentence, supervision, fine) they would receive if convicted. Some defendants accept the indication and plead guilty. If not accepted, the indication is not made known to the sentencing judge (Searle et al., 2004, 94).

The introduction of status hearings seemed to have had a positive impact on the workloads of defence counsel and prosecutors. The latter often noticed an improvement in their own case management practices as far as they were better prepared for status hearings. Several also noted the beneficial effects of the status hearings because they provide additional time and opportunities for dealing with matters other than by way of a defended hearing (Searle et al., 2004, 117).

On the other hand, key informants also indicated that there were potential disadvantages to the status hearing process. For example, some of them observed that, with time, status hearings become just another step in the criminal process. Status hearings can take up a lot of time and may create additional work for those involved. In some cases, it may actually contribute to extending the process for final disposition. There is also a risk that the process may lead to putting undue pressure on the defendants to plead guilty, particularly unrepresented defendants (Searle et al., 2004, 121). The new process does not directly address the issue of lack of preparation by defence counsel or the difficulty for defence counsel to get information in a timely manner.

Prior discussion of a case between the defence and prosecuting counsel should be encouraged in order to promote early case resolutions and avoid further proceedings. However, it was not clear that the status hearings were actually encouraging such early discussions. According to key informants, while prior discussions were not seen as obligatory, they certainly seemed to be encouraged by judges. However, a number of defence counsel and prosecutors reported that judges did not encourage discussions prior to status hearings, or while they may have done this previously, this was no longer the case (Searle et al., 2004, 89).

Case Conferencing - New South Wales

In New South Wales, an administrative scheme was introduced in January 2006 as a pilot. This was done in response to concerns that the growing number of pleas of guilty entered at or immediately before trial was rising, to as much as 50 percent of the cases in 2004. The scheme involved the provision of an advising service to the police, screening of the full brief of evidence provided by the police, service of a disclosure certificate by the prosecution to the defence in all criminal matters, a case conference with voluntary participation by represented accused, confirmation of the case conference outcome in writing, and sentence discounts in recognition of the utilitarian value of a plea of guilty. The pilot project was successful: the percentage of cases committed for trial and the rate of late pleas were both reduced (Cowdery, 2008; Hardy, 2008).

In April of this year, the *Criminal Case Conferencing Trial Bill, 2008* was adopted in New South Wales. It essentially builds on the main features of the administrative schemes mentioned above, but it makes the case conferencing compulsory and sets some firm sentence discount levels. The new statute requires an accused person's legal representative and the prosecution to participate in a compulsory conference in relation to an offence before the accused person is committed for trial for the offence except in certain circumstances (for example, where the accused person enters, or agrees in writing to enter, a guilty plea before a conference is held). The legislation sets the level of sentence discount at 25 percent if an accused enters a guilty plea before committal to trial and at 15 percent if the guilty plea is entered at any time between the committal to trial and the trial.²⁰

8. Focusing on the Trial and the Sentencing Process

8.1. Attendance of Defendants and Witnesses

One of the major causes of delays and collapsed trials is the non-attendance of witnesses or defendants.

Improving the attendance of defendants and witness is a good strategy for preventing unnecessary hearings, debilitating delays, and generally improving the efficiency of the criminal justice system. Poor witness attendance is a significant cause of ineffective and cracked trials. Supporting victims and witnesses and protecting them from intimidation are a necessary part of such strategies. Better systems for convocation of witnesses and defendants, and witness information and management

²⁰ *Criminal Case Conferencing Trial Bill, 2008*,
[http://www.parliament.nsw.gov.au/prod/PARLMENT/nswbills.nsf/1d436d3c74a9e047ca256e69001d75b/6d5787b82551df87ca25741e001a0765/\\$FILE/b2007-089-d27-House.pdf](http://www.parliament.nsw.gov.au/prod/PARLMENT/nswbills.nsf/1d436d3c74a9e047ca256e69001d75b/6d5787b82551df87ca25741e001a0765/$FILE/b2007-089-d27-House.pdf)

are also required to improve the overall performance of the criminal justice system. The more disconnected victims or witnesses of crime become during the justice process, the less likely they are to be willing to participate and the more likely that their actions or inactions will result in adjournments, collapsed cases and other inefficiencies (see, Payne, 2007).

The level of information and support that victims and witnesses receive when participating in the criminal justice process is an important factor. Neglecting the needs of victims and witnesses may lead to a withdrawal of support for the prosecution, non-attendance at court, and dissatisfaction with the process, which can result in failed cases and the reluctance of witnesses to re-engage in the criminal justice process on future occasions (Home Office, 2004).

The “No Witness, No Justice” initiative developed in the England focused on witness care and assistance, including the development of dedicated units for witnesses, assessments of the needs of witnesses, and support for them to attend court. Some of the initial pilot projects implementing the initiative were evaluated and were shown to significantly affect the overall performance of the criminal process (Avail Consulting, 2004).

