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Australian Institute of Criminology

Criminal trial delays in Australia: trial listing outcomes

Jason Payne

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Director's introduction

This report details the results of research conducted across Australia to identify the reasons that criminal trials do not proceed on the day of their initial listing. Two commonly reported reasons for delay are growth in trial initiations and the increasing complexity of trials. However, this study found that delays were most likely the result of the large number of trials that fail to proceed as scheduled. It is these trials, also known as ineffective trials that consume significant court resources.

The quantitative data revealed that more than two in three listed trials fail to proceed on the designated day. Approximately half of these delays are due to either a late guilty plea or the case being withdrawn by the prosecution. The other half are re-listed for a new hearing at some later point. Although the former group are finalised by the due date, considerable resources would be save if these matters could be completed much earlier. The qualitative interviews suggested this could be achieved for some matters if there were:

- appropriate incentives to settle cases earlier
- better and earlier preparation of cases
- strategies to maximise victims and witnesses attendance at court.

The research grouped those cases that are adjourned into two types – those resulting from limitations on judicial and court resources or court listing practices and those resulting from a request from the defence, the prosecution or both. Limitations to judicial and court resources may occur when court facilities such as access to CCTV or court support staff are unavailable, or when judicial officers are unexpectedly prevented from hearing new cases. Requests for adjournment occur in most cases as a result of the unavailability of key parties on the day (including the defendant and witnesses), the need for additional information to be collected or the need for further judicial processes.

In total 11 factors are identified as important contributors to trial adjournment or delay. These factors are similar to those canvassed in 1999 by the Standing Committee of Attorneys-Generals Working Group on Criminal Trial Procedure. The Working Group made 56 recommendations on a wide range of areas, from case preparation to trial listing practices, that were designed to assist in reducing trial delay. Many of those recommendations still apply today.

The oft quoted statement 'justice delayed is justice denied' has important implications for the criminal justice system. Delays have a range of unintended consequences including:

- unnecessary hardship for victims and their families
- undermining public confidence in the system's ability to deliver justice in a timely fashion
- sending the wrong messages to offenders
- undermining the morale of criminal justice practitioners.

The findings presented in this report are based on interviews and consultations with more than 60 stakeholders from 42 criminal justice agencies across Australia. This qualitative fieldwork was supplemented by analysis of quantitative data on trial listing outcomes as provided by states and territories.

I would like to thank the many people who assisted the AIC in the conduct of this research, particularly judicial officers and court personnel who gave up their time and provided access to data. Not everyone will agree with our findings but if this research results in some changes that reduce the delays in criminal trials we will have had a direct and lasting impact in improving outcomes for both victims and offenders.

Toni Makkai
Director
Australian Institute of Criminology

Acknowledgments

The Australian Institute of Criminology gratefully acknowledges the Australian Government Attorney-General's Department for their support and assistance in the compilation of this report. The AIC would also like to acknowledge those jurisdictional representatives who so kindly gave their time to assist the AIC in understanding the complex issues surrounding criminal trial management in Australia.

The author also gratefully acknowledges the assistance of Dr Russell Smith, Dr Judy Putt and Janet Smith of the AIC for their thoughtful input into earlier drafts of this report.

Disclaimer

This research report does not necessarily reflect the policy position of the Australian Government.

Contents

Executive summary

The criminal trial is a fundamental component of the Australian criminal justice system. Persons accused of committing criminal offences may elect to challenge those accusations in court before a panel of their peers. The trial affords protections to the accused, such that any case against them must be fair and proven beyond reasonable doubt. Similarly, the trial affords protections for the community, to ensure that criminal offenders against whom there is sufficient evidence are convicted and sentenced. Some key facts about the Australian criminal trial system:

- more than 750,000 criminal matters are initiated within the court system each year
- criminal case initiations have declined in recent years
- the vast majority (approximately 85%) of initiations are resolved through a finding of guilt (plea or verdict)
- the bulk of Magistrates' Court initiations (75%) are finalised within 13 weeks, while the same proportion of higher court (District and Supreme) trials are finalised within one year.

This report examines the reasons for which criminal trials in Australia fail to proceed on the day of listing. The rationale of such an inquiry is that matters that fail to proceed as scheduled contribute to backlog and delay, both of which consume significant criminal justice resources. Moreover, delay in the criminal trial system may result in adverse effects, not the least of which is the anguish endured by the victims of crime and their families, and the community demanding protection from criminal offenders. In the words attributed to British Prime Minister William Gladstone, 'Justice delayed is justice denied'.

Matters that fail to proceed

Not all criminal matters are finalised expeditiously. This research used quantitative data from courts across a number of Australian states and territories to demonstrate that more than half of all listed criminal trials fail to commence on the listed day. The number varies between courts and across the states and territories from 61 to 86 percent. Of those matters that fail to proceed, a significant proportion are finalised either because the matter is withdrawn by the prosecuting agency, or the defendant enters a late plea of guilty. In the latter situation, matters that resolve by way of a late guilty plea have been listed for a trial hearing before the court, so late pleas result in the matter being finalised by a means other than that originally intended. Finalisation accounts for more than 50 percent of matters that do not proceed, with the figure varying across the courts and jurisdictions from 43 to 81 percent.

The second possible outcome for a listed criminal trial is adjournment. An adjournment results when one or more of the parties involved – the prosecution, the defence or the court – is unable to proceed as listed. As a result, the matter is adjourned and re-listed. Matters requiring re-listing accounted for an average of more than 40 percent of all matters that do not proceed.

In summary, the data suggest that, of every 10 trials listed in the Australian criminal jurisdiction, on average:

- 3 will proceed as scheduled
- 4 will be finalised without trial, either by way of guilty plea or prosecution withdrawal
- 3 will be adjourned and re-listed for another hearing.

Reasons for late finalisation

As noted, there were three possible aggregate outcomes for the criminal trial: it proceeds as scheduled, is finalised on the day, or is adjourned and re-listed to be heard on another trial date. There were two possible outcomes for matters that were finalised: finalisation by way of prosecution withdrawal or by a late guilty plea. Using a qualitative consultation methodology that included more than 60 stakeholder interviews from 42 criminal justice agencies, this report highlights three reasons why a significant number of defendants plead guilty at the last minute.

- *Late plea negotiation between the defence and prosecution* – this was identified as having resulted from a range of factors, including late or limited disclosure from the prosecution to the defence, late changes to the charges and indictment, late or limited contact with the defendant, late examination of the criminal brief, late collection of evidence and deposition of victims and witnesses.
- *The difficult or apathetic client* – despite legal counsel's best efforts, some defendants simply refuse to communicate or negotiate on plea until the last minute. This was indicated as particularly prevalent among recidivist offenders with significant experience in the criminal justice system.
- *Defendants advised not to negotiate earlier* – there were many reasons for this, including deliberate attempts by defence counsel to improve the remuneration prospects of legally aided matters, to prolong the case in the hope that the evidence is unobtainable or cannot be produced, and because there were limited incentives to consider an earlier guilty plea.

In terms of matters that are withdrawn from prosecution, the consultations identified three key factors:

- *The role of the summary/committal hearing in determining the sufficiency of the evidence in support of a criminal matter* – committal proceedings were originally implemented to test whether there was sufficient evidence against the accused to warrant committal to the higher courts. Criticisms have been made regarding the efficacy of the committal procedure to ensure that sufficient evidence existed to proceed with the prosecution as many deficiencies in evidence are not identified until well after the committal process.

- *Preparedness of the prosecution* – many prosecution withdrawals were the result of limited or late preparation on behalf of the prosecution. Late preparation was noted as occurring for two main reasons, late briefing to private counsel or late transfer of brief to senior prosecuting counsel. In both cases, it was not until the criminal brief was reviewed by senior prosecuting counsel that issues or problems were identified that warranted withdrawal.
- *Unexpected issues* – in some cases, unexpected problems may arise during the preparation of the criminal brief that are beyond the control of prosecuting counsel. Forensic evidence may not become available by the trial date, or a victim may decide soon before the trial that they no longer want to give evidence or testimony at trial.

Reasons for adjournments

The second category of trial that does not proceed included those matters that are adjourned and re-listed. These were further defined into two groups: matters not reached by the court, and matters adjourned upon request.

Matters not reached by the court are those that have been listed, but where the court is unable to provide the judicial and court resources to facilitate it. This may be because of:

- *Over-listing* – where the court lists more trials than it has the capacity to hear in any one week. Over-listing is a practice used in some courts (usually high volume courts) where the court attempts to account for the significant number of matters that do not proceed with a trial list that will generate sufficient utilisation of court resources. Sometimes, as a result, some matters are not reached as scheduled.
- *Limited court facilities* – the court is unable to provide the necessary resources to facilitate the trial as scheduled. This may include limited access to closed circuit television services or court support staff.
- *Unexpected reductions in court capacity* – for one reason or another the court is unable to provide the capacity it had anticipated. This might be because judicial officers or court personnel are absent. Unexpected last minute changes to capacity may result in matters being adjourned.

The second category of adjournment includes those matters adjourned on request by the defence, prosecution or both. The qualitative consultations identified three primary reasons for this:

- *Matters cannot proceed because one or more of the parties (witnesses, defendants, legal counsel) are unavailable on the day of trial* – this might result from the unexpected non-appearance of the defendant (fail to appear) or because problems of availability were not identified until late in the trial preparation process.
- *Matters cannot proceed because additional information is required* – this may include the need for additional evidence, clarification of legal funding on behalf of the defendant or simply that one or both parties had not adequately prepared themselves and their case prior to the day of trial.

- *Matters that cannot proceed because further judicial processes are required prior to the trial* – this primarily includes additional judicial hearings, such as a *Basha inquiry* or *voir dire*, both used to test the tenability of the evidence or witnesses in the absence of a jury. Often the need for such inquiries results from last minute negotiation and the late identification of issues by the defence or prosecuting counsel.

The underlying factors

It became necessary to distinguish between matters where inability to proceed was the result of deliberate actions or inactions by one or more of the parties to the trial, and those that were not. Delays resulting from the latter are typically referred to as being unavoidable, while those from the former are often referred to as being unnecessary or deliberate. Within this lie three fundamental issues for trial preparation:

- the more tardy either party is in the preparation of a criminal matter, the less likely they are to be able to proceed
- the fewer incentives for early disposition, the fewer matters that will be disposed early
- the more disconnected a victim or witness becomes during the trial preparation process, the less likely they are to be willing to participate and the more likely that their actions or inactions will result in adjournment or withdrawal.

This report highlights eleven underlying factors, identified throughout the consultative review as important contributors to trial adjournment/withdrawal.

Trial uncertainty – legal counsel are less likely to prepare for a criminal matter that they believe is unlikely to proceed to trial. Trial uncertainty results from the number of causes of trial adjournment, including over-listing.

Prosecution case uncertainty – the less concrete the prosecution case, or the more amenable the prosecution case is to last minute modification, the more likely that plea negotiations, withdrawals and defence adjournments will result. Should the prosecution elect to introduce additional evidence or witnesses prior to the trial, the defence is entitled to adequate additional time to review that information and prepare their defence.

Prosecution charge uncertainty – where the prosecution decides to amend the charges on the indictment shortly before the trial date, late plea negotiation is more likely to result.

Lack of seniority of legal practitioners – a consistently identified criticism of the legal profession was that fewer and fewer experienced legal professionals were available for practicing in criminal trials. As a result, key agencies have developed procedures that see junior legal and paralegal staff handling the pre-trial preparation of criminal matters. Junior staff are have limited experience and authority to critically assess and negotiate during the early stages of the trial process.

Limited or late disclosure – all Australian states and territories have legislation or guidelines that govern the requirement for disclosure. Late disclosure to the defence or the failure to disclose all material relevant to the facts or issue of law in dispute may result in late preparation and adjournment.

Limited or late communication – the success of pre-trial negotiation relies on the level and quality of communication between defence and prosecuting counsel. Limited or late communication between the parties may result in late preparation and negotiation on a guilty plea.

Limited incentives for early guilty pleas – there are few incentives for a defendant to plead guilty earlier in the criminal trial process. Although sentence discounting is used in all states and territories, the methods and procedures are still disputed. Early negotiation on plea will be difficult to obtain without sufficient incentives.

Ambiguity of probable sentencing outcome – defendants may be more likely to commence negotiations if the sentencing benefit is clearly articulated to them at the beginning of the trial preparation process. Sentencing indication, as trialled unsuccessfully in NSW (Weatherburn 1995) is one mechanism for reducing the ambiguity in sentencing and discounting. Reducing the ambiguity may encourage earlier consideration and negotiation.

Limited disincentives for non-cooperation – at present there is an absence of disincentives for both prosecution and defence counsel to prolong the trial process. Sanctions against the unnecessary or deliberate actions of either party are discussed as one example of how counsel may be discouraged from late preparation.

Barriers for victims and witnesses – victims and witnesses play a vital role in the criminal trial process. A number of issues that may result in the non-attendance of a victim or witness at a scheduled trial are discussed. Earlier and more detailed communication between legal counsel and the victim/witness as well as improvements in victim and witness services are discussed as methods for improving participation.

Future directions

This report concludes with a discussion of future directions in criminal trial procedure using examples from Australia and overseas. It highlights significant work already undertaken in this area, namely the Standing Committee of Attorneys-General Working Group on Criminal Trial Procedure, convened in 1999. In their deliberations the committee made a total of 56 recommendations, many of which relate specifically to the underlying factors identified in this report and which highlight how only minimal progress has been made in reducing trial delay in Australia. This report calls for a renewed commitment to the consideration and implementation of the working group's recommendations, as well as a need for the development of innovative methods for addressing the four key priority areas identified in this report:

- improving the quantity, quality and timeliness of information sharing and communication between the investigating authorities, prosecution, defence and the court
- promoting earlier discussion and consideration of a guilty plea with the defendant, including the improvement of incentives for early guilty pleas and disincentives for non-cooperating counsel
- improving certainty in trial listings
- improving services for victims and witnesses and encouraging greater satisfaction and participation in the criminal trial process.

The lack of any obvious or dramatic improvement in criminal trial delay is not for a want of effort. Many of the Australian jurisdictions have implemented various methods aimed at improving the efficiency and effectiveness of the criminal trial procedure. Most have focused on front ending the criminal trial procedure so that each of the key parties is obliged to prepare a criminal trial well in advance of the trial date. The success or otherwise of these efforts is difficult to determine given the large number of factors likely to affect trial delay. Nonetheless, when asked what factors were essential to the success of improving the early preparation and finalisation of criminal trials, the respondents suggested:

- greater commitment from investigating authorities to improve the quality of information available at the time of arrest and charging, possibly by setting minimum standards that state what should be included in the investigative materials
- involvement of the prosecuting authority as early in the trial process as possible, preferably prior to or at the time of charging
- review of all charges by experienced legal practitioners, preferably those who will take the matter to trial

- availability of legal representation at the earliest possible time after arrest and prior to charge
- commencement by legal counsel of plea discussions at the earliest possible time, preferably prior to the summary or committal hearing
- identification of dispute focused on the key issues of fact or law – counsel should be encouraged to find and agree to as much common ground as possible
- communication between prosecution and defence counsel should be undertaken between experienced practitioners with the authority to make decisions and with a commitment to expediency
- sufficient incentives available and clearly articulated to the defendant at the earliest possible time, preferably at or before committal.

Respondents were also asked about issues and problems in the implementation and delivery of a front ended system. The criticisms centred on five key issues:

- Commitment to pre-trial management processes by all contributing agencies. Where one or more key groups become less committed or concerned with the efficacy of the process, procedures tend to become less effective. Ensuring that the procedures are developed in consultation and that each agency develops and maintains internal policies and culture consistent with the new procedures is vital.
- Demonstrable utility of the practices and procedures to all key agencies. Should agencies perceive the process as of little or no advantage, or having no tangible benefit, willingness to comply will be compromised.
- Longevity of the new procedures through appropriate succession planning.
- Flexible approach, open to a program of evaluation and review that ensures that post-implementation issues can be addressed and rectified.
- An appropriate system of sanctions and procedures is developed to manage non-compliance.

Finally, two issues were identified as necessary points of consideration in any future attempts to minimise ineffective trials. First, that any such methods developed with the intention of modifying current criminal justice procedure should be cognisant of the financial and resource implications of such changes. Managing the criminal trial procedure is a costly process shared across multiple agencies, and increasing their burden would have significant financial and resource implications, many of which may prohibit effective and consistent implementation. Second, innovations and changes in criminal trial procedure should be evaluated for their effectiveness. A commitment to long term, jurisdictionally consistent and systematic data collection and evaluation is necessary for assessing the outcomes of new trial procedure and will assist in identifying areas where further improvement and efficiencies can be made.

The problem of trials that do not proceed

Introduction

In the late 1800s the British Prime Minister William Gladstone is believed to have said 'Justice delayed is justice denied'. At the time, he was concerned primarily with the lengthy delays experienced in passage of legislation that sought to grant home rule for the Irish. In more recent times, the quote has been used as commentary on the impact of delays in the processing of criminal matters through the courts. In Australia, as in many other countries, delay remains a key issue for policy makers and practitioners who value efficiency and effectiveness as critical outcomes of the criminal justice system. Delay has become a benchmark against which criminal justice performance is measured. This is for good reason – delay, among other things, may be responsible for increasing community disillusionment with the justice system and decreasing satisfaction with the law. Delay affects everyone, the accused who might or might not be guilty, the victims and their family who have been aggrieved by the offences against them, and the community who demand justice, safety and protection.

The criminal trial is a fundamental component of the justice system. Persons accused of committing criminal offences may elect to challenge those accusations in court before a panel of their peers. The trial affords protections for the accused so that any case against them is fair and proved beyond reasonable doubt. Similarly, the trial affords protections for the community to ensure that criminal offenders against whom there is sufficient evidence are convicted and sentenced.

In this context, the present study aims to identify the reasons that criminal trials do not proceed on the day of listing. It does so under the assumption that criminal trial delay contributes to excessive and unnecessary utilisation of criminal justice resources. Matters that do not proceed to trial consume valuable criminal justice resources and, in reducing the prevalence of such delays, it will be possible to generate further efficiencies in the criminal trial system. The aims of this research project were twofold:

- estimate the proportion of criminal trials in the Australian lower and upper courts that do not proceed on the day of listing
- ascertain the reasons trials do not proceed.

The research was informed by a three staged research methodology consisting of:

- a national roundtable held in September 2005
- interviews with key stakeholders from every Australian jurisdiction between November 2005 and February 2006
- quantitative data collected from lower and higher courts in Australia.

This first section introduces the problem of criminal trial delay in Australia. It highlights what is known from the Australian literature about delay and its causes. Section two provides details of the prevalence of and reasons that criminal trials are adjourned, while section three discusses the factors underlying the high numbers of trials that do not proceed. The final section provides a discussion of ways forward, highlighting both Australian and overseas examples of good practice in trial management.

The criminal justice process

From entry to finalisation

The Australian criminal justice system can be depicted as a process model that identifies the pathways into and out of criminal justice agencies (see figure 1). Typically the process commences with the commission, identification and investigation of a criminal incident. If identified, an offender will be arrested, charged and released on bail or remanded in custody until a scheduled hearing in the Magistrates' Court (otherwise known as the local court or court of petty sessions). Some offences (primarily traffic and some minor offences) may be proceeded against by way of a court attendance notice or summons.

Offences are categorised into two types, summary and indictable, in each jurisdiction's legislation. Summary offences are dealt with by a magistrate within the jurisdiction of the Magistrates' Court while indictable offences are dealt with in the District Court (otherwise termed the County Court) or Supreme Court. In both cases, a criminal matter is initiated in the Magistrates' Court as either a summary hearing (summary matters) or committal hearing (indictable matters). A committal hearing is defined as preliminary hearing in which the prosecuting agency attempts to persuade the magistrate that there is a strong enough case against the defendant to go before a jury in the higher courts (Redfern Legal Centre 2002). A defendant may plead guilty at this initial hearing (summary or committal). In doing so, the defendant agrees to the statement of facts provided by the police or prosecuting agency, a conviction is recorded and the defendant is sentenced. In some cases the matter is adjourned for sentencing.

