PART TWO: Work Practices—Disposition of Cases

Work practices are mixture of institutions and those who work within them: in this section we provide an overview of the most salient elements: types of lawyer, public defender programmes, plea bargaining, administrative justice approaches aligned with decriminalization. These are not mutually exclusive and indeed may be used in conjunction with each other. They are presented separately for analytical purposes.

A. Type of Lawyer Used in Criminal Cases and Costs of Their Use

To an external observer, the legal profession may appear relatively homogeneous, which on closer examination is not the case. One of the first studies looked at the social structure of the bar in Chicago. When looking from the perspective of client types, it was clear that the profession divided into two hemispheres. On one side were the corporate lawyers, those undertaking securities, banking, and other kinds of corporate transactions; on the other were the personal plight lawyers, those who acted primarily for individuals in such matters as divorce, property, and of course crime. The distinctions between the two hemispheres were such that they were educated in different law schools—national versus local—and came from different socio-economic (and sometimes ethnic) backgrounds. The only shared feature was that they were both termed attorneys.[122] Corporate lawyers typically practise in large law firms, while criminal lawyers are in small firms or practise as sole practitioners. Nevertheless, the personal plight hemisphere contains more lawyers by number than the corporate. This type of hemispherical division has been found to be replicated in a number of countries including the UK.

It is arguable that in the UK the present legal aid system is geared towards the needs of lawyers rather than the delivery of quick and cost effective justice to the public.[123] An illustration being a recent investigation by the Legal Services Commission (LSC), which discovered 120 legal practices specialising in asylum cases, had overcharged the government by millions of pounds.[124] Some of this has been recouped and in addition a new deal is being implemented with barristers bringing a junior's pay down to £80,000 pa and a QC's to £240,00 pa. Furthermore the LSC plans to introduce fixed fees for police station work, which also could include rates cuts.[125]

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[122] Heinz J. and Laumann. E. (1982) *Chicago Lawyers: The Social Structure of the Bar* (ABF: Chicago)

[123] Sir David Clementi, quoting the DCA (Department for Constitutional Affairs (2003) *Competition and Regulation in the Legal Services Market* (London: DCA) described the Profession as "outdated, inflexible, over complex and insufficiently accountable or transparent" (*Review Of The Regulatory Framework For Legal Services In England And Wale*s Dec. 2004) and noted artificial barriers and restrictive practices, including the need to employ a solicitor outside the court and a barrister inside despite much common training. The Review is available at www.legal-services-review.org.uk/content/report/report-chap.pdf

[124] Oxford Prospects) Legal Services Commission website, trade news www.oxfordprospect.co.uk/Legal%20Aid.htm.

[125] Rohan, P. (2005) "Fixed Fees for Crime Work on the Way" 102:35 *Law Society Gazette* 15th September 1 and 3.

Outsourcing of services, as the story of Railtrack tells, is not always a good way to control costs and maintain quality.[126] And it may be that part of the solution is, where possible, to bring services in-house. An examination of the fees paid to various types of lawyers in a number of jurisdictions will provide information and points of comparison for fees paid to lawyers in the UK and allow some tentative conclusions to be drawn about the costs of use of particular types of lawyer in the range of criminal law cases.

> There is an increasing realisation that fee structures can have a major effect on not only the cost but also the quantity and quality of legally aided work.[127] The relationship between an attorney's compensation and the quality of his or her representation cannot be ignored.[128]

The Goriely et al study figures (in sterling) for expenditure on criminal legal aid *per capita* of the population, demonstrates that costs of representation account for the majority of spend. [129]

Table Nine: Per Capita Spending on Criminal Legal Aid in England and Wales, Scotland and the Netherlands.

	England and Wales	Scotland	The Netherlands
Population (1991)	51,099,000	51,107,000	15,010,000
Representation in jury courts	£5.76	£4.79	nil*
Representation in non-jury courts	£3.16	£10.32	£1.41
Court duty solicitor schemes	£0.24	£0.18	n/a
Assistance at Police stations	£1.34	n/a	n/a
Advice	£0.47	£1.36	£0.16
Appeals	£0.25	£0.29	£0.20
TOTAL	£11.22	£16.94	£1.77
Less contributions	£0.08	nil	Nil
TOTAL NET COSTS	**£11.14**	**£16.94**	**£1.77**

*The Netherlands do not have jury trials.