The evaluation was able to gather "persuasive evidence" that the “No Witness, No Justice” projects had led directly to an increase in witness attendance which, in turn, yielded significantly improved trial outcomes: ineffective trials due to witness issues had decreased significantly, with a wide margin between the decrease in the pilot areas (26.8%) and decrease nationally (7.5%); cracked trials due to witness issues had decreased noticeably; and, the number of cases resolved by a late entry of guilty plea had increased (as intended by NWNJ) significantly (Avail Consulting, 2004, 7).

In England, a study of the National Audit Office (2004) looked at the problem of defendants’ non-attendance at court. It revealed that, when making decisions to release an accused on bail or to remand him or her in custody, the courts do not always receive sufficient and timely advice from the criminal justice agencies. Furthermore, there are limited options available to the magistrates for dealing with defendants who present a higher risk of non-attendance in court (National Audit Office, 2004, 34). The study further revealed that, as is also the case for most other aspects of case management, securing the defendants’ attendance at court hearings requires the cooperation of different criminal justice agencies. It showed that criminal agencies at the local level did not have comprehensive strategies in place to improve attendance in court (National Audit Office, 2004, 20). Prompt action was not always taken when defendants failed to attend a hearing (National Audit Office, 2004, 26).

The Main Street Criminal Procedure Committee (2005), responsible for an initiative to reduce the backlog in the Vancouver adult criminal court, reviewed the impact of recently adopted Criminal Case-flow Management Rules. One of the objectives of the

rules was to increase "trial certainty". The Committee's conclusion was that the rules had not affected the prior unacceptably high level of trial collapse (70%) and noted that one of the main reasons for trials collapsing was the non-attendance of a witness or an accused. It appeared unlikely that the trial collapse rate could be brought down unless something was done to improve attendance by witnesses and accused persons. In this particular instance, it was obvious to the Committee that the poor attendance rates were due to the fact that many defendants and witnesses at Main Street suffer from substance addiction, mental illness and other social challenges.

8.2. Problem Solving Courts

One of the measures frequently considered for improving the efficiency of the criminal justice process and, in particular, to deal with the caseload and the backlog of cases typically occasioned by persistent offenders is to segregate certain cases and assign them to a specialized court in order to streamline the adjudication process. Such specialized courts do not necessarily reduce the case processing time, the type of pleas entered by the defendants, or even whether the case go to trial or not (Davis, Smith and Nickles, 1996). Together with other measures, such as improved scheduling, these courts can produce some efficiency and reduce the overall case processing time. More importantly perhaps, these courts may help provide a more effective response to chronic offending and therefore reduce the number of cases the justice system must process.

Problem-solving courts are also specialized courts, but their principal focus is on improving court outcomes for victims, litigants, and communities. They aim to do so by responding more effectively to local crime problems (like domestic violence, drug dealing, and quality-of-life offending) as well as the kinds of individual problems that often fuel crime (e.g., drug addiction and mental illness). Addressing these needs is often perceived also as a way to address the many court management and case management issues created by persistent offenders who are often involved in multiple cases, dealing with multiple charges and are less than diligent in participating in the criminal trial process and complying with its requirements.

In British Columbia, for example, the average number of counts per provincial adult criminal case in 2004/05 was three, and 53% of the counts being dealt with during that fiscal year could be attributed to 17% of the accused²¹. A six month study in 2004-05 showed that 17% of all the accused persons in the court system had more than one open court file at the same time, yet all the active files for an accused were heard at the same session only 45% of the time.

²¹ Source: CORIN database, 2004-05 RCC Data, Provincial Adult Criminal Data.

Problem-solving courts are being established and tested all over the continent²². These include community courts that seek to improve the quality of life in neighbourhoods struggling with crime and disorder, drug courts that link addicted offenders to treatment instead of incarceration, mental health courts, sexual offences courts, and domestic violence courts that emphasize victim safety and defendant accountability. Drug courts already exist in Toronto and Vancouver. A new community court is being established in Vancouver. In many ways, this approach is totally consistent with the police-based crime-reduction approach that is favoured in British Columbia and elsewhere and which focuses on a concerted response to “prolific offenders”.

These problem-solving courts usually require the partial co-location with the court of various services such as legal aid, the adult and youth probation service, some addiction counselling services, and victim/witness assistance services. For these courts to be efficient, some prosecutors are usually located in the same building as the court (to allow easy access to files and information, conferencing with defence counsel; or participation in case management conferences).

8.3. Availability of Pre-sentence Reports

Delays between conviction and sentencing do not appear to have been studied carefully. Delay between conviction and sentencing could constitute an infringement of Article 11(b) of the *Charter of Rights*. In considering the seriousness of the delay and whether a Charter infringement has occurred, a judge must consider the nature of the prejudice inflicted on the defendants, the cause of the delay, and whether the delay is systemic and reasonable under the circumstances (Brockman and Rose, 2006).