Defended matters (those where the defendant pleads not guilty or reserves a plea) proceed to trial. For summary offences the matter is tried before a magistrate in the Magistrates' Court. If committed for trial, indictable offences are tried before either the District or Supreme Court, with or without a jury. Indictable matters are typically presented at a preliminary hearing in the higher courts for the presentation of the indictment, after which a trial date is set.

A matter may therefore be finalised in three ways:

- guilty plea – the defendant pleads guilty at the summary/committal hearing, on or before the trial date
- the matter is withdrawn from prosecution or defeated at the committal hearing
- the matter proceeds to trial where the defendant is proven guilty or acquitted.

Following a factual determination of guilt, criminal matters then proceed to sentencing. The manner by which a criminal matter progresses through the different criminal justice agencies may vary depending on a variety of factors including, but not limited to:

- the jurisdiction (state and territory or court level) in which the matter is being processed
- the prosecuting agency – some agencies (other than the police) may initiate criminal proceedings
- the offender and/or offence type – some offences can result in summons to court, others through charge and arrest.

Criminal justice system throughput

There are two primary data sources used for determining the flow and throughput of the Australian criminal justice system. The first is the annual *Report on government services* (ROGS) produced by the Steering Committee for the Review of Government Services Provision (SCRGS) (SCRGS 2006). This report provides data on the number of matters lodged in the criminal jurisdiction by court and state for the previous financial year (see Table 1). The ROGS shows that 774,900 criminal matters were lodged across Australia in 2004–05, the vast majority in the Magistrates' Courts (695,700 criminal matters). District Courts saw 26,300 matters and Supreme Courts saw 5,000 matters.

Table 1: Criminal court lodgments, by court level, 2004–05 ('000)

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
Magistrates	193.1	142.3	177.0	78.6	74.7	60.4	5.4	11.9	743.6
District/County	10.4	4.9	7.1	2.5	1.3	. .	. .	. .	26.3
Supreme	0.6	0.7	1.6	0.5	0.4	0.6	0.3	0.4	5.0
(Total)	(204.1)	(147.9)	(185.8)	(81.6)	(76.5)	(61.0)	(5.7)	(12.3)	(774.9)

. .: not applicable
Note: Magistrates' Court includes Children's Court lodgments
Source: Adapted from SCRGS 2006: C.12

The second data source is the Australian Bureau of Statistics' (ABS) *Criminal courts, Australia* (ABS 2006) which indicates that in the 2004–05 financial year there were 573,949 finalised criminal defendants across Australia. Of these, the vast majority (557,426; 97%) were finalised in the Magistrates' Courts (Table 2). At both court levels, there are two primary finalisation outcomes, adjudicated and non-adjudicated. Adjudicated matters are those where the defendant was acquitted or proven guilty (including a guilty plea). Non-adjudicated matters are those where the criminal defendant was registered but not proceeded against because the matter was withdrawn or transferred to another court. In the Magistrates' Courts, approximately 12 percent of defendants were finalised but not adjudicated; this was the case for 13 percent of defendants in the higher courts. The bulk of non-adjudicated matters in both jurisdictions were finalised because the matter was withdrawn from prosecution (74% in the Magistrates' Courts, and 96% in the higher courts).

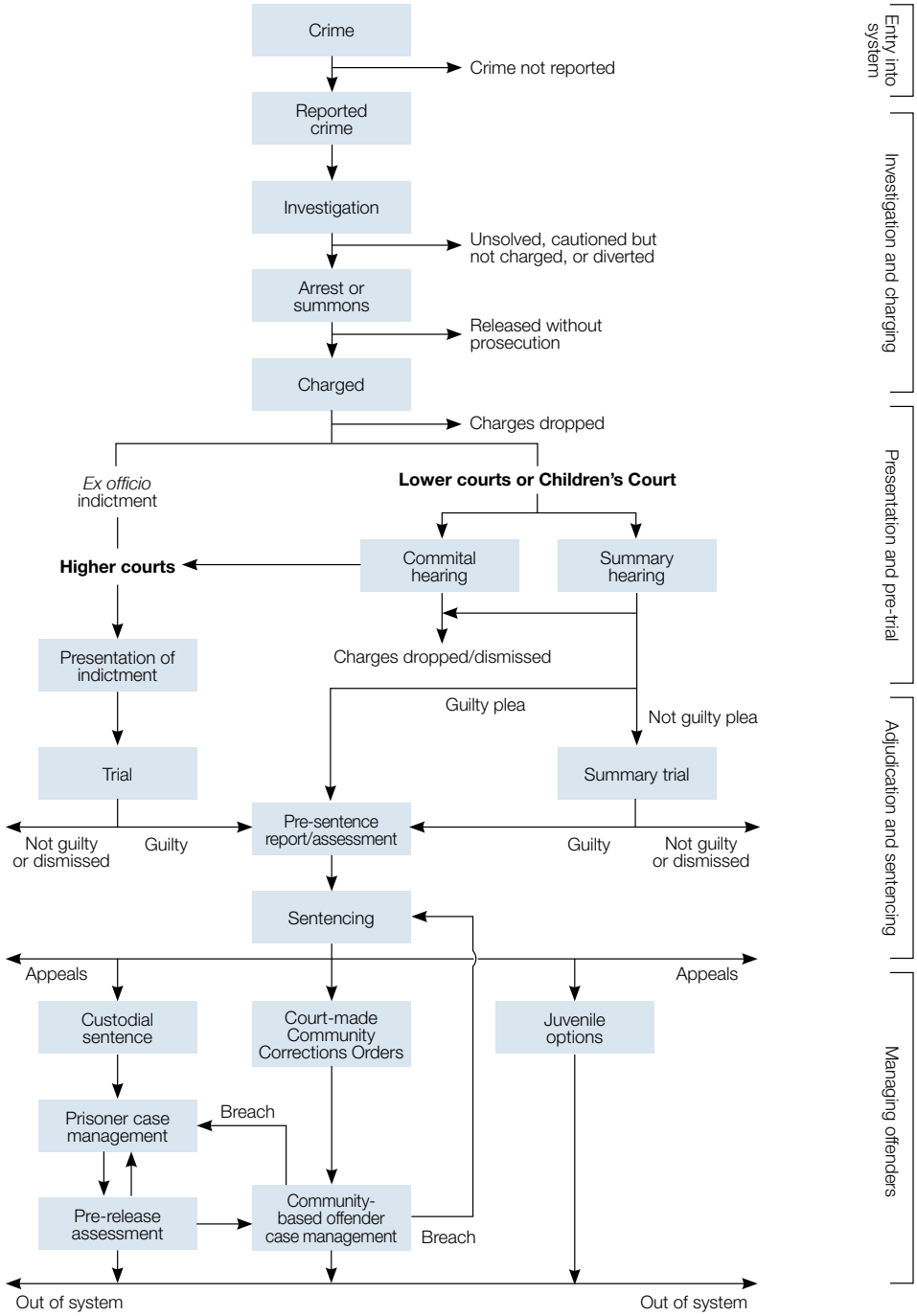
The majority of all criminal matters are finalised by adjudication (87% in both jurisdictions) and of these, more than 90 percent are proven guilty. The ABS Criminal Courts collection does not indicate the proportion of Magistrates' Court finalisations that were due to a guilty plea, although guilty pleas in the higher courts accounted for 88 percent of all proven guilty finalisations. These data indicate that the vast majority of criminal matters each year do not proceed to trial. Of the small proportion that do, the majority result in a verdict of guilty.

Table 2: Finalised defendants, by court level, 2004–05

	Magistrates' Courts	Higher courts	Total criminal finalisations
Adjudicated			
Acquitted	19,309	1,259	20,568
Proven guilty[a]	473,988	13,169	487,157
Total	**493,297**	**14,428**	**507,725**
Not-adjudicated			
Withdrawn by prosecution	47,647	2,004	49,651
Other[b]	16,470	90	16,560
Total	**64,117**	**2,094**	**66,211**
(Total)	(557,426)	(16,523)	(573,949)

a: Includes guilty plea
b: Includes defendants finalised by transfer to another court level
Source: Adapted from ABS 2006

Figure 1: Sequence of events in the criminal justice system



Source: SCRGS 2004

What is trial delay?

The purpose of this report is to highlight the reasons that criminal trials do not proceed on the day of initial listing and it is assumed that delay is generated when a trial fails to proceed. Delay inevitably consumes valuable criminal justice resources including court administration, judicial, prosecutorial and defence resources – not to mention the time and cost implications for victims and witnesses. Karpin (1990:1) suggested that although it has become the 'hobby horse and whipping post for the media… and politicians', delay is a reality of the criminal trial system.

As noted earlier, summary matters are listed and tried in the Magistrates' Courts, while indictable matters proceed to the higher courts for the presentation of the indictment and listing. Each court has available to it a certain level of resourced capacity for hearing defended trials. This capacity is determined by the court and takes into account the number of hours each judicial officer is available outside their other delegated responsibilities. Although the actual listing practice in each court varies, the procedure can be broadly defined as a diary system, where each week is defined as having a specified resource capacity, and trials are set down in a manner that maximises the use of that capacity. Trials will invariably run for differing lengths of time depending on the complexity of the case and the number of witnesses to be called. In any case, a trial is typically set down for hearing in the next available time slot within the listing diary. Given the throughput numbers highlighted in the previous section, it is not surprising that the next available listing date in most court jurisdictions is not usually until some months after the matter is ready to be set down. Moreover, should that trial fail to proceed and be adjourned, it is likely to be re-listed and therefore delayed further.

There are two commonly used concepts of delay in the criminal trial system. The first refers to the time taken to dispose of a criminal matter. For example, the Bureau of Crime Statistics and Research in its criminal court publications presents information about delay as the average time between initiation and finalisation (see BOCSAR 2005). The longer it takes for a criminal matter to be finalised the more it is said to have been delayed. This concept of delay as total duration is driven primarily by what is quantifiable and statistically measurable. If average total duration increases or decreases, average delay is said to have increased or decreased.

The second concept of delay is more frequently used by legal practitioners to describe the time taken for a criminal matter to be resolved over and above the time necessary to resolve it. It is akin to suggesting that every criminal matter has a duration (number of days) within which a resolution of a fair trial can and should be found, and any excess over this optimal duration indicates delay. Of course, the optimal duration of a trial is almost impossible to quantify, which is why it has evaded systematic measurement to date.

The two concepts are connected. The second measure of excess duration is a fraction of a matter's total duration. It is also worth noting that excess duration is not something that is simply added to the end of a criminal matter. Instead, it is important to recognise that the process of a criminal matter may be subdivided into a number of smaller procedural units, during each of which excess duration may be generated. Late preparation or investigation by the police during the initial pre-charge stage may add to delay, as will excessive deliberation by the jury or sentencing judicial officer. Federal Court Judge, Mark Weinberg (2001) notes that 'to delay… is to be irresolute, or to procrastinate' and identified four key areas where delay can arise:

- in the investigation of complex crimes
- between the laying of charges and initial hearings (committal or summary)
- between initial hearings and trial
- between trial and appeal.

Finally, although delay as excess duration is reasonably straightforward it evades systematic measurement. To measure it would require the quantification of each criminal matter's optimal duration, which is next to impossible. Each criminal matter varies in the complexity of its legal argument and the evidence or number of witnesses required. Total duration is most frequently used as an aggregate measure of delay although its capacity to explain which part of the trial process was in excess is limited.

The extent of trial delay

As the quantification of delay is extremely difficult, there are no Australian studies that measure delay as a proportion of total duration. Instead, two aggregate measures are consistently used to indicate the extent of delay in Australian criminal courts. The first, produced by the ABS, is data on case duration (defined as the length of time taken from initiation to finalisation). Table 3 shows the distribution of finalised cases in 2004–05 by duration, finalisation type and court jurisdiction. The results indicate that, in the Magistrates' Courts, two in three criminal matters are finalised within 13 weeks from initiation while a small proportion of cases (3.5%) were finalised after 52 weeks. Matters where the defendant was proven guilty (either by a guilty plea or finding by the court) were most often completed within the shortest time frame, while the opposite was true for matters that were acquitted (fewer than half were completed within 13 weeks). This difference is probably driven by the high number of guilty pleas, which as shown earlier, constitute the majority of proven cases.

In the higher courts the situation is different with only one in four matters finalised within 13 weeks from initiation and two in three matters not finalised before 52 weeks. The differences between the Magistrates' Courts and the higher courts is not unexpected, because indictable matters are likely to be more serious and complex and therefore require significantly more preparation time. The final point of interest is the difference in duration between matters that are finalised by a plea of guilty or by court finding in the higher courts. Although comparable data points are not available for the Magistrates' Courts, the trend confirms that defended matters are likely to take much longer than matters resolved by guilty plea.

Unfortunately, the criminal court duration data provided by the ABS do not account for multiple listings. It is therefore impossible to determine whether adjournments are indeed a factor associated with increased case duration.

Table 3: Case duration from initiation to finalisation, by court level, 2004–05 (percent)

	Under 13 weeks	13–26 weeks	26–39 weeks	39–52 weeks	52 weeks & more	Total
Magistrates						
Acquitted	45.1	28.3	13.9	5.2	7.5	100
Proven guilty	77.7	13.8	3.8	1.9	2.7	100
Not adjudicated	54.5	22.5	9.3	5.4	8.3	100
(Total)	**(73.3)**	**(15.7)**	**(5.0)**	**(2.5)**	**(3.5)**	**100**
Higher Courts						
Acquitted	3.3	15.7	19.6	15.3	46.0	100
Proven guilty (plea)	29.9	26.0	18.0	10.9	15.2	100
Proven guilty (finding)	3.3	9.5	16.5	16.6	54.1	100
Not adjudicated	14.4	22.8	19.0	12.5	31.4	100
(Total)	**(23.5)**	**(23.3)**	**(18.1)**	**(12.0)**	**(23.2)**	**100**

Source: Adapted from ABS 2006

The second commonly used indicator of delay in the criminal courts is the backlog indicator developed and used as a benchmark in the ROGS (SCRGS 2006). The backlog indicator measures a court's pending caseload by time – for example, how many of the court's current pending matters are more than six, 12 or 24 months old. The ROGS sets the following standards against which each state and territory is measured:

- for Magistrates' Courts (including the Children's Court) – no more than 10 percent of pending cases should be more than six months old, and no cases are to be more than 12 months old. That is, Magistrates' Courts are expected to resolve all cases within one year of initiation
- for higher courts no more than 10 percent of pending cases should be more than 12 months old and no cases are to be more than 24 months old.

Table 4 provides data on national and jurisdictional performance against the backlog indicator. Nationally, one in five pending lower court cases have been in the system for more than six months, and nine percent are 12 or more months old. Similar proportions are seen in the District and Supreme Courts, although note that the backlog indicator threshold is greater. Around one in five matters have been in the system for 12 months or more, and between five and seven percent for more than 24 months.

Table 4: Backlog indicator, by court level and state/territory, 2004–05 (percent)

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
Magistrates									
Cases > 6 months	10.3	17.6	26.5	31.2	27.8	16.7	18.3	na	21.6
Cases > 12 months	2.5	4.7	11.5	11.7	15.2	6.5	6.1	na	8.9
District/county									
Cases > 12 months	15.7	14.1	19.2	29.5	25.2	na	na	na	20.2
Cases > 24 months	2.4	2.8	6.1	7.1	7.9	na	na	na	5.0
Supreme									
Cases > 12 months	23.0	13.6	13.7	28.1	24.7	11.9	12.7	27.9	18.0
Cases > 24 months	9.7	8.2	4.9	14.6	9.3	1.3	1.3	13.1	6.9

Source: Adapted from SCRGS 2006

Both the ABS and ROGS estimates of duration and backlog are crude aggregate measures of time spent in the criminal courts and neither provide information about delay per se. The fact that a criminal matter remained active in the system beyond six or twelve months says nothing about whether that time was attributable to delay that could have been avoided.

Causes of trial delay

Although it is not the purpose of this study to examine the extent or cause of delay in the criminal justice system, it is important to appreciate delay as a multifaceted concept affected by different mechanisms. The first and perhaps most widely recognised cause of delay is systemic – arising when criminal matters cannot be resolved expeditiously because the criminal justice system itself cannot provide the means through which speedy resolution can be facilitated. As highlighted earlier, the criminal justice system has two primary transition points – the initial hearing (summary or committal hearing) and the trial. In order for a criminal matter to proceed through each transition, the matter must be ready to proceed, and the court must have the capacity to facilitate it.

Given the data presented earlier on the aggregate number of annual matters initiated, and the backlog indicator, it is not surprising that the duration of a criminal matter incorporates time spent waiting for the next available listing. Not every matter can be heard as early or as expeditiously as it may be prepared, and delay is inevitably generated by a system that is unable to hear a matter earlier, due to its existing caseload.

This systemic view of delay in the criminal justice system is simplistic in that it assumes that every case can be prepared earlier than it is able to be listed. As parties to the criminal justice process, including the Crown and defence, have multiple cases to manage, systemic delays are often relied upon as a method for organising and managing an individual or group caseload. It is also possible that a criminal matter may be listed by the court earlier than was possible to prepare it, leading to adjournments and further delay. Nonetheless the purpose of highlighting systemic delay in the criminal justice system was to address some of the reasons that criminal trials cannot be listed earlier, even if they were able to be prepared. For the most part, systemic delay is the byproduct of an increasing court workload (or decreasing capacity) which results from several possible factors:

- increases in the number of matters initiated within the courts (including new matters, sentencing and appeal registrations)
- increases in the average length of criminal trials
- increases in the number of court appearances needed to resolve a matter.

There is little evidence that the criminal courts are subject to an increasing number of new trial initiations, sentence or appeal registrations. Both the ABS criminal court statistics and the ROGS data indicate a modest decline in the number of criminal lodgments and finalisations in the 2004–05 financial year, when compared with the previous three years (ABS 2006; SCRGS 2006). A similar conclusion was reached by Weatherburn and Baker (2000a) in their study of listings in the NSW District Court between 1995 and 1999. Their study, the most comprehensive to date, suggested that significant increases in trial delay could not be explained by increasing criminal lodgments and sentence registrations (both of which declined over the period) and appeal registrations (which remained steady). It appears that systemic delay is not caused by an increasing number of new trials.

In terms of trial length, the evidence is mixed. Federal Court Judge Mark Weinberg in his 2001 address to an Australian Institute of Judicial Administration conference suggested that the average length of the criminal trial has increased from around five to eight days in recent times (presumably in higher court trials). Unfortunately, there are no national sources of information that provide indicative data on changes to the average length of a criminal trial (as separate from the entire trial process), and it should be noted that trial length will vary by court jurisdiction. Nonetheless, there is good reason to suspect that criminal trials are consuming a greater proportion of criminal court resources than was previously the case. Chief Judge Rozenes (2001) of the Victorian County Court noted several reasons criminal trials are increasing in length:

- criminal matters appearing before the court are increasing in complexity – fraud and drug crimes were cited as cases of greater sophistication requiring more detailed and sophisticated evidence
- criminal investigation is becoming more complex for the average case and greater standards of evidence are being required by juries
- there has been a 'proliferation of procedural and evidentiary rules' that consumes substantial court time
- the quality of legal representation for both the Crown and defence has declined, as too have the number of judges experienced in trial procedures.

Chan and Barnes (1995) undertook a study of 61 lengthy NSW higher court trials in an effort to understand the factors associated with trial length. The authors noted that lengthy trials – where the trial length was greater than 20 days – were more likely to:

- involve a larger number of Crown witnesses and lawyers
- be of particular charge types – with fraud and drug charges being the charges mostly linked to longer trials
- involve a defendant who was solely or partly legally aided
- involve complex technology in the presentation of the case.

Although criminal trials may have increased in average length, this does not necessarily mean that such increases have resulted in systemic delay. Weatherburn and Baker (2000a) tested this hypothesis and found no significant relationship between trial length and trial delay. In fact, for the period of the study between 1995 and 1999 where trial court delay increased by 23 percent, trial length remained relatively stable. It is important to note that the authors in this study defined delay as the total duration between committal and trial finalisation. Trial length is a small component of the overall calculation of a criminal matter's duration in this study, but seemed to have limited explanatory power in a reduction of court capacity.