Though these figures are from the mid 1990's they are still relevant in as indicative of current trends.

(i) *United States*

Numbers of lawyers in the US are among the highest in the world as the figures from the Bureau of Labor Statistics indicate:[130]

Table Ten: US Number of Lawyers

Employment (1)	Employment RSE (3)	Mean hourly wage	Mean annual wage (2)	Wage RSE (3)
528,270	1.0 %	$53.17	$110,590	1.1 %

[126] See, for example, Collins, H. (2002) Railtrack and the Future An LFIG Position Paper at www.lfig.org/downloads/future-of-railtrack.doc. Accessed 25.11.2005

[127] Goriely, *et al* supra n 19 at 55.

[128] Florida Supreme Court as quoted by Boruchowitz, B. (1997) "Lessons from the United States' Public Defender Experience" available at: http://faculty.law.ubc.ca/ilac/papers/02%20Boruchowitz.html

[129] Goriely, *et al* supra n 19 at 18.

[130] Full statistics for area and type of occupation are found at Appendix 2

Percentile wage estimates for this occupation:

Table Eleven: US Lawyers Percentile Wage Estimates

Percentile	10%	25%	50% (Median)	75%	90%
Hourly Wage	$23.38	$32.00	$46.83	(5)	(5)
Annual Wage (2)	$48,630	$66,550	$97,420	(5)	(5)

(source: www.bls.gov/oes/current/oes231011.htm)

Moreover, earnings are varied among different types of lawyers.

Some scholars have argued that criminal lawyers do not reflect the best standards of the bar.[131] Certainly there have been scandals, as Bogira's book describes. But with the variety of associations and greater oversight by different agencies, standards have improved. Those working in the area of indigent defence are generally lower-paid as they have to negotiate with the state, as guardian of the public purse, for their rates. The example of indigent defence lawyers in Massachusetts shows the tensions. In July 2005 defence lawyers went on strike, complaining about low rates of remuneration, refusing to take court appointments for indigent defendants. Approximately 600 defendants were left without counsel. The hourly rates for defence counsel had been at $30 to $40 per hour, among the lowest in the country, for some years. As a result of the strike action, the state legislature approved new rates of between $50 to $100 per hour and raised the number of public defenders by 130.[132] Although the situation in Massachusetts was extreme, it has resonated in many other states.

(ii) *France:*
The situation in civil code countries is different to the common law one. In France there are a number of categories within the legal profession, including *avocats, jurists,* and *huissiers.* For this report *avocats* are the key lawyers, ie, those that represent clients in court. Note that the latest available statistics are from 2002. In total there are 39,454 *avocats* of whom 39.4% are based in Paris.[133] Every other major city in France registers less that 5% of the total. With a population of over 60 million, there are 65.4 lawyers per 100,000 people nationally. Within Paris the figure rises to 731 per 100,000.[134] The majority of *avocats* are generalists: only 13,117 are certified as specialists.[135]

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[131] Carlin, J. (1962) *Lawyers on Their Own* (Rutgers University Press: New Brunswick); Carlin, J. (1966) *Lawyers' Ethics a Survey of the New York City* (Russell Sage Foundation: New York); Feeley, M. (1979) *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (Russell Sage Foundation: New York)

[132] NACDL (2005) "Massachusetts Adopts Significant Reform", 16 September www.nacdl.org/public.nsf/DefenseUpdates/mass021