In many situations, the sentencing process is delayed because the necessary information has not been made available to the court (e.g. a pre-sentence report).

9. Performance Indicators and Feedback Loops

The lack of performance data for monitoring the impact of various case management initiatives is a real obstacle to further progress in that area (Main Street Criminal Procedure Committee 2005). In England, as in many other countries including Canada, a great deal of performance information is already being collected, but most of it focuses on the performance of individual agencies, not of the system as a whole (Lord Chancellor’s Department, 1999, 7).

The European Commission for the Efficiency of Justice has recently conducted a comparative study of existing practices relating to the monitoring and evaluation of court systems in six European countries (Ng, Velicogna and Dallara, 2007). The study revealed a fragmented implementation in these countries of monitoring and evaluation

²² See some examples provided by the Centre for Court Innovation: <http://www.courtinnovation.org/> and <http://www.problemsolvingjustice.org>

policies. The practices ranged from “traditional statistical surveys of workload, largely lacking in consequences, to performance based remuneration systems that define the salary of individual judges based on the number of cases they decide” (Ng, Velicogna and Dallara, 2007, 3). The authors of the study derived from their data a five step model for developing a proper monitoring system: data collection, creating a normative framework, capacity building, monitoring and evaluation, and, accountability and action. Another study conducted for the European Commission for the Efficiency of Justice began to identify some of the main indicators which could be used for a comparative evaluation of judicial processes (Albers, 2003).

The performance measures (or indicators) used within the justice sector vary from one jurisdiction to another. In New South Wales, they include things such as: (1) the time between a matter being committed for trial and the date on which a trial (if one occurs) is finalised; (2) the time between a matter being committed for trial and the date on which the matter is finalised (regardless of whether it is finalised by way of trial); (3) the amount by which the period between committal for trial and the date of trial finalisation (if one occurs) exceeds some designated standard; (4) the time between a matter being committed for trial and the date on which a trial (if one occurs) commences; and, (5) the time between a matter being ready to be listed for trial and the earliest date on which it can be set down for trial. (Weatherburn, 1996, 1)²³.

Monitoring the progress achieved in reducing delay in the justice process is another way of measuring the performance of the system. An ongoing assessment process to support continuous improvements in the system is usually required. A joint assessment of the progress made in reducing delay in the youth justice system in England was conducted by HM Inspectorate of Constabulary, HM Crown Prosecution Service Inspectorate, and HM Magistrates’ Courts Inspectorate (2002). It provides a useful example of an approach which has systematically identified the critical efficiency factors within the system, developed indicators to monitor these factors and compare them against the performance targets set for reducing delays in the youth justice system.

In 1999, the National Audit Office produced a comprehensive report which looked at management and performance issues in processing criminal cases. The report contains detailed recommendations on how to improve the management of the process and increase its performance. The report identified the need for better case management information, across the system, as a pre-requisite to effective initiatives to improve the system’s efficiency (National Audit Office, 1999).

The European Commission for the Efficiency of Justice has been working assiduously with the member States to develop a quantitative basis for comparing the efficiency of various judicial systems and has produced a revised scheme for the evaluation of criminal justice systems. The scheme allows for the ongoing collection of data on

²³ See also: The Vera Institute of Justice (2008). *Indicators of Rule of Law*.

national judicial system, including for example data on “simplified procedures” and other means of increasing the efficiency of court proceedings (European Commission for Efficiency of Justice, 2006).

10. Conclusion

In addition to noting in other countries some efficiency improvement initiatives which deserve more careful scrutiny, it is also possible to draw a few general conclusions from the present preliminary review of the field. First, we note of course that very few of the initiatives that have been taken to improve the efficiency of the criminal justice system have actually been evaluated systematically. One is therefore left with very soft information with which to identify successful models and promising practices. Few of the efficiency improvement initiatives considered so far seem to have had a sustained impact on the system. This seems to have led many to conclude that the only truly successful initiatives to improve the efficiency of the criminal justice process will be those which adopt a comprehensive and integrated approach to performance enhancement.

There is of course another conclusion which has already been reached by several jurisdictions working on improving the efficiency of their criminal justice system. It is that most attempts to influence the behaviour of the participants in that system and to introduce procedural refinements and to increase the performance of the system are going to be largely futile, unless they are accompanied by an ability to monitor the performance of the system and its many components and assess the impact of reforms. The collective experience in that area is that leadership at all levels of the system will be required and that some habits and attitudes may need to be reconsidered.

It is also clear that improvements are most likely to occur if the goals of the proposed performance enhancement initiatives are communicated clearly, in practical terms, and if these goals are generally shared among those who participate in the daily operations of the criminal justice system. The setting of clear efficiency targets and benchmarks has also been shown to make a difference. In fact, it is probably a prerequisite for any successful performance enhancing intervention. Finally, the means must exist to monitor the performance of the system and its components and to provide feedback to those who are investing efforts and energy in improving its performance.

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