Although Weatherburn and Baker (2000a) argue no direct link between trial length and trial delay in NSW, it is plausible that increases in trial length may result in reduced court capacity, particularly over the long term. That is, if resourcing remained constant and every trial increased by an average of one day, the number of trials able to be heard by the court would be diminished.

The final cause of systemic delay in the criminal justice system may be the increasing number of hearings required by the court (or by the parties) before finalisation. It may be that a matter is repeatedly adjourned on request by the Crown or defence or, as has become more frequent, criminal courts are instituting more intensive case management procedures which require multiple preliminary hearings prior to trial. An example of these procedures is described later in this report. The greater the number of hearings required for a criminal matter, the greater the level of resources required by the court to resolve it. With already limited resources and a backlog of pending cases, each additional hearing serves to decrease the time available for dealing with new matters. Any mechanism that increases the number of hearings required for a matter will consume the valuable resources of the court with the potential to lead to systemic delay.

The second but equally important form of delay in the criminal justice system is that which is attributable to the actions, or inaction, of the parties to the trial process. Here delay results from factors not within the control of the criminal justice system, but is imposed upon criminal matters from the parties to that system. Karpin (1990) described three categories of this type of delay:

- *unavoidable delay* – resulting from factors outside the control of criminal justice practitioners, typically imposed upon the system by defendants and witnesses
- *unnecessary delay* – caused by the incompetence or ignorance of the criminal justice practitioners and their failure to adhere to good practice in case management
- *deliberate delay* – resulting from the engineering or exploitation of the criminal trial process by practitioners to generate excess duration.

Weatherburn and Baker (2000a), having discounted an increase in trial length and an increase in the number of trial lodgments as factors associated with delay, turned to examine issues relating to the management of criminal trials within the NSW District Court as a possible explanation. They concluded that criminal trials often failed to proceed on the initial listing date and as indicated earlier, adjournments result in re-listing at the next available trial date. In fact, the authors found that:

- fewer than 40% of trials proceeded at the time of first listing
- although the probability of proceeding to trial increases each time a trial is listed, even by the time a trial is listed for the a fifth time, the probability of proceeding on that day is only a little over 60%
- the reasons trials did not proceed included resolution by a late guilty plea (35%); adjournment to another hearing date (29%); the trial not being reached by the court (22%); non-appearance of the defendant (6%); withdrawal of the trial by the prosecution (5%).

These results are similar to those in other Australian states and territories. In 1996 a report from the office of the Western Australia Auditor General (1996) was released and estimated that over half (55%) of summary trials scheduled in the Court of Petty Sessions did not proceed to trial. The 2000 annual report of the Victorian County Court highlighted that 80% of criminal trials listed in the 12 months to 1 September 1999 failed to proceed on the day of listing. Data collected for the purposes of this report and presented in the next section confirm that little has changed in recent years.

Finally, it is important to note that the two categories of delay described here are not mutually exclusive. Systemic delay, resulting from diminished court and criminal justice resources may in part result from the overutilisation of resources generated from unnecessary, unavoidable and deliberate delay. This network of effects is difficult to disentangle. Nonetheless, the purpose of this study is to describe the main reasons criminal trials do not proceed on the day of initial listing, under the premise that when a trial does not proceed as scheduled, it contributes to both forms of delay. There is good reason for this: trials that do not proceed have been listed and therefore monopolised court time. The time set aside for that trial is subsequently underutilised and contributes to backlog and congestion in criminal trial lists. Those matters are then subsequently adjourned to another hearing date and require re-listing. Re-listed matters must be postponed until the next available trial date generating delay both within the individual matter, and contributing to the growing backlog of listed matters.

Are adjournments the problem?

The fact that a trial does not proceed on the day of initial listing is not in itself a negative outcome. Perhaps the trial was unable to proceed on that day because it was listed earlier than it was able to be prepared, or perhaps additional evidence was required to ensure that the accused received a fair trial. It is important here to recognise that an adjournment is a legitimate mechanism within the criminal justice system to ensure that the court, the prosecution and the defence are adequately prepared and that the defendant receives a fair trial. Weinberg (2001) clearly states that:

> [T]he right to a fair trial is, as the High Court has repeatedly emphasised, the 'touchstone' or 'fundamental prescript' of our system of criminal justice. The need to minimise delay and to ensure that trials are conducted efficiently, and within proper cost constraints, must always be subsidiary to that fundamental prescript.

Adjournments are a protection afforded to the parties of the criminal trial process and it is not the intention of this report to argue that adjournments are granted unnecessarily by the judiciary. The question is, what proportion of adjournments (or requests for an adjournment) granted on the day of listing might have otherwise been avoided. As Weinberg (2001) argues that greater emphasis is needed on the importance of obtaining a fair trial, he also argues that:

> …it is not the purpose of the criminal law to punish at all costs. It is of fundamental importance that accused persons against whom there is insufficient evidence should be acquitted.

Trials that do not proceed – prior research

Australia

The most detailed study of criminal trial delay to date was conducted in NSW by the Bureau of Crime Statistics and Research (Weatherburn and Baker 2000b). The study analysed the outcomes of all trial matters appearing before the NSW District Court between 2 August 1995 and 1 October 1999. The authors concluded that less than half of all listed trials fail to proceed at first listing and late guilty pleas were a significant contributing factor to increases in delay. Using two survey instruments, they were able to further detail some of the underlying factors associated with trial delay. In relation to late guilty pleas, the most highly rated reasons were:

- there was a late decision by the Crown to accept a plea to lesser, different, or fewer charges
- counsel was unable to discuss the matter with the Crown until late in the process

- counsel had difficulty obtaining instructions from the defendant until late in the process
- the client changed their instructions at the last minute
- there was no clear benefit to the client in pleading guilty at an earlier stage.

Weatherburn and Baker identified adjournments as the second most common reason for criminal trials not proceeding in NSW. In their survey, members of the judiciary and court administration were asked to indicate what they felt were the reasons for such adjournments. The survey revealed that the majority of adjournments were granted following an application by defence counsel (61%). The main reasons for such an application included unresolved problems with legal representation (40%) or that further preparation of the case was required (26%). Around one in three applications for adjournment were lodged by the Crown with the main reason being that a Crown witness was unavailable.

Finally, the third most common reason was that the trial was not reached by the court. This means that the court was unable to hear the matter on the day of listing and subsequently adjourned it to be heard on another date. In the majority of these cases (approximately 55%) the trials were not reached because 'too many trials were listed on that date'. Slightly less than 30 percent resulted because there was no judicial officer available to commence the proceedings and around 15 percent resulted because another matter listed on that day ran longer than the scheduled time (Weatherburn & Baker 2000b).

United Kingdom

The UK Home Office conducted a survey of 25 Magistrates' Courts throughout England and Wales to identify why scheduled court hearings were adjourned (Whittaker et al. 1997). The research formed part of a larger study on sentencing, fine enforcement, mode of trial decision and the use of remand, but provided useful information about adjournments. The study found that:

- the most frequently cited reason for an adjournment was that either the prosecution or defence were not ready to proceed to trial (54%), followed by adjournments where further information (such as a pre-sentence report) was required by the court to assist in sentencing, or where the defendant failed to appear
- local court practice is likely to influence the number and type of adjournments sought, having implications for the ability of global better practice methods to reduce trial adjournment
- magistrates were doubtful whether the discounts for an early guilty plea were sufficient incentive for a defendant to plead guilty at an earlier time.

Since this time, managing and reducing ineffective trials has become a priority for the UK Government and in 2006, the Home Office (2006a) released a revised edition of its criminal case management framework. Through this framework, the Home Office reports up to a 10 percent reduction in the prevalence of ineffective trials – those trials that are adjourned and require re-listing. The national UK figure of ineffective trials is 14.4 percent for higher courts, and 22.7 percent for Magistrates' Courts (Home Office 2006b).

The reasons trials fail to proceed

This section reviews the reasons criminal trials do not proceed, using both quantitative data and qualitative information obtained from all Australian states and territories. Details of the data collection methodology are found in the technical appendix.

The evidence

The quantitative data used in the report were collected from data collections maintained by courts in each jurisdiction. In those jurisdictions not already collecting data on the outcome of listed trial hearings, the AIC requested the collection of prospective data for the months of April and May 2006. As the bulk of data were derived from existing data sources, direct comparisons between the states and court levels should be approached with caution. Although every effort has been made to ensure that the data are comparable (or noted if not), it is highly likely that the definitions and counting rules applied at the time of collection varied between courts.

The aggregate data collected by the AIC are presented in Table 5 showing the number of trials listed in the collection period. In the final three rows of that table three percentage estimates are presented:

- the proportion of listed trials that did not proceed on the day of listing
- the proportion of all trials requiring re-listing
- the proportion of trials finalised without trial.

In all, well over half of all listed trials in all states and court jurisdictions were reported as not having proceeded. The figure ranged from 61 to 86 percent, with the average across jurisdictions estimated at approximately 70 percent. Again, significant variation is expected within these data, but they nonetheless confirm that the majority of listed trials do not proceed on the day of listing. Note also that the aggregate data are for all listed trials and includes those that have been listed for the first time and those that have been previously adjourned and re-listed. In accordance with the analysis undertaken by Weatherburn and Baker (2000a), it is suggested that the proportion of trials not proceeding as scheduled is likely to be greater for those matters appearing for the first time. The authors in that study found that, in the NSW District Court, the probability of not proceeding was greatest at initial listing and declined with each consecutive listing.

In the UK, the Home Office collects data on the number of listed trials that are ineffective. An ineffective trial is one that does not proceed and is re-listed. This calculation excludes cases that are finalised by way of guilty plea or withdrawal from prosecution because no further trial hearing is required. From the data provided to the AIC, it was possible to estimate the proportion of Australian criminal trials that are considered ineffective by summing together the number of trials adjourned to another date. This includes matters adjourned on request by defence or prosecution, or matters that were not reached by the court. This number varied widely across the states and court jurisdictions between 14 and 49 percent, with an average of 32 percent.

The number of trials that are finalised by late guilty plea or withdrawal on or near to the trial date was greater than the number of ineffective trials and ranges between 33 and 59 percent. The national average was 39 percent.

Table 6 examines the outcome of those trials that did not proceed and shows several interesting findings. The most common reason for a trial not proceeding was that the defendant pleaded guilty and the matter was subsequently dealt with (or adjourned) for sentencing. The exceptions were the Tasmanian Magistrates' Courts and the Queensland District Court. Late pleas of guilty account for between 18 and 53 percent of trials that do not proceed. The second most common reason was that the trial was adjourned because it was unable to proceed on the day of listing (between 6 and 58%) followed by matters that were withdrawn by the Crown (between 7 and 31%). In a small number of cases, matters did not proceed because they were not reached by the court on the day of listing.

The reasons for trials not proceeding need not be similar between courts or geographical locations. For example, a greater number of summary trials in the South Australian Magistrates' Court were withdrawn from prosecution than in any other location. Similarly, some jurisdictions experienced a higher level of adjournments than others. Other studies have also found that the reasons trials do not proceed can vary by location (Weatherburn & Baker 2000a; Whittaker et al. 1997). Interestingly however, the proportion of trials not proceeding due to late pleas of guilty was relatively consistent across all jurisdictions.

Table 5: Summary of outcomes for listed trials by state and court jurisdiction

	WA MC	NT MC	ACT SC	NSW DC	SA MC	SA DC	Qld DC	Tas MC	(Total)
Proceeded to trial/hearing (n)									
Full or part heard	273	135	6	82	247	93	22	638	(1,496)
Did not proceed (n)									
Adjourned	216	82	11	72	128	24	57	943	(1,533)
Guilty plea	246	102	18	67	329	78	42	288	(1,170)
Withdrawn	103	51	4	10	201	16	16	403	(804)
Not reached by court	21	0	1	0	0	14	19	0	(55)
Other	32	0	1	4	0	15	0	0	(52)
(Total listed)	**891**	**370**	**41**	**235**	**905**	**240**	**156**	**2,272**	**(5,110)**
% not proceeding	69.4	63.5	85.4	65.1	72.7	61.3	85.9	71.9	70.7
% adjourned and re-listed	30.2	22.2	31.7	32.3	14.1	22.1	48.7	41.5	32.1
% finalised without trial	39.2	41.4	53.7	32.8	58.6	39.2	37.2	30.4	38.6

Sources: Perth Magistrates' Court, January–May 2006; Darwin Magistrates' Court, January–May 2006; ACT Supreme Court, January–May 2006; NSW Central District Court, January–April 2006; Adelaide Magistrates' Court, January–December 2005; Adelaide District Court, January–May 2006; Brisbane District Court, April–May 2006; Tasmanian Magistrates' Courts, January–May 2006

Table 6: Reasons for not proceeding (percent)

	WA MC	NT MC	ACT SC	NSW DC	SA MC	SA DC	Qld DC	Tas MC	(Total)
Did not proceed									
Adjourned	35	35	31	47	19	16	43	58	(42)
Guilty plea	40	43	51	44	50	53	31	18	(32)
Withdrawn	17	22	11	7	31	11	12	25	(22)
Not reached by court	3	0	3	0	0	10	14	0	(2)
Other	5	0	3	3	0	10	0	0	(1)
(Total)	**100**	**100**	**100**	**100**	**100**	**100**	**100**	**100**	**100**

Sources: Perth Magistrates' Court, January–May 2006; Darwin Magistrates' Court, January–May 2006; ACT Supreme Court, January–May 2006; NSW Central District Court, January–April 2006; Adelaide Magistrates' Court, January–December 2005; Adelaide District Court, January–May 2006; Brisbane District Court, April–May 2006; Tasmanian Magistrates' Courts, January–May 2006

Table 7: Reasons for adjournments (number)

	WA MC	NT MC	ACT SC	NSW DC	SA MC	SA DC	Qld DC	Tas MC
Did not proceed								
Defendant did not appear	121	24	1	2	–	3	–	296
Witness not available/ did not appear	33	14	–	–	–	6	–	–
Defence not ready	126	–	3	32	–	–	32	–
Prosecution not ready	20	–	–	14	–	–	12	–
Other	17	44	7	24	–	15	13	647
Total Not Proceeding	**317**	**82**	**11**	**72**	**–**	**24**	**57**	**943**

Sources: Perth Magistrates' Court, January–May 2006; Darwin Magistrates' Court, January–May 2006; ACT Supreme Court, January–May 2006; NSW Central District Court, January–April 2006; Adelaide Magistrates' Court, January–December 2005; Adelaide District Court, January–May 2006; Brisbane District Court, April–May 2006; Tasmanian Magistrates' Courts, January–May 2006

Where available, the AIC also obtained specific details about the reasons a criminal matter was unable to proceed and adjourned (presumably for re-listing). Table 7 provides the breakdown for each court. Again, cross-jurisdictional comparisons should be treated with caution as each jurisdiction is likely to apply different counting rules to the classification of adjournments. For example, in cases where the defendant did not appear in court on the trial day, the defence is likely to request an adjournment. In some jurisdictions it would appear that no trials were adjourned because a defendant did not appear, but such cases are likely to be aggregated under 'defence not ready/unable'. The purpose of the data in Table 7 is to highlight the heterogeneous nature of trial adjournment – that requests can be made by both the Crown and the defence, and can be the result of multiple factors, such as problems with defendants and witnesses. This view is supported by the qualitative interviews conducted for this research project.

In some cases, the AIC was given specific qualitative information regarding the situational and procedural factors for a criminal trial not proceeding as scheduled. This was generally in the form of a written comment by the court clerk relating to the discussion between defence, the prosecution and the judicial officer. As expected, it became apparent that multiple factors may be at play in many trials that do not proceed. For example, as discussed later, a defendant may plead guilty to one charge only after the prosecution tenders no evidence on others. Another example is where the defendant did not appear in court, and as a result of further investigations by the defence, an adjournment was made so that a psychological assessment could be obtained. One matter recorded as not reached by the court was actually the result of number of things. First, the defendant did not appear at 10:00am as required and the matter was adjourned until after lunch. When the defendant did arrive, they brought with them a number of signed affidavits from witnesses in support

of their defence. A second adjournment was made because the court no longer had the time to continue the case and introduce the affidavits. The adjournment also fulfilled a request by the prosecution for cross-examination of the defence witnesses. Clearly, the categorisation of trial listing delays is fraught with difficulties. The remainder of this report attempts to understand the factors and difficulties behind the successful listing of criminal trials.

The reasons for late finalisation

More than one in three matters listed for trial each month were finalised by way of guilty plea or withdrawal by the prosecution. This equates to well over 50 percent of all matters that do not proceed on the day of trial. The bulk of these finalisations are by way of guilty plea – accounting for as much as 89 percent of matters finalised on the trial day. This section examines some of the key research findings regarding late guilty pleas and withdrawals identified in the qualitative consultations.

It is important to clarify several issues. First, both guilty pleas and withdrawals are treated as case finalisations because the matter is not required to be re-listed for trial. This is consistent with the definition of ineffective trials used in the UK and recognises that, although a guilty plea on the trial date may result in an adjournment for sentencing in some jurisdictions, the matter is not required for re-listing as a trial and therefore not an ineffective trial. Second, a last minute plea of guilty is not necessarily a negative outcome for the criminal justice system. A finding of guilt is seen by many as an outcome nonetheless and considered more favourably than matters that resist finalisation. Finally, the fact that a trial is withdrawn from prosecution is also a positive outcome for the criminal justice system. It is 'of fundamental importance that accused persons against whom there is insufficient evidence should be acquitted' (Weinberg 2001). In this vein, a decision to withdraw a matter from prosecution is the result of an assessment that the evidence is insufficient to secure a conviction – an important protection afforded by the Australian criminal justice system.

Despite late guilty pleas and withdrawals being considered the positive finalisation of a criminal matter, the fact that they occur on or near the trial date is of concern. Earlier in this report, the problem of systemic delay brought about by the listing of criminal matters that are not proceeded with was highlighted. This is of particular concern when discussing the problem of late finalisation. Consider an aggravated assault trial with an estimated duration of four days. Suppose that on the day of trial, the defendant pleaded guilty to the indictment, the conviction was recorded and the matter adjourned for sentencing. In anticipation of that trial, the court will have set aside four trial days for one sitting judicial officer to hear the matter. When the defendant pleaded guilty, the remaining trial days are vacated and the judicial officer is underutilised. Moreover, it is not just judicial resources that are impacted by this late plea of guilty. Depending on the nature of the trial, the Crown will have also set aside four trial days,

organised witnesses and arranged for expert testimony, all of which must be cancelled at the last minute. The defence may have also been unaware of their client's intention to plead guilty and allocated resources to the four day trial.

The question therefore is not whether guilty pleas or withdrawals can be prevented after entry into the trial processing system, but if a similar outcome could have been achieved earlier and with less cost to the criminal justice system. In the case of withdrawn matters it is also necessary to ask why so many cases make it into the trial list in the first place only to be subsequently determined as having insufficient evidence to proceed.

Late plea of guilty

As the single most common reason that criminal trials do not proceed on the day of listing, late guilty pleas have received much attention and debate. The Standing Committee of Attorneys-General Working Group on Criminal Trial Procedure (1999: 20) noted that the 'burden on higher courts will obviously be eased if there is an increase in the early identification of guilty pleas'. It was the unanimous opinion of all respondents to this review that late guilty pleas remain of most concern to criminal trial procedure in Australia, both in the higher and lower courts.

It is important to note that late guilty pleas may be entered at any time between the summary hearing and the trial date, and that not all late guilty pleas occur on the day of the trial itself. Although this report discusses the late guilty plea as occurring on the day of trial, in reality guilty pleas can be entered days or weeks before the trial is set to commence. In some cases, guilty pleas may be entered well in advance of the trial date. Data provided by the Queensland District Court for example, indicated that of the 42 trials resulting in a late guilty plea between 27 March and 5 May 2006, seven (17%) occurred on the day of trial, 12 (29%) occurred one to five days prior to the trial, three (7%) occurred within five and ten days and 19 (45%) occurred more than 10 days prior to the trial date.