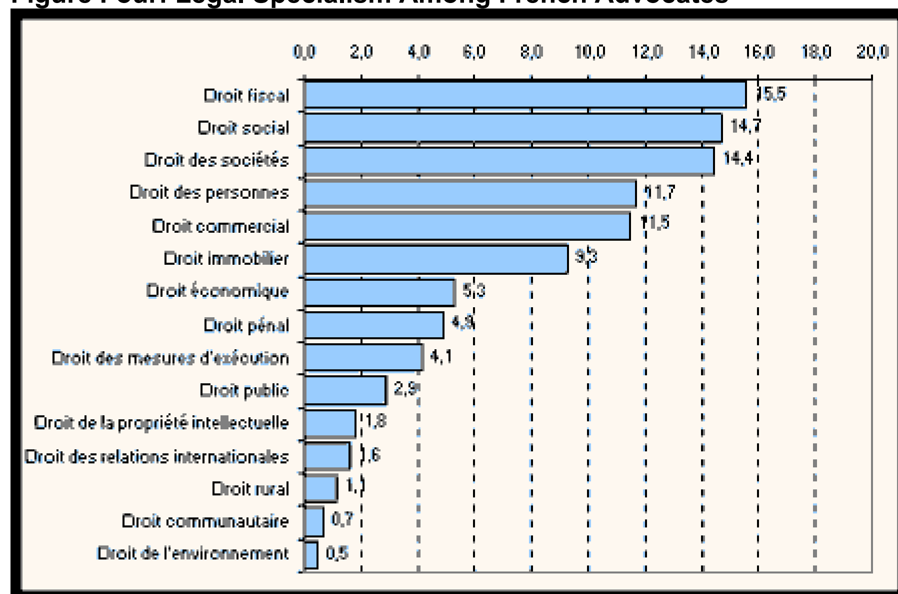
[133] French Ministry of Justice (2002) "Statistique Sur La Profession D'avocat" www.justice.gouv.fr/publicat/statsavocats/statsavocats1.htm#11

[134] Note that the total number of *avocats* has risen from 32,000 in 1996 to 39,454 in 2002—quite a rapid rate of growth.

[135] French Ministry of Justice (2002) "Statistique Sur La Profession D'avocat" www.justice.gouv.fr/publicat/statsavocats/statsavocats4.htm#42

The following figure provides the breakdown of specialisations among *avocats.*[136]

Figure Four: Legal Specialism Among French Advocates



The figure clearly shows that "*droit penal*" (criminal law) only takes a small proportion of *avocats* at less than 5%.

(iii) Australia:

Australia has 36,124 solicitors and barristers, roughly one lawyer per 550 people.[137] Commercial and property work reported the highest numbers of lawyers' practices. Australia's 191 community legal centres and 8 legal aid authorities employed 1,323 lawyers; in addition, 1,325 lawyers did volunteer work at the community legal centres. Government funding amounted to Aus$366.8 million for the centres and authorities.

(iv) *New Zealand*

The legal profession of New Zealand, although modelled on the British one, is fused. The country has 9,419 lawyers in a population of 4,035,461, around one lawyer per 428 people. As at June 2004, 1,074 of these practitioners were approved to provide criminal legal aid services, which (for 2003/04) represents 40 criminal grants per provider.[138] Nationally there were 2.9 providers per 10,000 people with, as might be predicted, a trend for higher

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[136] Ibid. The various specialisations are: Tax law, labour law, company law, people's rights (this includes the determination of concepts such as personality, name, moral and physical entities), commercial law, property law, law of the economy, criminal law, enforcement measures law, public law, intellectual property law, international relations law, rural law, EU law and environmental law. Unfortunately there are no geographical statistics for *droit penal*, but is highly probable that Paris contains the majority.

[137] Law Council of Australia (2004) *Snapshot of the Legal Profession* www.lawcouncil.asn.au/faqitem/1957249953.html

[138] Legal Services Agency (2005) *An Analysis of the Supply, Distribution and Assignment to Legal Aid Providers in New Zealand 2003-2004* (Legal Services Agency: New Zealand) at 1 see www.lsa.govt.nz/distributionanalysis.htm accessed 25.11.05

rates of provider supply in larger cities and lower rates in smaller towns.[139] Further figures analysed for 2003/04 show the following:

- 794 lead providers of criminal grants representing a national take up rate (the number of identified lead providers as a percentage of all listed providers) of 74% and an average of 54 grants per led provider.
- 2.1 lead providers per 10,000 of the population.
- 42,710 legal aid recipients received grants of aid for criminal proceedings.
- 114 grants of criminal aid per 10,000 of the population.
- 2.5 criminal listed providers per 100 legal aid recipients
- 62% of all legal aid recipients chose, or were otherwise assigned, providers within the same location (this demonstrates a good level of 'fit' between the legal aid recipient and the provider).[140]