In the opinion of most court services staff, the sooner a guilty plea is entered (i.e. the greater the amount of time before the trial), the more likely it is that the listing officers can replace its position on the criminal trial list with another trial. There was no agreed consensus across Australia as to how early is early enough, and the variations between the courts and states are due in part to varying listing practices. All agreed however that 'the longer the better' and most nominated periods in excess of three weeks. Significant lead time and notification are needed because listing officers must give consideration to the capacity of any newly listed trial to be prepared, at short notice, to proceed when closing a gap in the listing schedule. Such consideration must take into account the Crown's and defence's capacity to prepare the legal argument, organise and depose the witnesses and defendant and arrange for evidence and expert testimony. The reality, as indicated by the majority of respondents is that many gaps in the listing schedule remain vacant.

The consultations conducted for this review highlighted a variety of explanations for the prevalence of late guilty pleas. Perhaps the most commonly noted reason was attributed to last minute plea negotiations between defence and prosecuting counsel. Plea negotiation is a common part of the criminal trial process where the goal is to determine the appropriate manner in which matter should proceed, and the basis upon which a plea might be obtained. The discussions are held informally between counsel, often only within the days or weeks leading up to the trial listing date. Should counsel reach an agreed set of charges, consistent with the evidence in the case, a resolution may be found. Information obtained from the South Australian Legal Aid Commission indicated that the vast majority of guilty pleas entered on the day of trial were the result of plea negotiations where the defendant was afforded an opportunity to plead guilty to lesser or fewer charges.

The reasons indicated for plea negotiations most often being resolved within the few days prior to the trial listing date included:

- *late service of brief* – defence counsel received the necessary information relating to the matter only shortly before the trial and it is not until the full service of all relevant information that the defence will be adequately prepared to negotiate
- *late or limited disclosure of the full/final indictment* – prosecuting counsel did not disclose all details relevant to the indictment, or changed details of that indictment (and the charges included on the indictment) at the last minute
- *limited contact with the defendant* – not all defendants are easily accessible: some are in custody, others are on bail and difficult to contact or maintain contact with and defence counsel may have limited opportunity to discuss or have negotiations approved by the defendant until near the trial date
- *late examination of the brief, or late transfer of the brief to the private legal profession* – either counsel do not conduct a thorough examination of the brief in a timely fashion, or the brief is not sent out to a private practitioner until near the trial date
- *late commencement of negotiation* – neither defence nor prosecuting counsel had initiated the plea negotiations until the late in the process and limited preparation and communication on both sides may lead to last minute negotiations
- *limited authority to negotiate* – although early negotiations had begun, it was not until late in the process that senior counsel or other personnel with the authority to approve negotiations had become involved.

The second most widely recognised factor for late guilty pleas relates to the defendant and their role in the negotiation processes. It was frequently noted throughout the consultative review that often the defendant changed his/her instructions to counsel at the last minute, despite all other processes that had been undertaken. To understand this, it is necessary to appreciate that a guilty plea cannot be entered on behalf of a defendant without his/her expressed instructions. Regardless of any advice to the contrary, some defendants are simply reluctant to enter a guilty

plea until the trial becomes a real prospect. One respondent indicated the importance of appreciating the psychology of the criminal offender, and that the bulk of those who appear before the criminal justice system do not see efficiency of process as their priority. Some offenders simply delay the inevitable. In the opinion of another respondent, it is not 'until [the defendant] sees the whites of the judge's eyes' that they truly appreciate their predicament and decide to plead guilty. This was noted particularly in cases where the defendant was on bail and faced a high probability of imprisonment, or loss of a drivers licence for motor vehicle offences.

This research project did not interview defendants themselves as to the reasons for last minute changes in their plea. Instead anecdotal evidence of experienced practitioners who work on a daily basis with these issues was used. Offender psychology is important as one motivating factor because of the role the defendant plays in any decision to enter a guilty plea. There is reason however to suspect that some individuals, particularly those who are appearing as a defendant for the first time, are heavily reliant on the instruction of their legal counsel. Some of the factors highlighted for why a defendant might be advised to withhold a plea of guilty until the last minute include:

- at the time of summary hearing or committal, there was question as to the quality of the police evidence and scope for plea negotiation – defendants are advised to withhold a plea until the full details of the indictment are known
- there are limited incentives to plead guilty at an earlier time – although all jurisdictions offer sentence discounts for early guilty pleas, these discounts may not be incentive enough
- there is a risk, particularly in sexual assault cases, that the witnesses or other evidence will not be able to be produced and the matter will be withdrawn
- the longer a trial is delayed, the less credible and reliable the evidence becomes and the more likely the defendant is to be found not guilty – it is not uncommon for defendants to withhold a plea until the strength of the prosecution case has been revealed.

Another reason frequently noted concerned the fee structure for legal aid matters. Concerns were raised that the legal aid fee structure in some jurisdictions encourages counsel to take a matter to trial, rather than to seek earlier resolution. Legal aid, which funds the vast majority of criminal defendants, is provided through two primary mechanisms – a matter may be handled inhouse by employees of the Legal Aid Commission, or may be briefed out to private practitioners and members of the Bar. In the latter case, counsel will be remunerated according to an approved fee structure that is scaled to the level and complexity of the tasks required. Matters that result in an early guilty plea require less preparation than those taken to trial. Matters that are pleaded on the day of the trial are remunerated at a higher rate because there is an assumption that

matters that reach trial required significant pre-trial preparation. It was suggested by a number of respondents from a wide variety of agencies that the volume of late guilty pleas reflects the fee structure whereby private counsel prefer to proceed to and plead their client guilty at trial than to plead guilty earlier. One respondent from the private sector stated that the remuneration for legal aid matters was so small that no private practitioner could possibly survive in the profession if all matters were resolved prior to the trial date.

There is logic in a fee structure that remunerates according to the length of time or amount of work required in preparing a brief. Another respondent from the private sector noted that criticisms of the fee structure assume that all late guilty pleas are avoidable and are the responsibility of defence counsel, but that this is not always the case. In some cases, defence counsel may have prepared for trial under the expectation that the matter will proceed, but last minute plea negotiations or changes made by the defendant can prevent the trial from going ahead. For this respondent, there was a fine line between rewarding some defence counsel for disposing of a matter earlier and punishing others for issues or problems beyond their control.

It was beyond the scope of the present study to review and evaluate the fee structure of legal aid matters. Instead, this is highlighted as a continuing issue that some believe contributes to the prevalence of last minute guilty pleas. This is not a new issue, having been widely discussed in 1999 by the Standing Committee of Attorneys-General Working Group on Trial Procedure. In their recommendations they state:

> …we believe that legal aid commissions should consider the adoption of a more solution oriented approach to the grants of assistance rather than continuing with the traditional approach of funding the various stages of the criminal trial process (1999: 32–33)

Another reason noted during the consultations was the lack of incentives in the court listing system to encourage early guilty pleas. In Victoria for example, the County Court listing system is differentiated into streams according to the type of matter to be heard. Defendants who plead guilty enter a plea stream and their matter is adjourned for sentencing, while those who plead not guilty enter the trial stream. During the consultations in Victoria, it was indicated that the trial stream was more expeditious than the plea stream, and that those defendants who wanted an earlier outcome were better served by withholding a plea until the trial date. The defendant would then be sentenced at the scheduled trial date, which was likely to be many months before the same outcome would be achieved in the plea stream. The purpose of highlighting this is to illustrate that procedures implemented to streamline the criminal justice process may have generated disincentives for individuals to enter an early plea of guilty.

No case to prosecute (nolle prosequi, no bill)

A criminal matter that is withdrawn from prosecution is known as a *nolle prosequi* or *no bill*, a mechanism formalised under the state and territory criminal codes or public prosecution legislation. In Queensland for example, section 563 of the *Criminal Code 1899* defines a *nolle prosequi* as the mechanism by which 'A Crown Law Officer may inform any court, by writing under the officer's hand, that the Crown will not further proceed upon any indictment, or in relation to any charge contained in any indictment, then pending in the court'.

Typically, the decision to withdraw a matter is formalised by the Director of Public Prosecutions after consideration of the evidence. If the evidence is deemed insufficient, the matter is withdrawn. In some cases however, the decision to withdraw a criminal matter may not be the result of a lack of evidence, but difficulties in producing such evidence before the court. A common example of this occurs in sexual assault trials where a *nolle prosequi* is entered because the victim (or any other witness) refuses to participate or give evidence in a criminal trial hearing (Lievore 2005).

It should be noted that a *nolle prosequi* does not prevent the Crown from entering a new indictment, nor is it a discharge of the original offence: a *nolle prosequi* does not prove innocence on the matters to which it relates (see for example *Croome v. The Commonwealth* (1946) 73 CLR 583; 599 (HC); *Re Seidler* (1986) 1 Qd.R. 486; *Doyle* (1987) 30 ACR 379).

There are two key questions regarding the withdrawal of criminal matters that are of interest to this report:

- how is it that a matter, subsequently determined as having insufficient evidence, successfully proceeded to listing
- why is it that some matters are withdrawn at the last minute, not earlier, and was it possible to have withdrawn them at an earlier time.

The interviews conducted for this project point to two equally important answers to these questions. The first relates to the quality of the pre-trial processes that exist in a jurisdiction to test the tenability of a criminal matter before presentation at trial. The second relates to the quality and level of investment undertaken by the Crown to fully examine a matter before the trial date.

In the first case, it should be recalled that in both indictable and summary matters an accused person is presented before the Magistrates' Court for a summary hearing. For indictable matters, this is known as the committal hearing, designed 'to ensure that there was sufficient evidence to warrant an accused person being committed for trial in a superior court' (Coghlan 2001). It involves the presentation of the evidence supporting the prosecution case and in some circumstances the testing of that evidence by the defence. A summary of the committal proceedings in each state and territory is provided by the Working Group on Criminal Trial Procedure (1999: 27–29).

During the early 1990s there was significant debate surrounding the future of the committal hearing in the Australian criminal trial procedure (Dowd 1990). For some, the procedure had developed into nothing more than an unnecessary, additional hearing that could be avoided using alternative procedural mechanisms. Others saw the committal as a fundamental pillar of the criminal trial system that enabled both the prosecution and defence to assess the strength of the evidence and that resulted in a decision on whether a case was fit for trial by someone independent of the prosecution (Hidden 1990).

During the consultation process, several respondents raised concerns about the capacity of the committal process to identify cases that should not proceed to trial in the higher courts. Despite its original purpose, the committal process was seen as no longer delivering quality assessment of the evidence, ultimately leading to matters being committed for trial, but subsequently withdrawn. For the most part, the deficiencies in the committal system were attributed to external factors, such as limited or late disclosure, the promise of evidence that is not yet available, poorly prepared witness statements or incomplete evidence briefs. According to the respondents in this study, it has become commonplace for a matter to be committed to a higher court despite deficiencies in these areas.

The second issue raised related to the level of preparedness of the prosecution on the day of trial. It was suggested that *nolle prosequi* was often the result of late preparation by the Crown, and the identification of gaps in the prosecution case that could not be rectified. While it was not the object of this study to examine the procedures of the prosecuting agencies in case preparation, it was noted that, across the jurisdictions criminal matters were often not reviewed by senior prosecuting counsel until a few days prior to the trial listing. This was for two reasons:

- senior counsel employed within the DPP were busy dealing with other matters and could not afford the time to review the brief at an earlier stage
- the matter was briefed out to private counsel, but not until a short period before the trial, primarily because the cost to engage private practitioners was prohibitive, or private practitioners themselves were heavily booked and could not dedicate time to the brief until the days shortly before the trial.

It was the opinion of the majority of respondents that matters withdrawn from prosecution result primarily from limited or late preparation, that is, it is not until the days prior to the trial that a criminal matter is reviewed by an experienced senior legal practitioner. Thus it is not until then that problems in the Crown case are identified, and a withdrawal becomes necessary.

Discussion

This section has highlighted the reasons criminal matters are finalised without trial on or near the trial date. Finalisations result from two key factors, late guilty pleas and prosecution withdrawals. In terms of frequency, late guilty pleas constitute the bulk of all matters finalised without trial and a significant proportion of all matters that do not proceed to trial as scheduled. Understanding these factors and reducing the prevalence of late guilty pleas remains a priority of criminal trial reform in Australia.

The reasons highlighted for the high prevalence of late guilty pleas included:

- late service of brief to the defence
- late or limited disclosure of the full/final indictment
- limited contact with the defendant
- late examination of the brief by defence, or late transfer of the brief to the private legal profession
- late commencement of negotiation between defence and prosecution to secure a plea
- reluctance by the defendant to plead guilty until the last minute
- reluctance by defence counsel to seek an early guilty plea due to financial incentives.

The other method of finalisation identified in the review was *nolle prosequi* – withdrawal by the prosecution. Respondents highlighted pre-trial preparation as a key issue in explaining the withdrawal of criminal matters at the last minute. Matters often remain unscrutinised by senior prosecuting counsel and it is not until such scrutiny occurs that issues are identified that cannot be resolved and warrant withdrawal.

The reasons for adjournments

According to data provided by the each of the states and territories, approximately one in five criminal matters are adjourned and re-listed for trial. These rates vary across jurisdictions from 14 to 49 percent. These are known as ineffective trials in Britain (Home Office 2006b) and the interviews conducted across Australia highlighted several reasons for the prevalence of adjournments that could be grouped within two broad categories:

- adjournments resulting from the court's inability to proceed with the trial as scheduled
- adjournments resulting from Crown or defence inability to proceed to trial on the day of listing.

Trials not reached by the court

Across Australia the number of trials that fail to proceed because they were not reached by the court varies. Some jurisdictions had no trials adjourned due to the lack of court capacity in the reporting period, while in others the estimate was more than one in ten. The reasons the court may not reach a trial are varied and include:

- the court had listed more matters than it had the capacity to hear
- the court was not able to provide the necessary services for a listed trial, such as interpreter services or technological services to facilitate testimony and video linkup
- court personnel, including judicial officers and court staff were unexpectedly absent from the court (due to illness, etc).

Over-listing is practice used in some jurisdictions where the court intentionally schedules more trials than it has the capacity to hear in any one week. With high rates of adjournments and finalisations without trial, over-listing counterbalances those trials that do not proceed with a list that is likely to generate sufficient workload for the court. For example – assume that a court has a weekly listing capacity of 10 trial days (two judicial officers sitting for five days), and each trial has an estimated duration of one day resulting in a capacity to hear 10 trials per week. If only one in five (two trials) proceed according to schedule, with the remaining eight trials being adjourned, the court would utilise only one-fifth of the time it has allocated. To maximise the use of the court's capacity the trial schedule is over-listed so that five times as many trials are listed as the court has the capacity to hear. To achieve maximum utilisation of 10 full sitting days, 50 one-day trials will need to be listed.

In practice, the calculations involved in over-listing are more complicated than described above. Two variables – available sitting days and trial length – vary each week between trials and courts. Also, even trials that do not proceed require some judicial time to organise an adjournment or hear any applications as required. Using data provided by the Queensland District Court for example, over-listing can be demonstrated in practice. For the six week period between March and May 2006, there was an average of six trial judges available for 27 sitting days per week. An average of 26 trials were listed for a total of 75 sitting days per week. Each week the court was over-listed by a factor of 2.8.

As noted in the previous section only 14 percent of listed matters in the Queensland District Court proceeded to trial (equivalent to an average of four trials per week). Each week 10 sitting days were utilised for the four trials that actually proceeded. This means that although engaged in a practice of over-listing, which sees almost three times the number of sitting days scheduled than are available, the court sits for only an average of one third of the time it has allocated.

As a result of over-listing, some trials will fail to proceed because the trial itself was not reached by the court. Ideally, over-listing is undertaken using complex calculations that minimise the number of trials that are not reached by the court, but it is an inexact science. As highlighted in the data provided earlier, and by the respondents to this review, occasionally criminal trials are adjourned and re-listed because there were insufficient judicial officers or court time to hear the matter. Of course counting the 'not reached' matters as the responsibility of the court assumes that all matters not reached were in fact ready to proceed. But, given the high rate of late guilty pleas, withdrawals and adjournments, this is unlikely to be the case.

A successful listing system relies on the availability of judicial officers and court staff, and an accurate assessment of trial length as made in submissions by both Crown and defence counsel at the time of listing. In the first instance, judicial officers and court staff are equally susceptible to changes in their personal or professional circumstances that affect their availability. Any listing procedure that relies on predetermined judicial availability may be affected by last minute changes in any one or more of these areas.

The second situation – the underestimation of trial length – was noted by the respondents as more likely to result in changes to judicial availability. When listing a matter during the pre-trial process, judicial officers take submissions from both the Crown and defence on the estimated time required to hear each matter. Estimates will vary depending on the complexity of the legal argument and the number of witnesses to be called. Respondents noted that it was not uncommon for such estimates to be lower than the actual time required. When trials take a greater number of days than originally estimated, all other trials in the schedule are affected. Another option is to adjourn the trial as part heard and re-list it for another date. In any case, underestimation was primarily attributed to the lack of sufficient preparation and case assessment at the time of listing. Counsel who have not adequately assessed their cases at the time of listing will estimate trial length, but inadequately informed estimates are subject to significant modification.

Court resourcing also plays an important role in determining whether a matter, otherwise ready to proceed, does not proceed to trial. During the consultation process it was noted that some criminal trials cannot proceed because the resources needed to facilitate the trial were unavailable. Access to closed circuit television facilities and interpreters were among the factors noted by the respondents. Finally, the court may have difficulty convening a panel of jurors and in such cases, the trial is likely to be adjourned and re-listed.

Trials adjourned on request

A large proportion of those matters that do not proceed to trial are adjourned on request from either the Crown or defence. The reasons for such adjournments vary, but can be categorised into three broad types:

- matters that cannot proceed because one or more the parties (witnesses, defendants and legal counsel) are unavailable on the day of trial
- matters that cannot proceed because additional information (for example evidence, access to legal aid) is required
- matters that cannot proceed because further judicial processes (such as Basha inquiries and *voir dire* hearings) are required prior to the trial.

The most consistent finding as to the reasons trials are adjourned relates to the availability of key participants on the trial day. In the case of the defence, it was noted that a large number of trials failed to proceed because the defendant failed to appear. For the prosecution, the availability of key witnesses was also identified, with trial adjournments sought when witnesses had advised of their inability to attend, or simply did not appear.

Problems with the non-appearance of defendants and witnesses were regarded as a significant contributing factor across all states and territories. Several identified defendant groups were highlighted as being more likely to fail to appear. They included Indigenous defendants, those with a mental health problem, or those with prior experience in the criminal justice system (high volume recidivist offenders). The next chapter of this report details the barriers faced by victims and witnesses in the criminal trial process. It is sufficient here to recognise that the non-attendance of victims and witnesses may contribute to the number of trials that are adjourned.

In particular, respondents in the Northern Territory highlighted difficulties with Indigenous Australians, who make up the significant proportion of the clientele in the local criminal justice system. To understand these difficulties it is important to appreciate some of the cultural sensitivities that exist. When asked why Indigenous defendants might not appear in court on the day of trial, respondents stated several reasons:

- The criminal justice process is typically seen as a white European system that is secondary in importance to other cultural factors. An Indigenous person's moral obligation to family is typically regarded as higher in priority than their legal obligations to the criminal justice process. For example funerals are of particular importance in Aboriginal culture, and family members have specific moral obligations to participate.

- Indigenous offenders have limited understanding of the criminal justice process. Often they speak one of many Indigenous languages. Communicating the importance of their legal obligation to attend court may be difficult or misunderstood.
- Not all Indigenous Australians have a fixed or known address, or access to transportation facilities. Many reside a significant distance from the town centre or the location of the court house. Locating defendants in the time leading up to trial may be difficult.

Trials are also adjourned because either the defence or Crown were unable to attend on the trial date. For the most part, respondents noted that such circumstances were most likely to occur when counsel had double booked themselves. In a similar way that over-listing can result in matters being not reached, double booking within the legal services environment can result in adjournments where counsel are unavailable for any secondary trial. Counsel (both prosecution and defence) may organise to proceed with two or more trials in any one week, assuming that at least one of those trials will be adjourned. In the same way that the court attempts to maximise the utilisation of its judicial officers, legal practitioners may attempt to manage their case loads to maximise their own utility. On occasion, counsel is unable to attend a matter because an earlier matter was successful in progressing to trial.

While there are other, less benign reasons for a party to a criminal trial being unable to attend court, it is important not to forget that legal practitioners, witnesses and defendants are all susceptible to changes in life circumstances (such as illness) that prevent them from attending court on the day of listing.

The second reason for requested adjournments relates to the preparedness of either party to proceed to trial on the date scheduled. The consultations conducted for this review highlighted lack of preparedness as a significant contributing factor towards adjournment in all agencies and jurisdictions. Lack of preparedness includes:

- evidence not being available on the day of trial, particularly the case in trials where complex forensic evidence and expert testimony are required
- counsel not having adequate time to prepare a matter
- identification of issues relevant to the facts of the case and requiring further investigation late in the preparation process
- the defendant choosing to change counsel at the last minute, and new counsel yet to be appointed or, newly appointed counsel having had limited time to review the brief
- the defendant no longer being able to afford the costs associated with hiring private legal counsel, and thus appearing in court unrepresented
- a victim or witness no longer wishing to participate in the trial process but the prosecution not wishing to withdraw the matter.

The availability of forensic evidence and other specialist services was highlighted in all jurisdictions as a problem for complex criminal trials. Forensic evidence such as DNA analysis, uses complex methods requiring specialised testing facilities. The demand for such facilities is increasing, and the time taken to receive results may not mirror the timeframes within which the information is required by the court. Similarly, reports regarding cost estimates for damage, or medical reports for injured persons are also sometimes difficult to obtain prior to the trial date. Matters may successfully proceed through the initial hearings (summary or committal) on the assumption that the evidence will be available at trial date. It is only closer to the trial date that such issues are identified and adjournments are subsequently requested.

Not all evidentiary problems are the within the control of the Crown or the police. External factors may prohibit the timely delivery of forensic evidence. In the ACT for example, policing resources are provided by the Australian Federal Police (AFP) under the auspices of ACT Policing. Analysis of forensic evidence is coordinated by the AFP's central forensic laboratory which serves both the local ACT Policing unit and national AFP operations. In the wake of the 2004 bombings in Bali, a significant proportion of the AFP's forensic capabilities were directed at the identification of victims, at the expense of local ACT forensic needs. While the importance of the AFP's international role in conducting forensic analysis work at this time was acknowledged, such situations result in a significant backlog of evidence that is beyond the control of prosecuting counsel.

Changes to a defendant's legal situation are also cause for adjournment. This review notes that some adjournments are requested/granted by the court on the basis that a defendant is unrepresented. This occurs where a defendant opts to seek new representation, or where a client's ability to privately fund a matter changes and they are required to seek legal aid. A defendant may choose to obtain different defence counsel or seek legal aid funding at any time, and if such a decision is made near to the trial date, the court has no choice but to adjourn the matter so that new counsel may be identified and adequately briefed. During the consultations conducted for this review, it was suggested by several key respondents that such practices were particularly common amongst defendants who were well versed in the legal system, and who were stalling for time. One respondent provided anecdotal evidence of a regular client who frequently dismissed defence counsel on or just prior to the trial date so as to deliberately prolong their matter.

The final category of matters that fail to proceed on the day of listing include those where additional judicial processes are required before the matter can be taken to trial. Two prominent examples are *voir dire* hearings and Basha inquiries. A *voir dire* is a preliminary hearing in which the judge, in the absence of a jury, hears arguments relating to the admissibility of evidence. A Basha inquiry is a practice that has developed in most jurisdictions where pre-trial examination of the witness is undertaken by the judicial officer. Established in *R v Basha* (1989) 39 A Crim R

177, a Basha inquiry may be requested by the defence after additional evidence has come to light and after the accused has been committed for trial. A Basha inquiry is not a legal entitlement, but is likely to be granted in cases where an unfair trial would result from a the denial of such a proceeding. In the case of either a *voir dire* or Basha inquiry, applications must be lodged before the court for consideration. The issue in relation to trials that fail to proceed is that late applications for such procedures often result in the adjournment of the criminal matter until such hearings have been completed.

Summary

The reasons criminal trials do not proceed on the day of listing vary. The qualitative consultations highlighted two broad categories:

- matters finalised on or by the trial date
- matters that require adjournment and re-listing.

In the former are matters that are withdrawn from prosecution or resolved by way of a late guilty plea. Several reasons were highlighted as contributing to the high number of finalisations. Matters are typically withdrawn by the prosecution where there was insufficient evidence to prosecute. This includes matters where evidence was no longer available, as with victims and witnesses who no longer wish to participate in the trial process. Two factors were identified as contributing to the prevalence and lateness of prosecution withdrawals:

- limited investment in the preparation and review of the case material prior to the trial date
- late briefing to private counsel.

Late guilty pleas were also identified as a significant contributor to the number of matters finalised on or shortly before the trial date. The reasons for this included:

- defendants not wanting to plead guilty until the threat of a criminal trial becomes reality; this includes situations where the defendant is advised to wait until the evidence against him/her is fully identified
- defence counsel members not wanting to plead their client guilty until the trial day for financial motives
- defendants opting to plead guilty at trial to avoid the more time consuming processes of the plea and sentencing hearings
- pleas resulting from last minute negotiations between defence and Crown on the indictment.

The second of the two categories of matters that fail to proceed are those that require adjournment and re-listing. These matters constitute approximately 20 percent of the total number of trials listed each month. There are two primary categories of adjourned matters:

- those unable to be facilitated by the court – including matters not reached, or where the court was unable to provide the resources necessary for the commencement of the trial
- those adjourned on request from one or both of the parties.

The review identified pre-trial preparation as a significant contributing factor when adjournments are requested because one or both parties were not adequately prepared to proceed to trial. This was noted to have occurred when:

- the defendant or witnesses were unavailable or did not appear on the day of trial – this might be for legitimate reasons such as illness, or the defendant may have absconded, or in some cases, there were difficulties with the corrective services agency delivering the defendant to the court
- Crown or defence were unavailable to attend court at the scheduled listing. Often counsel were double booked for matters listed in the same week
- evidence was not yet available or had been delayed. This was primarily noted in relation to forensic evidence which can be costly and time consuming
- the defendant had opted to change his/her legal representation near to the trial date and new representation was being sought.

Factors underlying the reasons trials fail to proceed

In any consideration of matters that do not proceed to trial, it is sometimes easy to forget that adjournments are a fundamental component of the Australian criminal justice system. In essence, they provide a protection for both the defendant and the community by ensuring that defendants are convicted where there is sufficient evidence, or acquitted where there is not. In a report on reasons criminal trials are delayed, it should be recognised that not all adjournments are unnecessary and that the fine line between equity and efficiency in the criminal justice system requires careful consideration.

Despite these cautions however, the overwhelming majority of respondents to this study noted that the number of criminal matters that fail to proceed remains at unacceptably high levels. It was generally acknowledged that adjournments are requested more often than necessary and that both guilty pleas and withdrawals are entered far later than desirable. Inquiry should therefore not focus solely on the reasons a criminal trial is adjourned or withdrawn, but also on the underlying factors that contribute to the tardiness of such applications. This section highlights some of the key factors nominated by the respondents as contributing to the high levels of last minute applications for adjournment or finalisation.

These factors are broadly classified as either systemic – those resulting from inefficiencies in the trial processing system, or habitual – those resulting from the decisions and practices of the parties to that system.

Trial uncertainty

When asked why some criminal matters are not prepared (or adequately prepared) by the trial date, a frequent response from both prosecution and defence counsel related to trial certainty – that is, there is limited incentive to prepare a criminal trial if it is likely that it will fail to proceed.

This argument sounds circular – on the one hand trials often fail to proceed because of limited pre-trial preparation, but on the other hand limited pre-trial preparation results from the large number of trials that do not proceed. However, for each criminal matter there is a level of resource investment required from both the Crown and defence including the time required to prepare the matter, to brief and liaise with the client and witnesses and to pursue plea negotiations. These resources are limited and difficult to manage, particularly where counsel is managing several matters at a time. When a trial is unlikely to proceed on the day of listing, neither party is willing (or perhaps able) to invest such resources into its preparation. As a result, the matter is not prepared, or prepared only at the last minute and this may result in the late guilty plea, withdrawal, or identification of issues requiring further adjournments.

Respondents generally identified trial certainty as an important factor in reducing the number of trials that fail to proceed on the day of listing, particularly those that result from insufficient pre-trial preparation. Improving certainty will not however, be an easy task. Actions to improve both the systemic factors such as over-listing or habitual factors such as communication and disclosure are key priority areas.

Prosecution case uncertainty

Certainty in the prosecution case was highlighted by defence advocates as a critical factor in ensuring the early disposal of a criminal trial. Several respondents noted that it is not uncommon for the prosecution case, including the evidence to be tendered and even the charges included on the indictment, to be modified within a short period of time prior to the trial date. The prosecution brief is an evolving document that may be modified at any time prior to the initial trial hearing – even in the few days leading up to it – such that new charges may be added and old ones may be removed or changed. Moreover, in support of those charges, new evidence previously unseen by the defence may be produced. These last minute changes make it difficult for defence advocates to realistically assess their client's situation and therefore make them reluctant to pursue early negotiation to secure a plea. Instead, last minute modifications to the prosecution are most likely to result in:

- last minute negotiations on plea, sometimes on the day of the trial itself
- requests for adjournment, seeking further time to review the new charges against the defendant and the evidence tendered in support of those changes
- requests for additional judicial hearings, such as a Basha enquiry or *voir dire*.

It was indicated by many respondents to this review that having full knowledge of the entirety of the prosecution case well in advance of the trial date would assist in securing earlier and more timely disposition of some criminal matters. As long as the allegations against their client (including the evidence and even the charges to which they will face) remain uncertain, there is little incentive for either defence counsel or the defendant to consider early disposition, or proceed to trial on the scheduled trial date.

Prosecution charge uncertainty

Charge certainty refers to the charges against the defendant included on the indictment and the previous section highlighted how charges are frequently modified, and sometimes lessened in the lead up to the trial. The frequency with which such changes are made can raise suspicions about the quality or appropriateness of the original charges, or the quality of the evidence available to support those charges. Former NSW Director of Public Prosecutions Ian Temby QC noted (2001)

> [I]t is at least a possibility worthy of serious consideration that in a significant proportion of cases guilty pleas are not offered, or not offered at an early stage, because the prosecuting authorities have selected charges which are inappropriately heavy in the objective circumstances of the case.

The issue highlighted here is similar to several concerns raised by key stakeholders during the interviews conducted by the AIC. Several respondents suggested that it was common for police and prosecuting agencies to 'overcharge' defendants knowing that not all charges would survive the plea negotiation process, but that a conviction would still be secured, even if to a lesser charge. This practice is neither accepted nor condoned in any jurisdiction in Australia, but not all jurisdictions provide policy guidelines on the choice of charges (see Temby 2001). The Commonwealth Director of Public Prosecutions policy guidelines clearly state that 'under no circumstances should charges be laid with the intention of providing scope for subsequent charge bargaining'. In Victoria the guidelines focus on the decision to prosecute, not on the choice of charges.

Despite having policies and statements to the contrary, several respondents noted that there is nothing but good will to prevent the police and prosecution from overcharging. If such a practice does exist – and this report does not have any direct evidence of it – it may help to explain why so many criminal trials are resolved by guilty plea after last minute plea negotiations to lesser charges.

For the purpose of this discussion however, it is important to note that no defendant should be expected to plead guilty to charges for which they are not guilty. Nor is it the case that defence counsel should advise their client to plead guilty to charges not substantiated by the evidence. Rather, Temby (2001) argues that

> …prosecuting authorities across Australia should be encouraged to ensure that their policies and guidelines: (1) deal with the question of the choice of charges; (2) require prosecutors to ensure that the charge or charges laid adequately reflect the criminal conduct disclosed by admissible evidence, and will provide the court with an appropriate basis for sentencing; and (3) sanction discussions with defence counsel with a view to facilitating the appropriate choice of charges.

Limited or late disclosure

It has become apparent that *information* is key to the success or otherwise of a criminal trial. The more information available to the parties on or before the trial date, the more likely it is that the matter will proceed to trial. Disclosure is the broad area of legal practice that encompasses the rights and responsibilities of each party to provide information relevant to the prosecution of an accused person, where failure to disclose is likely to lead to an unfair trial. Associate Director of Public Prosecutions in South Australia, Wendy Abraham QC in her 2001 address to the Australian Institute of Judicial Administration noted that:

> It is well established and accepted that the disclosure of material which is in the possession of the prosecution which might be relevant to the defence case, is an important and fundamental ingredient of a fair trial. The failure of the prosecution to provide disclosure of such material may see a conviction overturned on appeal where a miscarriage of justice arises.

Although disclosure appears an important component of the criminal justice process, Abraham (2001) also noted that:

> [I]n Australia there are limited statutory requirements imposed on the prosecution to provide pre-trial disclosure to the defence. Largely the prosecution's disclosure obligations are governed by the common law and the various prosecution policies that have been published by each of the Directors of Public Prosecutions.

During the consultations for this report, the vast majority of stakeholders were in favour of full disclosure by the prosecution to the defence. Timely disclosure improves the quality of the pre-trial preparation process and increases the likelihood that a matter will be ready to proceed.

Not all parties, however, supported the notion of full disclosure. Those against suggest that full disclosure increases the evidentiary burden on the Crown to provide all information obtained during the course of the investigation to the defence, even if such information is irrelevant to the trial itself. One respondent stated that it was common for defence counsel to request information that was either not available or not of material importance to the issue of fact or law in dispute. By requesting such information, prosecution and defence were forced into a dialogue that often resulted in an adjournment – requested by the defence where it was believed that full preparation could not be made without full disclosure. To this end, those in opposition to full disclosure have warned that:

- such practices allow the accused to tailor his/her defence (rather than a true defence) to the evidence provided

- full disclosure has the potential to increase the length of criminal trials, both in terms of the time necessary for the preparation of a matter, and in the length of dispute over issues or problems that are not central to the trial itself.

This report is not intended to make recommendations relating to the disclosure obligations. This work has already been conducted (see for example Working Group on Criminal Trial Procedure 1999). Instead, this report notes that matters that do not commence on the day of initial listing are sometimes the result of delays generated by the lack of timely information disclosure between the Crown and defence. Clearly, prosecution disclosure is important in securing a fair trial. In 1999, a working group on criminal trial procedure made six recommendations regarding the obligations of prosecution disclosure. These were that:

- the prosecution obligation of disclosure should be given a statutory basis
- the statutory obligation should be specifically identified as applicable to both prosecutors and investigators
- internal disciplinary sanctions should exist in respect of investigators who fail to comply with their statutory obligations
- disclosure should be required prior to committal proceedings unless the requirement for disclosure is waived at the first or subsequent mention of the matter
- recognition should be given to the ongoing nature of the obligation
- the obligation could be expressed in terms similar to those contained in the policy promulgated by the Commonwealth Director of Public Prosecutions.

The defence has no such obligation to disclose information to the prosecution, although some have argued that defence disclosure is essential to any discussion of streamlining the criminal trial process (Rozenes 2001). Respondents to this review noted that cases most likely to proceed without delay are those where both the Crown and defence have communicated openly on the facts and evidence surrounding the prosecution and defence case.

The problem of enforcing defence disclosure comes primarily from an accused's right to silence, that Chief Judge Rozenes of the Victorian County Court (2001) notes is derived from a common law rule that:

> protects the accused from being required to cooperate with those who are investigating his/her conduct and, in the context of the criminal trials, encompasses the right to decline to indicate a line of defence before the close of the prosecution case or to make any admission of fact that may excuse the prosecution from proof of that fact.

To this end, defence disclosure is seen by many as an important step towards improving the pre-trial preparation of criminal matters, but is unlikely to be formalised in any way that contravenes the defendant's right to silence and the accusatorial nature of the criminal justice process. A collaborative effort by the Australian Directors of Public Prosecution and the National Directors of Legal Aid sought to develop a best practice model for the determination of indictable charges in 1998. The collaboration suggested that defence disclosure should be encouraged but limited to the requirements necessary for efficient and effective case management. They recommended that:

> [T]he critical features of the disclosures by the defence [should include] the requirements that the defence disclose what is not in dispute and respond with regard to specific defences. Such requirements relieve the Crown of the need to prove matters not in dispute, but do not detract from the essential character of the accusatorial system. Other than alibi and expert evidence we do not suggest that the defence should be required to disclose the evidence which it proposes to call. It must be recognised that a defendant should not be expected to identify the defence case to the same depth and breadth as the Crown.

Rozenes (2001) notes in relation to criminal trials, that 'nothing will be achieved unless counsel are well prepared' and that 'this in turn depends in most cases on the level of funding and court listing practices'. Preparation, as a fundamental requirement of an efficient criminal trial, rests on the timeliness and quality of the information shared between the Crown and defence.

Reduced efficacy of the committal process

As described earlier, the committal hearing is the first hearing for serious criminal matters. The hearing is generally in the Magistrates' Court, although more recently in some jurisdictions it has been partially replaced by 'hand-up' committals, or in rare cases bypassed by *ex officio* indictments. The purpose of the committal hearing is to test whether the evidence against the accused is sufficient to warrant an indictment in the higher courts. Pedley (1998) stated that 'the committal … plays an important role in filtering out some cases, testing the strength of the case and providing disclosure of the Crown case'.

Several respondents suggested that the committal process no longer delivers the same outcomes for the criminal trial as it once did. That is, for the reasons mentioned above, the committal process is no longer a mechanism for ensuring preparedness, disclosure and certainty. Instead, some practitioners have come to see the committal process as 'simply another hearing with little value to the trial process', because many matters continue to evade the filtering process and proceed to indictment without any true test of the evidence.

The future of the committal process has been heavily debated. The Working Group on Criminal Trial Procedure (1999: 29) argued that the committal process, although experiencing problems, was a necessary feature of the criminal trial process. They suggested that the 'implementation of an effective procedure of complete and early prosecution disclosure will justify a fresh approach to committals' and that 'the opportunity to cross examine key prosecution witnesses prior to trial often assists in the early resolution of matters'. Moreover, the group highlighted the importance of involvement by the Office of the Director of Public Prosecutions (ODPP) at the earliest possible opportunity, because 'unless the prosecutor has been substantially involved in the investigation and arrest, it is unlikely that the prosecutor would have the necessary familiarity with the available evidence to be able to decide whether to charge or what charges to lay' (1999: 30). Among the 12 recommendations for the future of the committal process, the Working Group states that:

- in complex cases the ODPP should be involved during the investigative process
- in all matters the ODPP should be involved in reviewing the charges laid by the police at the earliest possible opportunity
- legal aid should be made available to all persons unable to afford legal representation facing committal on serious indictable offences as soon as possible after charge.

Lack of seniority and experience in the legal profession

Several respondents noted that criminal justice agencies had suffered in recent years from the 'juniorisation' of their legal staff. That is, it was becoming increasingly difficult to attract and maintain qualified and experienced legal practitioners well versed in criminal trial procedure. Experienced practitioners have developed a sense of intuition about the likely outcome of a criminal matter and are well placed to thoroughly asses a brief. They are competent in their understanding of the law and what is needed to secure a positive outcome for their client and organisation. The overwhelming majority of respondents to this review regarded experience as an essential ingredient to an effective trial.

This diminished availability of senior, experienced legal professionals has been the result of several factors, not the least of which is the increasing cost associated with engaging professional and experienced legal practitioners. As publicly funded agencies, maintaining a core group of experienced practitioners as fulltime staff was noted by one respondent to be 'extremely difficult'. In response, systems have developed to give greater responsibility to junior practitioners in the carriage of a matter up to the trial date. This can include, but is not limited to, the committal hearing, plea negotiations and pre-trial conferences.