The NZ Legal Aid Agency, rates the seniority of legal aid criminal providers in three levels according to their years of litigation experience.[141] Level one is up to four years; two is between four and nine years' and three is nine years and over.[142] Nationally (for 2003/04), 69% of all criminal listed providers were at level 3 and lead providers at level 3 undertook 67% of all grants.[143]

Much like the UK, New Zealand is faced with increasing dissatisfaction and anger over remuneration rates for lawyers providing legal aid services. NZ rates were lowered in 1998 and have not changed since.[144] Furthermore there is no means of adjusting rates in accordance with inflation.

Moreover the Legal Services Commission is reviewing options for alternative legal aid provider remuneration structures (which must be fiscally neutral). "The objective of [the] review is to consider whether other payment options would offer scope to improve on the cost effectiveness of the Agency's current payment framework".[145] The Legal Services Agency has analysed the desirability of three contracting options (i) fixed volume (ii) preferred supplier and (iii) fixed price, comparing them with the current case-by-case range of quality measures.[146] This is, however, only the first stage of the alternative contracts project and until the new Legal Services Amendment Bill (No 2) has been implemented, substantive work on this will not continue.[147] Once again we must await any lessons than can be learnt from this exercise

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[139] Ibid at 1 and 2

[140] Ibid at 2-6. The Report from which these figures were taken was undertaken by the NZ Legal Services Agency to improve its understanding of whether its list of criminal legal aid providers adequately matches the needs of those seeking legal advice and representation. And to develop better understanding of patterns of provider supply and assignment as well as establishing a base for tracking ongoing trends. The LSA intends to prepare a similar snapshot analysis of the make-up of the provider list and compare this with the location of legal aid recipients for 2004/05, Legal Aid Services (2005) "Snapshot Analysis of Provider Supply, Distribution and Assignment" 5:3 *News* July

[141] Ibid at 6.

[142] Ibid.

[143] Ibid at 7.

[144] Llyod, A. (2005) "Legal Services Committee Report—31 January 2005" at www.lawyers.org.nz/lawtalk/638LSC.htm accessed 18 November 2005.

[145] Legal Services Agency (Dec. 2003) "Legal Aid Improvement Programme" 3:6 *News* at 4

[146] Legal Services Agency (2005) *Annual Report 2004-2005* at 13 (Legal Services Agency: New Zealand) available at the LSA website: www.lsa.gov.nz

[147] Ibid.

B. Public Defender Programmes

(i) *United States*[148]:
The most well-established public defender programmes are located in the United States.[149] Three US Supreme Court decisions gave rise to a variety of programs for representation of the indigent.[150] Public defenders fall into two main categories: federal, and state and local. Federal Public Defender Organizations are established in 83 of the 94 judicial districts.[151] Federal public defenders tend to be experienced trial attorneys, either in private practice or in state and local public defender programs, because the type of cases are more complex than found in state courts. Typical cases include organized crime, white collar crime, fraud, and complex drug cases.[152]

At state level many states run public defender programs either at state level or delegate to county, regional or local level.[153] Typically public defenders are found within the major urban areas, eg, New York, San Francisco, Philadelphia and San Diego. Patterns vary across the US, e.g., Florida has 20 independent programmes; Illinois mandates a public defender office in each county of 35,000 people or more; West Virginia has set up 13 not for profit public defender corporations which funds all the programmes. Sixteen states have combined trial and appellate state public defender offices, while others have statewide appellate programs but no trial programs at state level. And others have combined state and regional programmes.[154] There is no consistency or coherence to the different approaches within the US.

Generally, at the state and local level the types of cases vary according to local guidelines and funding. Most time is spent on bail hearings, pre-trial conferences, plea negotiations, and trials. How much time public defenders can spend on investigating crime scenes, interviewing witnesses, and legal research depends on local support and funding. Given that public defenders spend most of their time with clients, they also become conduits for social and

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[148] See the *Compendium of Standards for Indigent Defense Systems* with respect to public defenders, compiled by the Office of Justice Programs, appended to the report in Appendix 3.
[149] See NLDA, History of Right to Counsel,
www.nlada.org/NLADA/About/About_HistoryDefender. See also Fabelo, T. (2001) "What Policymakers Need To Know To Improve Public Defense Systems" in Appendix 4; and Harlow, C. (2000) "Defense Counsel in Criminal Cases" in Appendix 5.
[150] *Powell v. Alabama,* 28 US 45 (1932); *Gideon v. Wainwright,* 372 US 335 (1963); *Argersinger v. Hamlin,* 407 US 25 (1972). See also Lewis, A. (1964) *Gideon's Trumpet* (Vintage: New York).
[151] AO Annual Report supra n 45 at 46. Federal support programs for the indigent held their 40th birthday with the passing of the Criminal Justice Act of 1964, 18 U.S.C. §3006A.
[152] Rosenfeld, A. (1997) *Public Defender Programs* (Harvard Law School: Cambridge).
[153] Note that more than half the counties in the US use the court assigned attorney in preference to other systems. NLDA, Defender Resources: Public Information, www.nlada.org/Defender/Defender_Public/Defender_Public_Home
[154] See Rosenfeld, supra n 152. Also two kinds of specialist public defender programmes exist in connection with death penalty cases and juvenile crimes.

health services.[155] Public defenders have little control over their workload, which usually results in minimal contact with clients.[156]

Funding is the key issue for public defender programmes. It is also one aspect on which it is difficult to find up to date information. The most reliable data are provided by the Bureau of Justice Statistics from 1999.[157] The Bureau estimated that $1.2 billion was spent on the defence of the indigent in the 100 most densely populated counties in the US. Of that 73% went to public defender programmes, 21% to assigned counsel programmes, and 6% on awarded contracts. Out of all criminal justice expenditure on police, prisons, and courts, this sum represented 3% of the total. Sixty percent of funds for indigent defence were provided by county governments of the 100 most densely populated counties, with states providing another 25%. Indigent defence programmes in general handled in the 100 counties approximately 4.2 million cases, which broke down into 80% criminal, 8% juvenile, 2% civil, and 9% others including abuse and neglect, contempt, and juvenile dependency. Public defenders handled 82% of the 4.2 million cases, court assigned attorneys 15%, and contract lawyers took 3%.

With staffing there is a big difference in numbers. Whereas in the 100 counties the public defender programmes employed 12,700 individuals including public defenders, investigators, social workers, support staff and paralegals, over 30,700 private lawyers were appointed through assigned counsel programmes. And although on conviction rates the results were roughly the same for indigent defendants and those who had their own lawyers, indigent defendants were liable to be imprisoned at a higher rate than those with their own lawyers, i.e., 77% to 88%.

In a study of Washington state in the United States, with a locally-based and funded public defender programme at the trial level, it was shown that even with an efficiently designed programme to ensure effective representation of indigent defendants budgets became limited as cases became more complicated and sentencing more severe.[158] This especially occurs in investigations and witness examinations where they can be skipped or done superficially. King County Office of the Public Defender (OPD), which includes Seattle, uses four not for profit organisations to provide public defence, approximately 200 attorneys.[159] Their case loads are as follows:

This table shows the number of cases for which OPD contracted with the four defender agencies for selected case types.[160]

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[155] Ibid.
[156] See New York State Unified Court System "Indigent Defense Summit" Resource Materials at www.courts.state.ny.us/ip/indigentdefense/resource.shtml
[157] See US Dept of Justice, Bureau of Justice Statistics, Indigent Defense Statistics, www.ojp.usdoj.gov/bjs/id.htm
[158] Boruchowitz, B. (1997) Lessons from the United States' Public Defender Experience. http://faculty.law.ubc.ca/ilac/Papers/02%20Boruchowitz.html
[159] One the Defender Association has 92 lawyers representing 14,000 clients per year at trial and appellate level. It has won a number of awards for its work; it also runs a legal clinic with the University of Washington School of Law. See www.defender.org
[160] See OPD website at www.metrokc.gov/dchs/opd/about.aspx