Senior counsel are often not engaged on a matter until the weeks, or days prior to the scheduled hearing. Respondents noted that:

- junior counsel are not often experienced enough to adequately or thoroughly assess the criminal brief, and it is not until the matter is handed to senior counsel that issues or problems are identified
- although often the first point of call for plea negotiations, junior counsel are not authorised to accept the final plea. This discourages early plea negotiations as opposing counsel see little benefit in engaging the matter until senior counsel are involved.

Limited communication between parties

Communication between defence and prosecution was frequently highlighted as an important factor associated with the late preparation of criminal trials. In the criminal justice system the defence and Crown are natural adversaries and communication between the parties is at times difficult to coordinate. Nonetheless, each party's capacity to prepare for a criminal matter is heavily reliant on their understanding and knowledge of the other's case.

Several stakeholders suggested that the relationship between the Crown and defence counsel could be enhanced and improved to maximise cooperation and communication. It was suggested that early communication between the parties was critical to the quality of and timeliness of case preparation.

It is equally important that the information shared between the parties is accurate and reliable. One criticism was that matters are often prepared by junior counsel and when the matter passes to senior counsel significant changes may be made to the indictment or prosecution case. As well as an increase in the levels and frequency of communication, it is also suggested that such practices should be undertaken alongside improvements in clarity and reliability of information. Communication between Crown and defence is not likely to serve any useful purpose if neither party has the authority to negotiate or make assurances as to the nature and reliability of that information.

Improving communication between the parties, in terms of the quantity, quality and timeliness of that communication will assist in the early disposition of criminal matters.

Limited incentives for early pleas of guilty

Late guilty pleas contribute significantly to the number of trials that fail to proceed on the day of listing, as described earlier. A key theme underlying these reasons was the lack of incentive for either the defendant or their counsel to seek speedy resolution to their matter. Any such incentive scheme must counteract incentives to withhold a plea, and be sufficient to entice the defendant to consider an early plea. There are several incentives for a defendant and his/her counsel to withhold a guilty plea:

- the longer the matter is active the more likely that evidence may be misplaced, or become less credible and therefore result in a positive plea negotiation outcome
- the possibility that the matter will be withdrawn, due to a lack of evidence or, as in sexual assault matters, the evidence cannot be produced
- the longer a matter is without adjudication, the longer the defendant can remain unsentenced – for defendants facing a term of incarceration, delays equate to more time in the community; for those expecting to lose their driver's licence, more time on the road
- the fee paid for legal aid matters is maximised if the defendant pleads guilty on the day of trial.

One mechanism used in all Australian jurisdictions to bring resolution to this problem is sentence discounting, whereby the sentence is reduced on the basis that the defendant pleaded guilty. It is a controversial issue across Australia because, as Fox and Freiberg (1999: 814) suggest:

> the tension between principle and pragmatism … is nowhere clearer than in the matter of the weight to be accorded to the fact than an offender has made a full confession and has pleaded guilty

Sentence discounts are awarded according to two factors – the level of an offender's contrition or remorse (as indicated by the plea) and the utilitarian benefit received by the community and the criminal justice system from that plea. The levels, extent and aspects of plea discounting have been heavily contested, and in recent years even the High Court of Australia has weighed in on the debate. In *Wong v The Queen* (2001) 207 CLR 584 Justices Gaudron, Gummow and Hayne disapproved of this structured, two stage discounting approach, suggesting that a mathematical method is likely to give rise to error and departs from basic sentencing principles (see Mildren 2006). Their view is that sentencing should result from 'intrinsic synthesis' where it is

> …the task of the sentencer to take account of all of the relevant factors and to arrive at a single result which takes due account of them all.

Nevertheless the majority judgement in *Wong* suggested that although structured sentencing was less than ideal, the 'indulgence in arithmetical deduction by the sentencing judge' is not forbidden, and it is now common for a sentencing judge to take into consideration both the utilitarian value and contrition in sentencing.

One year after *Wong*, the High Court revisited the issue of sentencing discounts in *Cameron v The Queen* (2002) 76 ALJR 382 where the court considered the fast track plea system operating in Western Australia. The majority judgment of Justices Gaudron, Gummow and Callinan recognised that discounts could be afforded on the basis of contrition and the utilitarian value of the plea, but were concerned that sentence discounts should not inadvertently penalise persons convicted at trial for contesting their charges. They stated that

> …the provision of a discount for a plea of guilty must not be, or appear to be, a judicial discouragement to an accused person against exercising rights to silence conferred by law or the right to put the prosecution to the proof of criminal accusations.

They suggested that this could be achieved by observing the pragmatic value of the early plea as an indication of the offender's willingness to facilitate the course of justice

> …[sentence] mitigation requires that the rationale for the rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of a willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing.

Two other cases in NSW and South Australia subsequently rejected the notion of pragmatism in *Cameron v The Queen*, arguing that the utilitarian benefit to the criminal justice system is still a viable consideration in sentencing discounts. In *R v Sharma* [2002] NSWCCA 142, the court held that the sentencing judge did not err in taking into consideration the utilitarian value of the plea as developed in *R v Thompson; R v Houlton* [2000] NSWCCA 309.

Both case law and legislation define the sentence discounting system in each state and territory. For the purposes of this report it is sufficient to recognise that the practice is widely utilised across Australia. The majority of respondents to this review indicated their support for the sentence discounting system. The Working Group on Criminal Trial Procedure (1999) suggested that all states and territories should consider the implementation of the fast track system operating in Western Australia. However, the same respondents felt that the system fails to deliver the necessary incentives to invoke an earlier plea of guilty for three main reasons:

- the discounting system was not transparent – that while judicial officers were encouraged to explicitly quantify the discount, there was often little difference in the sentence handed down from similar cases where no discount was given

- some judicial officers are believed to inflate head sentences to subsume much of the discount
- maximum discounts are usually applied when a defendant pleads guilty at the first available opportunity, but determination of first available opportunity varies.

All three criticisms relate to the capacity of the discounting system to encourage an early guilty plea. When the defendant or defence counsel remains sceptical about the discounts awarded for early guilty pleas, the decision might be to err on the side of caution and take the matter to trial. The alternative is for judicial officers to improve transparency and apply standard discounts graded and presented to the court on the basis of the attributes of each case. In such a system, it would be relatively easy for defence counsel to assess their client's situation and advise them accordingly. Moreover, it would help to ensure that like cases are treated alike. Justice Kirby's judgement in *Cameron* noted two controversial issues, the first relating to the transparency of the discount awarded by the sentencing judge. While recognising the potential pitfalls of a structured sentencing approach, he contended that

> …where a 'discount' for a particular consideration relevant to sentencing is appropriate, it is desirable that the fact and measure of the discount should be expressly identified. Unless this happens, there will be a danger that the lack of transparency, effectively concealed by judicial 'instinct', will render it impossible to know whether proper sentencing principles have been applied.

Some judicial officers consulted for this review expressed concerns about 'the transformation of sentencing from an art into a scientific formulation' resulting from a process forcing judicial officers to articulate the precise units of the discount. There is little doubt however, that sentence discounts will be most effective where the process is transparent and where defendants and defence counsel can adequately assess the probable outcome of an early plea. Achieving such transparency remains a difficult task.

The second issue highlighted by Kirby related to graded sentencing discounts in the context of the 'earliest reasonable opportunity'. Discounts afforded upon the basis of the utilitarian value of the early plea are maximised if the defendant pleads guilty at the earliest reasonable opportunity. In principle, this is the point in time at which the defendant was able to agree to the evidence presented by the prosecution and pleaded guilty to the charges. The earlier the guilty plea, the greater the utilitarian benefit delivered to the court and the community. The question is about when the opportunity to plead guilty is no longer at the 'earliest reasonable time'.

Respondents raised concerns about the strict interpretation of this issue because criminal matters are rarely static, and changes to the prosecution case may occur any time prior to, or on the trial date. Plea negotiations can occur as late as the day of trial itself, and often result in lesser or fewer charges. It can be argued that the time of any change to material facts, charges, or any other matter related to the indictment, is the earliest reasonable opportunity to plead guilty, but several respondents noted that this can lead to maximum utilitarian benefit being awarded where the defendant pleaded guilty at the latest possible opportunity.

In the view of defence counsel, there is no reason why the defendant should not be awarded the full utilitarian discount if the late guilty plea resulted from last minute negotiations with the Crown. This is particularly the case if the guilty plea results from substantial changes in the charges on the indictment. The defendant should not be penalised for not having pleaded guilty any earlier than the point at which the prosecution case was finalised. Justice Kirby stated that

> [T]he test is not the time when theoretically or physically a prisoner might have pleaded. The test is when it was reasonable, in all the circumstances and as a matter of practicality, to have expected a plea of guilty to be announced. That question is to be answered in a reasonable way, not mechanically or inflexibly.

While both transparency and the utilitarian principle of earliest reasonable opportunity remain contentious, the majority of respondents considered that:

- sentence discounts should remain as incentives for pleading guilty at an earlier stage
- defendants are more likely to plead guilty (or be advised to plead guilty) if the likely discount is adequate and identifiable during the early stages of the trial process
- a utilitarian benefit award should account for the actual savings to the criminal justice system, but that late guilty pleas afford little or no benefit and should not be rewarded accordingly
- should a late guilty plea result from changes in the indictment, defendants should not be penalised by a reduction in the utilitarian discount
- any effective system of discounts should be complemented by improvements in case and charge certainty to reduce ambiguity surrounding the earliest reasonable opportunity.

Ambiguity of probable sentencing outcome

Another concern raised was that of sentence indication, a practice that requires a judicial officer to provide a defendant during the pre-trial process with an indication of the sentence likely to be imposed by the court should they plead or be found guilty. The sentence indication scheme is proposed as a mechanism for promoting greater transparency in the sentencing process and providing the defence and defendant enough information to make decisions regarding an early plea.

In principle, sentence indication is about providing information to defendants regarding the 'benefits' likely to be received should they plead guilty at an earlier stage. Indication schemes are often discussed in connection with sentence discounting as a way of improving transparency and accountability in the sentencing process. It aims to provide incentives for a defendant to plead guilty earlier, or to persuade defendants that the benefits derived from an early plea outweigh the risks of going to trial and being found guilty. According to one respondent, sentencing indication is aimed at 'weeding out' those defendants who decide to take a chance at trial.

A formal system of sentencing indication was trialled during the mid-1990s in NSW in an effort to curb the growing number of late guilty pleas. In his interim evaluation of the scheme, Weatherburn (1995: 7) suggested that the program was developed under the premise that

> …some defendants proceed to trial only because they would prefer to plead not guilty and secure the chance of a full acquittal than face the sentence which they believe will be imposed on them if they plead guilty. If defendants in this situation could be persuaded to believe that a scheme had been introduced which guaranteed (or, at least provided strong assurance of) a much more lenient penalty in exchange for a plea of guilty than would be imposed upon conviction following a plea of not guilty, the proportion of them tempted to change their plea might increase.

In that same year Weatherburn, Matka and Lind (1995) published a final evaluation report that concluded that the sentencing indication scheme had failed to produce earlier and more frequent guilty pleas and provided no real benefit to those who pleaded guilty in terms of lesser sentences. However, in their summation the authors noted that despite the lack of statistical evidence, several stakeholders had expressed support for the program. They concluded that the program was more likely to be successful when lenient judicial officers were responsible for providing the sentence indications and that much of the criticism was based on the belief that defence utilisation of the program depended on the judicial officer assigned to the case – a greater number of early guilty pleas were entered when the judicial officer was seen as a 'light sentencer' (see comments by Sulan 2001).

Respondents' opinions were divided on the efficacy and likely effectiveness of such a program in promoting earlier pleas of guilty. Generally, defence counsel suggested that it would be a useful tool for advising their clients, but in light of the NSW trial, thought its success would be highly dependant on the judicial officer tasked with the role of indicating sentences.

One respondent from the judiciary considered that the principle of sentencing indication should not be abandoned although unsuccessfully implemented to date. In their opinion, a fundamental problem of the criminal trial processing system in Australia was the lack of appropriate information, clarity and consistency in the sentencing regimes of judicial officers, with defence counsel, prosecution and the defendant never being able to accurately assess the likely outcome of their case. Trials were frequently resolved at the last minute because of the uncertainty that surrounds sentencing. Improving certainty by ensuring that counsel have clear and appropriate information with which to advise their clients is a critical ingredient to a successful criminal trial process.

Not all respondents were of this view, with others noting that well trained and experienced legal professionals would not need sentencing indication as they would be experienced enough to assess their client's case without any indication from the court. For these respondents, lack of clarity and capacity to advise the client was a result of broader changes in the legal profession that could not be mended through judicial reform.

The future of sentence indication is uncertain. In light of the unsuccessful trial in NSW, it is unlikely that schemes will be implemented in the near future. In Victoria, the Sentencing Advisory Council has been tasked with investigating the viability of sentencing indication and is expected to advise the Victorian government in early 2007 (Victoria. Attorney-General 2005). One possible solution suggested by Sulan (2001) in his address to the Australian Institute of Judicial Administration was that

> [C]learly, achieving a larger percentage of guilty pleas on the basis of disparately shorter sentences is unacceptable. An alternative to such sentence indication might be for the court to allow suggested sentences to be put forward by counsel, by consent, and for the sentencing judge to indicate that that would be the sentence should the accused plead guilty on the facts as they stand. This would retain sentence discretion… yet limit judge shopping as the identity of the sentencing judge would be less relevant. At the same time… the obligations on the prosecution to achieve suitable outcomes in the interest of the State would maintain credibility in the system.

Limited disincentive for non-cooperation

Another issue raised throughout this review was the lack of sufficient disincentive for parties to procrastinate during the pre-trial process. Sanctions were mentioned as means through which disincentives for non-cooperation could be achieved. This is where the court is granted power to penalise parties for failing to adhere to and facilitate an adequate pre-trial preparation schedule. Sanctions on the defendant, defence counsel and prosecution are considered.

The Working Group on Criminal Trial Procedure (1999) highlighted the possibility of sanctions against the prosecution for late disclosure to the defence, or for the production of new evidence at trial that was not identified during pre-trial preparation.

> If an adjournment is required following the late production of evidence or through some other non-compliance by the prosecution, the court should be empowered to award costs of the adjournment and any other incidental costs against the prosecution…. [and that] the prosecution should only be entitled to lead the evidence if a reasonable explanation for its late production is provided or the interests of justice otherwise require that the prosecution be permitted to lead the evidence.

The success of such initiatives is heavily reliant on a willing and cooperative prosecution. Early prosecution disclosure and charge certainty are fundamental to securing a greater number of earlier guilty pleas. Sanctions against the prosecution as disincentives were indicated throughout this review as going hand in hand with proposed incentives for the defendant.

Sanctions against the defence are more difficult to devise and implement. Certainly, the Working Group on Criminal Trial Procedure (1999) favoured the utilisation of incentives rather than disincentives for promoting compliance by the defendant and defence counsel. They argued that sentence discounts should be viewed as the most practical method for rewarding defendants for their active participation in the pre-trial preparation process, but that smaller sentence discounts could be considered. This would limit the benefit where the court was not satisfied that full cooperation had been achieved. The working group stated that

> [W]hile we do not favour any attempt to fix a specific figure, in our view those who cooperate fully with [a] pre-trial regime should be entitled to a sentence discount if convicted… If a defendant fails to cooperate in any meaningful way, or only partially cooperates, the sentencing judge should be entitled to reduce the amount of discount or to decline to allow any discount… [and] If such a scheme is put in place, every defendant must be fully informed that a failure to cooperate may result in the loss of any sentencing discount that would otherwise be applicable… This obligation [should] rest with counsel to advise a defendant of the consequences of cooperation and lack of cooperation.

The working group also addressed several other possible sanctions against the defendant and their counsel, including:

- awarding costs against the defendant
- awarding costs against defence counsel
- exclusion of evidence if that would not result in an unfair trial
- restriction of the right to cross-examine
- comment by the judicial officer – this would require the judicial officer to comment on the conduct of either the prosecution or the defence in the presence of the jury
- Crown re-opening – where the prosecution is granted leave to re-open their case where the defendant failed to identify a specified defence, or nominated but subsequently changed that defence.

The working group did not support sanctions that resulted in penalising or awarding costs against the defendant (1999:51). As noted earlier, it is a fundamental principle of the Australian criminal justice system that the burden of proof rests with the prosecution and that the defendant has a right to silence. Sanctions against the defendant could be seen as imposing a level of obligation that contradicts these principles. It was the general consensus of the respondents to this review that incentives, rather than disincentives, should be used to encourage defendants to consider pleading guilty earlier. These incentives are likely to be most effective when used in combination with sanctions awarded against defence and prosecuting counsel who encourage late preparation, disclosure and negotiation.

Barriers for victims and witnesses

A frequently noted reason for an adjournment application was that a witness (including victims) did not appear on the day of the trial. While it is possible that the victim or witness simply forgot to attend the court at the specified time, other reasons were indicated throughout this review:

- they had a conflicting appointment or work commitment, or their personal situation was regarded as a higher priority
- they were unable to attend due to the financial burden of missing work or the travel costs associated with attending court
- they were anxious or concerned about their role in the trial process
- they had become disillusioned with the trial system and no longer wanted to participate.

To understand the complex array of reasons for a witness not appearing at the court on the day of trial, it is necessary to understand that witnesses and victims are a diverse group of individuals, with varying personal circumstances. They might include for example, a single mother with three children under the age of five, an elderly person with mobility limitations or a co-accused incarcerated in another state. Although it is impossible to identify the needs of each class of defendant, it was possible to identify three categories of witnesses that were frequently discussed as being the most problematic:

- *professional witnesses* – including investigating police officers and expert witnesses
- *willing but unable witnesses* – those who are unable to participate due to personal circumstances
- *disillusioned witnesses* – those who no longer wish to participate in the trial.

Professional witnesses were by far the most frequently cited as not appearing in court on the day of listing. This is not always of surprise to defence or prosecution, but advice of non-attendance is rarely provided to counsel in a timely fashion. Investigating police play a crucial role in court and without their testimony, it is almost impossible for the prosecution to proceed. Expert witnesses who provide information to the court in areas of their expertise are professionals, usually with fulltime employment and often from interstate or overseas and are not always easy to coordinate.

Despite these difficulties, the respondents noted that problems with expert and professional witnesses often emanate from limited or late communication with counsel. It was often the case that prosecution or defence counsel had only begun their communications with witnesses in the few weeks leading up to the trial date. By the time the witness identified their inability to attend court on the scheduled day it was too late to seek early leave to vacate the trial.

One respondent did note however, that although problems with professional witnesses were mostly the result of late preparation, there had also developed an ‘arrest-driven culture’ within the local police agency which counterbalanced the needs of the criminal justice system. In this respondent’s view, some police saw their responsibility as ending at the completion of investigation and arrest, and were ‘not always cooperative’ with prosecuting agencies during the trial.

The second category of witness included those members of the public who are willing to participate but unable to do so because of limitations in their personal or financial circumstances. Consider the example used earlier of a single mother with three children under the age of five who might find it difficult to arrange child care, or to fund the cost of travel to and from the court. While all jurisdictions offer witness assistance programs, respondents criticised such mechanisms as 'not going far enough to support witnesses as an integral feature in the delivery of justice'. One respondent suggested that support services had developed into a 'one size fits all model' that sees witnesses as subsidiary to the other key features of the trial process. It was suggested that 'more could be done to improve the facilitation of witnesses in criminal trials'.

The disillusioned witness is probably the most problematic of the three types identified. Reasons this might occur include:

- as a result of a previous negative experience in criminal court proceedings the witness no longer wishes to be involved
- the witness has had limited or no contact with the police, witness services, or legal counsel and feels isolated from the criminal trial procedure
- the witness has been inconvenienced by the trial process on prior occasions (perhaps as a result of last minute adjournments) and is sceptical of the certainty of any future proceedings.

These issues are easy to comprehend through examples. Suppose a rape victim was asked to give testimony and had prepared psychologically for the task. Then on the day of trial the prosecution and defence negotiate lesser charges on the basis that other evidence in the case could not be produced. Consider the psychological and emotional impact this might have on the victim who was not only unable to provide the testimony for which they had prepared, but also had to see the defendant no longer being convicted of the offence of which they were the victim. The impact of the trial process on victims as witnesses has been discussed in detail elsewhere (Lievore 2005; Stubbs 2003; Taylor & Joudo 2005).