Table Twelve: Office of the Public Defender Contracts with Defender Agencies

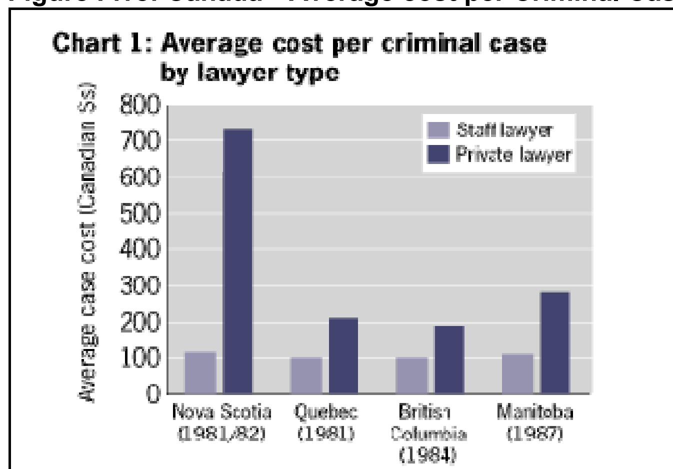
Case Type	2004	2003
Felony	10,365	10,404
Misdemeanor (Unincorporated King County)	6,513	7,498
Juvenile Offender	5,384	5,959
Dependency	6,587	6,209
Becca (truancy)	830	900
Contempt of Court	2,002	1,971
Involuntary Commitment	2,359	2,398

The OPD covers most felonies and misdemeanours, but excludes representation for civil lawsuits, divorce cases, child support hearings, traffic infractions, other civil matters or non-criminal charges, and cases filed outside of King County.

For a graphic description of the operation of public defender systems and their relationships to the courts and prosecutors see Steve Bogira's *Courtroom 302: A Year Behind the Scenes in an American Criminal Courthouse*.[161]

(ii) *Canada:*
The most reliable evidence on the efficacy of public defender programmes is found in Canada.[162] The key finding was that public defenders (staff lawyers) provided cheaper legal services than private lawyers. The following chart shows results from four provinces.

Figure Five: Canada—Average cost per Criminal Case by Lawyer Type



(Source: Dept of Justice Canada. 1995. *Patterns in Legal Aid*)

[161] Bogira, S. (2005) *Courtroom 302: A Year Behind the Scenes in an American Criminal Courthouse* (Knopf: New York) (a reporter spends a year observing a criminal court in Chicago where most cases—drug offences—are plea bargained)
[162] These results have been summarised by the Scottish Office, *A Literature Review of Public Defender or Staff Lawyer Schemes. Legal Studies Research Findings No. 19* www.scotland.gov.uk/cru/documents/r19-00.htm

Two reasons were adduced for this result: staff lawyers spent less time on cases than private lawyers; and staff lawyers engaged in plea bargaining at earlier stages than private lawyers resulting in speedier resolution of cases. Interestingly, clients reported no differences in satisfaction levels between staff and private lawyers.

(iii) *New Zealand:*
The development of a public defender service (PDS) is very recent in New Zealand. The Legal Services Act 2000 enabled the Legal Services Agency to establish a pilot scheme. This was opened up in May 2004. Eleven criminal defence lawyers, three support staff and a business manager deliver representation to clients at the Manakau and Auckland courts. In order to assuage the anxieties of the local private lawyers the Minister of Justice and the LSA decided on a staged approach. The public defenders would initially take 25% of all assignments building up in years 2 and 3 to 33% (which represents about 2,600 cases a year). From the inception of the PDS project until June 2005, there have been 1,355 assignments in the Auckland Court, 194 of these PDS preferred and 1,210 in the Manukau Court, 94 of which were PDS preferred.[163] A rotation system determines who gets cases between public defenders and private lawyers, although defendants can actively choose to have a public defender represent them.

The scheme is being currently monitored by Victoria University's Crime and Justice Research Unit.[164] Its researchers have produced their first interim report, which is of limited value as it only covers the first 11 months of the PDS.[165] The report indicates that for a PDS to be introduced successfully there needs to be intensive communication with private practice lawyers, who otherwise are likely to believe every imagined criticism that can be levelled against such a scheme. Whereas the PDs thought they were raising standards, private lawyers considered PDs as slipshod, short termist, formalistic and willing to cut corners to save money. Most of these perceptions were based on false assumptions. It has always been the case that the intent is that a public defender programme will never be intended to displace private lawyers but rather as part of a portfolio of types of representation available to defendants.