Improving the experience of witnesses in the criminal trial process is likely to improve witness participation rates and decrease the number of adjournments requested through witness non-appearance. One respondent suggested that 'some witnesses draw a line … they will participate and cooperate with the system in so far as the system cooperates with them … if they feel isolated or used by the system as a piece of evidence rather than a person with legal rights, they are less likely to willingly cooperate'. It was also noted throughout the review that some victims and witnesses have unrealistic expectations of the trial process and are often dismayed at standard procedures. While practitioners are accustomed to significant delays, the public may find it difficult to comprehend that the prosecution of a simple assault can take more than 12 months.

It is important to note here that the role of the prosecution is to ensure the fair trial of the accused. They act on behalf of the Crown to prosecute alleged offenders – they are not victim advocates nor do they legally represent the victim at trial. Nevertheless, victims as witnesses play an important role in the criminal trial process. Their cooperation is essential and measures to improve their experiences should be explored. Another respondent, an advocate for the victims of crime, suggested that information is the key to achieving this. At a minimum, information should ensure that the victim is informed of the process of the trial including timelines, the possibility of charge and plea negotiation, and the likely outcome of such negotiations. The witness should be kept informed of the progress of any pre-trial preparation so that they are not left wondering about, or surprised at a matter's outcome.

Indigenous persons as participants in the criminal trial process were frequently mentioned in the Northern Territory and Western Australia as likely to not appear on the day of trial. This was for several reasons:

- they may live in remote and isolated locations, or travel extensively and have no fixed address; locating and transporting witnesses to and from the court is difficult
- they may have limited competence in written and spoken English, so communicating their rights and responsibilities in the criminal trial process may prove difficult
- limited capacity for communication reduces the effectiveness and appropriateness of witness and victims services
- community and cultural values may discourage witnesses from providing testimony against other Indigenous community members.

Respondents noted that the problems primarily lie in the criminal justice system's inability to service the needs of Indigenous persons as opposed to seeing Indigenous persons as the cause of the problems. More detailed analysis to assess the barriers faced by Indigenous participants in the criminal trial system will be a positive step towards the formulation of more appropriate and culturally sensitive mechanisms to improve Indigenous participation.

Future directions

Addressing the underlying factors

The previous section dealt with eleven factors identified in the consultations as contributing to trials that do not proceed as scheduled. These factors are similar to those canvassed by the Standing Committee of Attorneys-Generals Working Group on Criminal Trial Procedure in 1999. Both reviews highlight that any methods to reduce last minute adjournments and finalisations should address these factors. In summary, there are several key issues to consider:

- improving the quantity, quality and timeliness of information and communication between the investigating authorities, prosecution, defence and the court
- promoting earlier discussion of a guilty plea with the defendant, including the improvement of incentives for early guilty pleas and disincentives for the non-cooperation of legal counsel
- improving certainty in trial listings
- improving services for victims and witnesses and encouraging greater participation in the criminal trial process.

Improving information

Information is critical to the preparation of a criminal trial. Without it, one or more of the parties will be unable to proceed. Information consists of three key components:

- *the prosecution case* – information generated as evidence or statements by the police at the time of investigation, charge and post investigation and information generated by the prosecution during additional post-charge investigation processes
- *the defence case* – information obtained by defence counsel from the defendant, including a deposition (or version of events), witness statements, and instructions on plea
- *the court's knowledge* – information relating to the likely outcome of the trial such as sentence discounting and indication.

These three components outline the chronological stages of the trial process. Police statements, evidence and investigation notes are used to determine whether to proceed with an official charge. Once the charges have been decided and laid, this information is then passed to the defence through disclosure. The defence will undertake an examination of the disclosed material, depose the defendant and discuss the potential for a plea or negotiation. After discussions between prosecution and defence, the matter proceeds to trial. At trial, all information obtained by both parties is disclosed to the court and the matter is tried. Information held by the court relates to the probable sentencing outcome of a defendant if found guilty.

Information can also be judged by quality, quantity and timeliness. The overall consensus of respondents was that the greater the quality of information obtained and transferred

between the parties, the more prepared each will be to proceed to trial. For example, the better the quality of information available at the time of setting down the indictment, the more likely that the charges will remain consistent and the less likely that the prosecuting authority will be required to modify the indictment at the last minute. Conversely, the less information available at the time of charging, the more likely that additional or better quality information obtained later in the process will result in last minute changes.

Quantity of information was identified as important by respondents. More information was generally regarded as being useful, especially in matters where quality was not assessable in allowing for a more appropriate assessment and determination of relevant charges. Also, the quality and quantity of information disclosed to the defence will assist in improving the capacity to assess and prepare the defence case. The reliability of that information as it relates to the certainty of charges will also assist in the early identification of guilty pleas.

In some circumstances, quantity may be counterproductive to trial preparation where excessive and irrelevant amounts of information are requested or provided during disclosure. There was not one respondent to this review who believed that disclosure to the defence was unnecessary or unwarranted, but some argued that legislation or guidelines that require full disclosure may promote deliberate attempts by one party to overwhelm their opposition and stifle the trial process. Take for example a complex fraud or drug matter that involved thousands of hours of phone tapping – transcribed and amounting to thousands of pages in written form. If there is no dispute about the facts of the case, but rather a complex issue of law not identifiable in the transcripts, some might argue that the provision of such information is unnecessary to the outcome of the trial, and to request or supply it can result in significant delays. A similar issue noted during the consultations was that defence counsel may request the prosecution to disclose material that does not exist. Some respondents concluded that the defence often had unreasonable expectations of what the prosecution had available to them.

Improvements in information quality and quantity were regarded as having a positive effect on the outcomes of criminal trials. Timeliness was the third critical dimension. Charge certainty is likely to improve with improvements in the quality and quantity of information available to the charging authority. However, the quality of any information is useful only if it is available at the appropriate point in time. Charge certainty is unlikely to improve if quality information only becomes available after the setting of the charges and filing of the indictment. Similarly, any process of full disclosure is only effective if the information is provided in a timely fashion.

In calling for improvements in the timeliness of information sharing, it is important to note that a criminal brief is an evolving document – continually added to throughout the trial preparation process. It is unrealistic to expect that all information will be available when first needed. For example forensic evidence may be held up or difficult to obtain, and decisions must be made about how to proceed despite the limitations to the available information. Two things are needed to counterbalance these issues. First, an effort should be made not to proceed with a matter until the information is made available and second, any decisions to proceed with the preparation or negotiation of the matter in the absence of such information should be made by legal practitioners with the authority and experience to assess the issue of law relevant to the matter. The involvement of experienced legal practitioners earlier in the trial process will assist in providing the necessary legal assessment and quality control of critical issues. Several respondents highlighted the problems generated by early decisions by inexperienced or untrained practitioners who do not have the expertise to critically assess the legal ramifications of the available evidence. These respondents suggested that appropriately trained prosecuting personnel should oversee the setting of charges, filing of the indictment and plea negotiations as early as is practical.

The final form of information relevant to this discussion is that obtained by the defence from the defendant. The capacity of defence counsel to negotiate a plea and ensure the preparedness of any contested matter will depend on the level and frequency of contact with the defendant. Some respondents highlighted that defendants could be difficult to locate, but others attributed late negotiation to late communication with the defendant resulting from undue procrastination by counsel. Improvements in the timeliness of consultation with the defendant, and the quality of the information and instructions obtained will help to improve outcomes for criminal trials.

In summary, information is the key to trial success. Improving the quality, quantity and timeliness of that information is critical to improving the outcomes for criminal trials. This consultative review identified four key areas where quality, quantity and timeliness would result in improvements in trial preparation:

- improving the information available to the charging agency at the time of filing the indictment and setting the charges – this includes improvements in the quality of the police statement of facts and the evidence resulting from subsequent investigations. The decision on the charges to be laid against a defendant should be made by legal professionals with experience in reviewing and assessing the elements of law relevant to each matter. This critical examination of the information in conjunction with improvements in the quality of the information will improve charge certainty and enhance opportunities for earlier review of the criminal matter

- improving the quality, but more importantly, the timeliness of the information disclosed to the defence to ensure that negotiation and communication processes are timely and productive, and that both parties are focused on the issue of fact or law that is in dispute
- improving the quality of the information obtained by defence counsel from the defendant
- considering the potential for information regarding sentence discounting to be provided by the court to the defendant.

Improving communication

Generally, improvements in the quality and timeliness of the information shared during the criminal trial process are most likely to be effective when the level of communication between the parties is maximised. Information may be passed back and forth, but it is not until adequate communication is formalised that key issues and scope for negotiation can be discussed. Communication is considered separately from information because, as highlighted by the respondents to this review, the efficacy of any pre-trial preparation will depend on the quality and frequency of communication, regardless of the quality of the information available to each party. Prosecution may provide full disclosure to the defence, but it is not until the parties begin to discuss the matter that a resolution may be found.

Other respondents highlighted the impact of the adversarial nature of the criminal trial process in fostering a culture of independence that impedes the willingness of parties to engage in detailed communication. To some extent this is driven by the defendant's right to silence, which may result in the inability of defence counsel to engage in meaningful discussion. Despite this, respondents overwhelming noted increased communication and improved timeliness of communication as essential to improved outcomes in criminal trials.

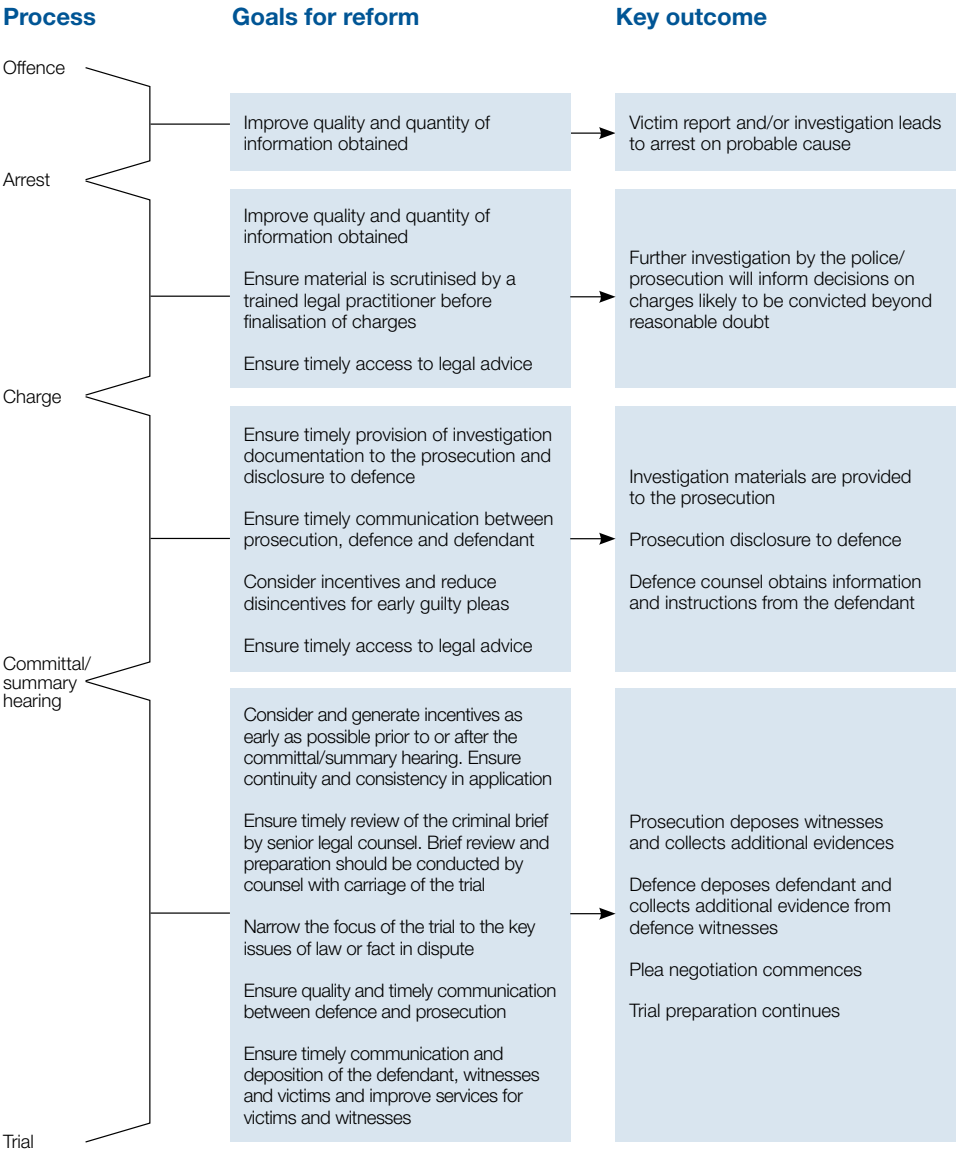
Improving certainty

This report has highlighted that charge and trial certainty are important elements in the improvement of the criminal trial process. Improvements in the quality control of the charging process to improve charge certainty were discussed earlier. Trial uncertainty is generated by two factors, however: trials that do not go ahead because of adjournments and late finalisations, and trials that do not go ahead due to trial listing systems that list more trials than can be heard. Uncertainty resulting from the former is likely to be improved by the methods already described. In the case of the latter, criminal courts need to be aware of the impact of over-listing systems. The need for over-listing would be reduced as a result of improvements in other areas, but listing formulas should be evaluated to ensure that they are not significantly contributing to trial uncertainty, and therefore to delay.

Improving victim and witness services

Finally, recognition of the importance of victims and witnesses in the trial process is an important feature of any effort to improve the outcomes of criminal trials. Reducing the burden of trial delay, improving support services, developing culturally appropriate services and improving the transference of information to victims or witnesses will improve participation, and reduce disillusionment of personnel.

Figure 2: Reform goals and outcomes



Front ending the system

When asked what mechanisms would improve the quality, quantity and timeliness of information and communication in the criminal trial process, the overwhelming response from the respondents to this review was about front ending. Front ending refers to the procedures that ensure timeliness. It was discussed both at the broader trial preparation level and at the discrete individual level of the organisation. Comments included:

> Front ending is about getting the prosecution and defence counsel to communicate earlier in the process.
>
> …the internal management of a criminal brief should be front ended so that experienced legal practitioners see and assess the evidence much earlier than in the week before the trial.
>
> … front ending is about making things happen earlier. It is about getting the parties to look at their files earlier in the process, communicate between each other, understand and comprehend the limitations of their cases well in advance of the trial day… the goal is that no one should be surprised by new information at the last minute.

Front ending is not a new concept to criminal trial practitioners. In many jurisdictions, practices and procedures have been developed in an attempt to achieve earlier discussion, case review and case management. This has been driven primarily from the judiciary. For example, in the Victorian Magistrates' Court a system of contest mentions is used to facilitate early discussion and to determine the likelihood of early resolution. Similarly the Victorian County Court has a system of case conferencing and directions hearings where the aim is to convene a meeting between the relevant parties to the trial and, according to Practice Note 1 of 1999

> [T]he Listing Judge may ask such questions of the parties and make such comments as the Judge thinks proper having regard to all the circumstances….. [The] Judge may, for example, draw out salient points, ensure that such points are fully explored, direct the discussion to important issues, keep matters on topic, and generally speaking, do all things necessary to fully explore the case at hand with a view to providing impartial assistance and guidance to the parties in discussions and thus helping them to reach a resolution in their discussions and reconciling their differences.

The stated aims of the case conference are to:

- subject the case to close and informed analysis at an early stage
- make an early identification of the issues involved in the case

- provide an opportunity for the defence to discuss with the prosecution responses to such offers
- provide an opportunity for the defence to make a plea offer and for the prosecution to respond to such offers
- achieve an early focus on the direction the case is likely to take
- enable full, frank and informed discussion between the parties under the impartial guidance of the listing judge.

It was not within the scope of this review to discuss every pre-trial case management process as they operate between courts and across each of the Australian states and territories. Instead, the processes and mechanisms considered good practice in pre-trial case management; and how practitioners view the utility of such processes and the problems encountered during their implementation and operation are considered.

Key goals of front ending

The previous section highlighted four key goals for reform in the criminal trial procedure. One of these was to improve the quality, quantity and timeliness of information and communication between the three key parties to the process, and this is probably most relevant to the front ending system. Respondents were asked to comment on what would be necessary to ensure that the front ending system was successful in improving quality, quantity and timeliness. The responses included ensuring:

- greater commitment from investigating authorities to improving the quality of information available at the time of arrest and charging. This may be done by setting minimum standards that state what should be included in the investigative materials
- that the prosecuting authority be involved as early in the trial process as possible, preferably prior to or at the time of charging
- that all charges laid are reviewed by experienced legal practitioners, preferably those who will take the matter to trial
- that legal representation is available at the earliest possible time after arrest and prior to charge
- that legal counsel begin plea discussions at the earliest possible convenience, preferably prior to the summary or committal hearing
- where a dispute is identified, it is focused on the key issues of fact or law – counsel should be encouraged to find and agree to as much common ground as possible

- when communication is undertaken between prosecution and defence counsel, it is between experienced practitioners with the authority to make decisions and with a commitment to expediency
- sufficient incentives to plead guilty are available and clearly articulated to the defendant at the earliest possible time – preferably at or before committal.

These factors were similar to the 56 recommendations made by the Working Group on Criminal Trial Procedure in 1999.

Problems in implementing a front ended system

Four key issues were identified as barriers to the successful operation of such front ending processes:

- *commitment* – the need for commitment to the process from all parties
- *utility* – the need to ensure that the processes are useful and not excessive or overdemanding
- *longevity* – the need to ensure that the procedures survive staffing and personnel changes
- *enforceability* – the need to ensure that participation and adherence to procedural rules can be enforced.

Commitment was the most frequently noted issue. The criticism is that pre-trial processes are typically managed by the judiciary, with little regard for the impact of such processes on each of the parties. The impetus is to reduce trial delay with the impact on judicial and court resources as the driving force. Without consultation and the commitment from all participating agencies and personnel however, the process, it was said, 'soon became another hearing where nothing was achieved'.

The next criticism of pre-trial management was that the process was not always useful to the parties in assisting pre-trial preparation. As commitment to the process diminished, adherence to the rules and principles of the process also declined. Some respondents noted that the prosecution or defence would 'send along junior counsel', without the authority to negotiate or discuss key elements of the case. Little could be achieved without the participation of senior counsel and the process then developed into 'a waste of time'. Similarly, without the commitment of defence practitioners who see the value of pre-trial processes, discussion may be stifled. One suggested that an uncooperative defence counsel may unnecessarily argue the protections afforded by the right to silence as a means of purposely delaying their trial.

Two key factors were often cited in relation to diminishing commitment to pre-trial management schemes: limited consultation during the development and the absence of key individuals with specific responsibility for the project. For example, it was noted that pre-trial management processes were developed by key individuals (judicial officers, directors of public prosecutions etc) and operated successfully until a change in personnel resulted in a change in practice. As new personnel, with different views about processes become involved, commitment to existing processes may decline. Despite being enshrined in practice directions, policies or guidelines, pre-trial processes are often driven by a few key personnel. A reliance on these individuals can be problematic for the efficacy and longevity of pre-trial procedures.

Finally, one respondent reported that 'once the process began to spiral downwards [in its efficacy]… there was little that could be done to bring it back'. This respondent echoed the sentiments of others that the pre-trial process, although mandated by the court, was rarely enforced with any useful system of sanctions. The court's inability or unwillingness to sanction non-compliance meant that deviation from standard practice would increase. The alternative argument was that the pre-trial case management process was developed as a mechanism to assist the parties rather than to enforce an additional set of rigid regulations to a criminal trial system that was far from rigid. For these respondents, each matter is unique and requires a unique approach. Sanctions limit flexibility.

Clearly, from the issues highlighted throughout this report, some system of front ending would ensure that earlier review and communication is undertaken in all contested criminal matters. Early disposition is likely to be achieved through a matrix of processes that address each of the relevant underlying factors, but the development of such as system may be difficult. It should be undertaken with full consultation, have appropriate succession planning mechanisms to ensure that the process survives any one individual or organisational culture, ensure that all parties are committed to the goals and aims of the process, and be backed up with a system to identify and quickly rectify lapses in commitment by all parties.

Initiatives overseas

The British criminal case management framework

In July 2005, British Lord Chief Justice released the second edition of the Criminal Case Management Framework in an effort to provide clearer understanding of what should be done at each stage of the criminal trial process (Home Office 2006a). The framework, in conjunction with the newly established criminal procedure rules represents the 'blueprint for transforming [the] vulnerable criminal justice system that has served for centuries, into a system which is appropriate for the 21st century' (2005: 6). It provides practitioners with guidance on how cases might be managed effectively and efficiently. According to the framework, 'the key to its success will be in the cooperation of the different agencies involved in the criminal justice system and of the legal profession and the acceptance of (a) active pre-trial case management by the court, (b) listing suited to local conditions and (c) tight control of the conduct of the trial itself' (2005: 3).

In terms of pre-trial case management, the framework provides for trial management to be handled by the court, but 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. At each pre-trial hearing prosecution and defence counsel are expected to provide answers the court in relation to whether:

- the prosecution has reviewed the charges and is satisfied that they remain appropriate
- the defendant has been properly advised in relation to credits for pleas of guilty and the consequences of failing to attend court when required.

The court is given the authority to:

- set a timetable for the preparation of the trial and completion of the case
- inquire into and take action in relation to any hearing which is wholly or partly ineffective or unnecessary
- continue with the pre-trial hearing in the absence of the defendant if appropriate
- take action against any party in relation to any failure to prepare or conduct the case properly.

The framework also recognises the need for a more independent approach to criminal trial listings, formulated in accordance with the needs of each court in each area. Listing clerks and judicial officers will be responsible for developing a listing practice that 'ensures that, as far as possible, all cases are brought before a hearing or trial with the minimum of delay and in accordance with the interests of justice… and consistent with the needs of the witnesses of the prosecution and defence' (2005: 5).

Finally, the court and its officers are given the responsibility to actively manage the criminal trial process. In doing so, it should expect that all persons in custody will be produced at court sufficiently in advance of the hearing, and that the defence and prosecution advocates will be prepared for the court to:

- investigate any failure to comply with pre-trial directions
- require, no later than the outset of the trial, the identification of the issues of the case
- make participants adhere to the timetable approved by the court and to take such action as may be necessary to ensure that the trial concludes within the time allowed
- require the provision of skeleton arguments for any points of law in advance of the hearing and to ensure that any oral submissions are made with economy
- curtail any examination or cross-examination submission or speech that is protracted or repetitive or oppressive (2005: 5).

The British framework is a significant step towards the streamlining of criminal trial processes.

The British No Witness No Justice initiative

In 2003, the No Witness, No Justice program was established in five pilot sites in England and Wales with the aim of testing the efficiency and effectiveness of new working practices to improve the levels of support and information given to victims and witnesses. The new working practices were delivered through witness care units that brought together police and Crown Prosecuting Service (CPS) to provide:

- a single point of contact for victims and witnesses, communicating with them through their preferred means of contact where possible
- a full needs assessment for all victims and witnesses in cases where defendants have pleaded not guilty, to identify specific support requirements such as child care, transport, language difficulties and medical issues and to highlight areas of concern, including intimidation
- witness care officers to steer individuals through the criminal justice process and to coordinate support services
- continuous review of victim and witness needs throughout the case by the CPS and police
- greater communication and contact with witnesses about cases including informing them of the case outcome or trial result, thanking them for their contribution to the case and offering post case support from the relevant support agency (Home Office 2003).

An independent evaluation of the project (Avail Consulting 2004) found that:

- witness attendance at court increased by about 20 percent
- the number of trials which had to be adjourned to a later date as a result of witness difficulties decreased by 27 percent
- the number of 'cracked' trials where the witness withdrew their statement or didn't attend decreased by 17 percent
- the number of 'positive' cracked trials due to late guilty pleas increased by 10 percent.

The Canadian backlog reduction initiative

In 2004, the Main Street Criminal Procedure Committee reviewed the backlog of criminal cases in the Vancouver Adult Criminal Court and a backlog reduction initiative was established to oversee improvements by:

- maximising the usage of courtroom capacity and the effective use of judicial resources
- ensuring compliance with the criminal caseflow management rules
- front ending the preparation of criminal trials, ensuring earlier disclosure, and ensuring more timely communication between Crown and defence counsel.

One year after the introduction of the initiative, the committee noted (2005) that despite the introduction of criminal caseflow management rules, trial date collapse remained at approximately 70 percent of all listed matters. This was higher than in most other provincial court locations in British Colombia, but was in part explained by the different local demographic of a higher proportion of defendants and witnesses with substance addiction and mental illness. The committee concluded that the rate of trial date collapse was unlikely to improve while non-appearance for witnesses and accused persons remained high.

The New Zealand status hearings initiative

Status hearings began in the Auckland District Court in 1995 as a form of a pre-trial conference aimed avoiding the inefficiencies created by late pleas of guilty and last minute withdrawals by the prosecution. They were modelled on the contest mention

system operating in the Victorian Magistrates' Court. At the time of evaluation, there was no legislative framework or national practice direction to govern the status hearing process, which had been implemented according to the different needs of each location (Searle et al. 2004). Generally the status hearing sought to encourage:

- early prosecution disclosure using a disclosure package to be provided by the police to the defence counsel before the status hearing
- sentencing indication upon request by the defendant at the time of the status hearing – although there was no obligation upon the judiciary to provide such indication and they would not do so without a full brief of the police summary of facts
- a narrowing of focus for prosecution and defence to concentrate on elements of fact or law relevant to the matter.

An evaluation of status hearings in New Zealand was mixed (Searle et al. 2004). In some courts, sentence indications were requested by the defendant in only 17 percent of cases. One in five hearings resulted in modifications to the charges, and 60 percent of cases were not resolved and went on to a defended trial. The evaluation did not assess whether the status hearing process resulted in improvements in last minute changes at the time of trial.

In addition to a quantitative analysis, the evaluation described participants' opinions and experiences of the status hearing process. The key conclusions where that:

- although not requested frequently, the sentencing indication scheme was generally considered an important mechanism for identifying early guilty pleas – members of the judiciary expressed some concern that the indication scheme should not be used to pressure a defendant into pleading guilty
- the process had the potential to breach a defendant's rights, particularly in relation to increasing pressure for counsel to identify earlier guilty pleas. Unrepresented defendants were considered particularly vulnerable
- national guidelines rather than statutory provisions should be used to develop the status hearings process. Statutory provisions were generally perceived as having the potential of reducing flexibility in the operation of the hearings
- status hearings were generally regarded as useful, but time consuming and resource intensive.

Resourcing for more effective 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. Often there is good reason a trial cannot proceed on the day of its scheduled listing:

- both defence and prosecuting counsel are tasked with the management of multiple cases at any one time – discerning which case needs their limited time and resources is difficult
- late production of evidence may be the result of external factors such as backlogs in forensic testing laboratories
- late briefing to private practitioners may be the only cost effective means of engaging the private profession for matters that the Director of Public Prosecutions or Legal Aid Commissions cannot complete inhouse
- cases not reached by the court may result from limited judicial or court resources.

Underlying each of these is a common factor – resourcing. It was not within the scope of the present study to assess the resourced capacity of criminal justice agencies in each state and territory, but resourcing is an important variable that should not be forgotten in any assessment of the problems underlying criminal trials. Moreover, resourcing is an important consideration in any proposal that seeks to improve the trial process. For example, increasing the level of pre-trial supervision by the court not only consumes additional judicial and court resources but increases the time required by defence and prosecuting counsel to appear for these supplementary processes. These additional, albeit short hearings, may result in significant savings later in the trial process, but they may not. In any case, innovations aimed at reducing the number of criminal trials that do not proceed should be undertaken with consideration of each participating agency's capacity to meet the required changes.

Evaluation and research

One judicial respondent to this review called for the further 'intellectualisation' of issues relevant to the criminal courts. It was suggested that any changes to the criminal trial system should be driven equally by academic debate as by practice. Moreover, innovative methods implemented by the courts and criminal trial practitioners should be subject to rigorous evaluation. A review of the Australian literature reveals only limited evaluations of the quality and effectiveness of newly implemented criminal trial procedures.

The work undertaken by the NSW Bureau of Crime Statistics and Research (Weatherburn 1995; Weatherburn, Matka and Lind 1995) remains the most rigorous of attempts to understand and quantify the effectiveness of innovations in criminal trial procedure. Trial procedure has received much attention in the form of commentary by judicial officers and practitioners (see discussions in the *Journal of judicial administration*), but empirical analysis is rarely utilised to test hypotheses and answer research questions.

In the words of one respondent,

> …we must ensure that when we start to utilise new practices, or stop using older ones, that the impact is measured in a systematic way … everyone will have a different experience of the trial procedure, but our reliance on the word of a minority is not in itself overly useful.

Research and evaluation are critical for ensuring the survival and effectiveness of reform in the criminal trial system. If implemented, front ending systems, discounting and indication schemes should be followed by evaluation and assessment. It is only with a continuing program of analysis that problems can be identified and solutions generated.

Appendix

Methodology

The aims of the present research project were to:

- estimate the proportion of criminal trials in the Australian lower and upper courts that do not proceed on the day of initial listing
- ascertain the reasons that trials do not proceed on the date of first listing.

The research is informed by a three staged research methodology consisting of:

- a national roundtable held on 27 September 2005
- qualitative interviews with key stakeholders from every Australian jurisdiction between November 2005 and February 2006
- data collection from lower and higher courts in all Australian jurisdictions between January and May 2006.

Roundtable

One representative from each state and territory was invited to participate in a roundtable convened by the AIC in Sydney on 27 September 2005. The purpose of the roundtable was to outline the reasons that criminal trials do not proceed on the day of initial listing and to develop a working plan for researching this topic in more detail. The working plan was to detail the methodology by which this research project would best achieve its aims. It was agreed that qualitative consultations, rather than a reliance on quantitative analysis would be most useful for this research. It was indicated that quantitative data would only report the aggregate reasons that criminal trials did not proceed (guilty plea, adjournment and withdrawal) but would not provide valuable information about the underlying reasons for criminal trial delay. The delegates agreed to establish a research reference committee to assist the AIC by facilitating the qualitative consultations and providing quantitative data where available.

Qualitative consultations

The AIC commenced consultations in each Australian state and territory in November 2005. The members of the research reference committee provided the names and contact details of at least one member from each of the following local agencies:

- court administration (including members from lower and higher court jurisdictions)
- the judiciary (including members from lower and higher court jurisdictions)
- Office of the Director of Public Prosecutions
- Office of Police Prosecutions
- legal aid and/or other public advocacy services
- the law society
- the bar association
- victim support and liaison officers.

It was important to obtain a broad spectrum of views and opinion. Each agency was invited to nominate a representative to participate in the AIC's consultations. Agencies which were not available to participate at the time specified by the AIC were invited to contribute by written response or teleconference interview. The bulk of the interviews were conducted face-to-face at a location nominated by the respondent and followed a semi-structured interview schedule focusing on three key discussion topics:

- the common reasons that criminal trials are adjourned or withdrawn, including the underlying factors
- the impact of trial adjournment on the agency and its clients
- methods or practices being used to prevent or reduce the number of trials that do not proceed on the day of initial listing.

The AIC conducted 42 agency interviews with 60 respondents across the eight Australian states and territories.

Quantitative data collection

A secondary aim of the consultation phase was to identify the availability of quantitative data on this topic. It was encouraging to note that most courts were already systematically collecting some data, although the data varied significantly between courts and locations. The AIC requested aggregate data from the Magistrates' and District Courts in each state and territory for January to March 2006. For those courts that were not currently collecting this data, a data collection instrument was devised and provided to the court for the collection of data for April and May 2006. The AIC received trial listing data from all states and territories across Australia. However, not all data, namely those provided by Victoria and the ACT, were able to be used in the main tables of this report.

There are several caveats that should be borne in mind when considering the aggregate quantitative data. First, the AIC requested and obtained existing data from most jurisdictions (with the exception of jurisdictions that collected the data using the AIC's data collection form). This means that the data were not collected using a standardised collection instrument, but rather for internal operational reporting requirements. Although every effort has been made to ensure that the quantitative data from across the states and territories are comparable, there may still be some discrepancies not accounted for. Comparative statements about the prevalence of trial adjournment between states and territories must be made with caution.

Second, and unless otherwise noted, the data provided by the states and territories pertain to the central local or District courts and therefore may not accurately reflect the experience of other metropolitan, regional or remote circuit court locations within those jurisdictions. During the consultations, respondents were asked to comment where possible, on the extent to which the experience of other courts was different from the central court. Respondents generally reported that the reasons criminal trials are adjourned or withdrawn are similar to the central court. Nonetheless, previous overseas studies (see Whittaker et al. 1997) have indicated significant differences between court locations.

References

All URLs were correct at 14 November 2006

Abraham W 2001. The duty of disclosure on the prosecution. Presented at the Australian Institute of Judicial Administration Reform of Criminal Trial Procedure Conference. http://www.aija.org.au/ctr/ABRAHAM.HTM

Australian Bureau of Statistics (ABS) 2006. *Criminal courts, Australia*. ABS cat. no. 4513.0. Canberra: ABS

Avail Consulting 2004. *No Witness, No Justice: pilot evaluation final report*. London: Avail Consulting http://www.cps.gov.uk/publications/docs/NWNJ_executive_summary_291004.pdf

Chan J & Barnes L 1995. *The price of justice: lengthy criminal trials in Australia*. Sydney: Hawkins Press

Coghlan P 2001. Committal – post committal. Presented at the Australian Institute of Judicial Administration Reform of Criminal Trial Procedure Conference. http://www.aija.org.au/ctr/COGHLAN.HTM

County Court of Victoria 2000. *Annual report 1 July 1999 to 30 June 2000*. Melbourne: the Court

Dowd JRA 1990. Committal reform: radical or evolutionary change? *Current issues in criminal justice* 2(2): 10–18

Fox R & Freiberg A 1999. *Sentencing: state and federal law in Victoria*, 2nd ed. South Melbourne: Oxford University Press

Great Britain. Home Office 2006a. *Criminal case management framework.* London: Home Office. www.cjsonline.gov.uk/framework

Great Britain. Home Office 2006b. *Departmental report 2004–2005*. London: Home Office. http://www.homeoffice.gov.uk/documents/annual-report-0405/

Great Britain. Home Office 2003. *No witness no justice.* http://www.cps.gov.uk/publications/communications/fs_nwnj.html

Hidden PJ 1990. Committal for trial and pretrial disclosure. *Current issues in criminal justice* 2(2): 19–25

Karpin A 1990. Delays in local courts. *Current issues in criminal justice* 2(1): 49–58

Lievore D 2005. Prosecutorial decisions in adult sexual assault cases. *Trends & issues in crime and criminal justice* no. 291. http://www.aic.gov.au/publications/tandi2/tandi291.html

Main Street Criminal Procedure Committee 2005. *Report on backlog in Vancouver Adult Criminal Court.* Vancouver BC: Provincial Court of British Colombia. http://www.provincialcourt.bc.ca/downloads/pdf/MainStreetCriminalProcedureCommitteeReportonBacklog.pdf

Mildren D 2006. Intuitive synthesis or structured approach. Paper presented at Sentencing: principles, perspectives and possibilities conference, Australian National University 10–12 February 2006. http://law.anu.edu.au/nissl/Mildren.pdf

New South Wales. Bureau of Crime Statistics and Research (BOCSAR) 2005. *New South Wales criminal court statistics 2004*. Sydney: BOCSAR. http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CCS04.pdf/$file/CCS04.pdf

Pedley M 1998. The problems with court rules and procedure in criminal cases: a prosecution perspective. Paper presented at Reform of Court Rules and Procedures in Criminal Cases Conference, Australian Institute of Judicial Administration, 3–4 July 1998

Redfern Legal Centre 2002. *The law handbook: your practical guide to the law in New South Wales*, 8th ed. Redfern: RLC

Rozenes M 2001. The impetus for change. Presented at the Reform of Criminal Trial Procedure Conference, Australian Institute of Judicial Administration. http://www.aija.org.au/ctr/ROZENES.HTM

Searle W et al. 2004. *Status hearings evaluation: a New Zealand study of pre-trial hearings in criminal cases.* Wellington: Ministry of Justice and Law Commission. http://www.justice.govt.nz/pubs/reports/2004/status-hearings-evaluation/executivesummary.html

Standing Committee of Attorneys-General. Working Group on Trial Procedure 1999. *Report.* Canberra: Standing Committee of Attorneys-General. http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentPersonal/(A0E22772974CC5513F69378CCFFF57C2)~SCAG.pdf/$file/SCAG.pdf

Steering Committee for the Review of Government Services Provision (SCRGS) 2006. *Report on government services 2005.* Melbourne: Productivity Commission

Stubbs J 2003. Sexual assault, criminal justice and law and order. *Women against violence* no.14: 14–26

Sulan JR 2001. Defence and legal aid. Presented at the Australian Institute of Judicial Administration Reform of Criminal Trial Procedure Conference. http://www.aija.org.au/ctr/SULAN.HTM

Taylor N & Joudo J 2005. *The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study.* Research and public policy series no. 68. Canberra: Australian Institute of Criminology. http://www.aic.gov.au/publications/rpp/68/index.html

Temby I 2001. Prosecution discretion and the use of appropriate charges. Presented at the Australian Institute of Judicial Administration Reform of Criminal Trial Procedure Conference. http://www.aija.org.au/ctr/TEMBY.HTM

Victoria. Attorney-General 2005. Council to advise on sentence indications and discounts. *Media release* 16 September 2005

Weatherburn D 1996. Measuring trial court performance: indicators for trial case processing. *Crime and justice bulletin* no. 30. http://www.agd.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb30.pdf/$file/cjb30.pdf

Weatherburn DJ 1995. *Sentence Indication Scheme evaluation: interim report: the impact of the NSW Sentence Indication Scheme on plea rates and case delay.* Sydney: BOCSAR. http://www.agd.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/R37.pdf/$FILE/R37.pdf

Weatherburn D & Baker J 2000a. Delays in trial case processing: an empirical analysis of delay in the NSW district criminal court. *Journal of judicial administration* 10: 6–24

Weatherburn D & Baker J 2000b. *Managing trial court delay: an analysis of trial case processing in the NSW district criminal court.* Sydney: Bureau of Crime Statistics and Research

Weatherburn D & Lind B 1996. Sentence disparity, judge shopping and trial court delay. *Australian and New Zealand journal of criminology* 29: 147–165

Weatherburn D, Matka E & Lind B 1995. *Sentence indication scheme evaluation: final report.* Sydney: Bureau of Crime Statistics and Research. http://www.agd.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/L10.pdf/$FILE/L10.pdf

Weinberg M 2001. The criminal trial process and the problem of delay. Presented at the Australian Institute of Judicial Administration Reform of Criminal Trial Procedure Conference. http://www.aija.org.au/ctr/WEINBERG.HTM

Whittaker C et al.1997. *Managing the courts effectively: the reasons for adjournments in magistrates' courts.* London: Home Office

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Why do so many criminal trials fail to proceed on the day they are listed? Each year in Australia approximately 770,000 new matters are lodged in criminal courts. The majority never proceed to trial because the defendant pleads guilty, but of those that do, more than half fail to proceed as scheduled. This report is an examination of the reasons underlying this ineffective use of court resources. After an analysis of data about trials and extensive interviews with court administrators, it finds that those trials that do not proceed can be placed into two categories: those trials that are finalised on or near the trial date either by way of late guilty plea or late withdrawal by the prosecution, and those trials that are adjourned and re-listed. While it finds that some delays will be inevitable, the report builds on recommendations made by a working group of the Standing Committee of Attorneys-General to suggest ways of reducing the backlog of criminal trials across Australia.