It is expected that the PDS will make savings in the legal aid expenditure on private practitioners. Initially there will be a front-loading when expenditure exceeds revenue, but that is expected to reverse in later years as the following table shows:[166]

[163] Anon (2005) "Public Defender Service" September *LawScene Newsletter of the NZ* Voluntary Welfare Organisations.
[164] Legal Services Agency, *Annual Report 2003/2004.* New Zealand, at 19-21.
[165] J. Paulin & K. Baelher. 2005. *The Public Defender Service Pilot Evaluation: Interim Report One* (Wellington: Victoria University).
[166] Legal Services Agency. 2005. "Statement of Intent 2005-2008" (Wellington)

Table Thirteen: New Zealand—Estimated Savings in Legal Expenditure Brought by the Public Defender Service

	2004/2005 estimated $000s	2005/2006 forecast $000s	2006/2007 forecast $000s	2007/2008 forecast $000s
Notional revenue	1,718	2,823	2,823	2,823
Expenditure	1,881	2,434	2,434	2,434
(Increase)/reduction in legal aid expenditure	(163)	389	389	389

(iv) *Lithuania and Bulgaria:*

Within the former communist bloc countries Lithuania decided in the late 1990s that its criminal justice system was inefficient and backward. In conjunction with the Soros Open Society Fund, the Ministry of Justice and the Lithuanian Bar Association pilot public defender offices were established, first in Siauliai then Vilnius, the capital. While there is no hard evidence, the scheme has been judged a success by the participants and further offices are to be set up as part of a mixed delivery system of justice.[167]

Bulgaria realised in the early 21st century that most criminal representation was being carried out by lawyers with no criminal experience. Again the Open Society Justice Initiative sponsored a public defender office. With training from western lawyers, the public defenders have considerably improved the level of credibility among criminal defence lawyers. The public defender office with the compliance of the courts and the bar association took over responsibility for nearly all indigent defendants. Within two months of being set up public defenders were responsible for hundreds of unfounded prosecutions being dismissed. [168]

One result to come out of these social experiments is that courts found positive results in dealing with professionally trained and minded lawyers who understood what kinds of information courts needed so as to make the criminal justice system operate efficiently both in terms of justice and economics.

(v) *Israel:*

Neither the Israeli Bill of Rights nor the supreme court have recognised the rights of indigent defendants to representation. Since 1972 the Ministry of Justice has provided support for indigent defendants through court-appointed counsel. In 1996 a public defender office was established to take over the provision of representation to indigent defendants. Court referrals account for 49% of its clients with a further 26% coming from duty lawyer schemes at courts run by public defenders, and 13% come from police station referrals. Criminal trials make up 46% of the caseload, pre-trial procedures are 26%,

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[167] Sesickas, L. (2004) "A New Model of State Guaranteed Legal Aid in Lithuania" Feb *Justice Initiatives* at 14-17 available at www.soros.org/resources/articles_publications/publications/justice_20040225/justice_initiatives_20040225_2.pdf

[168] Kinney, R. (2004) "Bulgaria: Seeking Equality and Transparency in Criminal Defense" Feb *Justice Initiatives* at 18-20 available at www.soros.org/resources/articles_publications/publications/justice_20040225/justice_initiatives_20040225_2.pdf

and remand hearings make up a further 21%. The improvement in the integrity of the Israeli criminal justices system is markedly apparent, but the cost has been high: the number of applications for public defenders from indigent defendants tripled in 1998-2000 from 15,102 to 53,934.[169]

(vi) *Scotland:*

Within the UK Scotland has been pro-active in establishing a public defender office, the Public Defence Solicitors' Office. First piloted in 1998, the use of public defenders was restricted to summary cases (equivalent to magistrates' courts). One evaluation has been carried out.[170] First, it is important to note that the Scottish legal aid system has economic incentives built in for early resolution of cases by a plea of guilty, unlike England. However, this should not affect the working practices of salaried lawyers. The main finding was that public defenders resolved cases at significantly earlier stages than their private counterparts and that their clients were more likely to plead guilty leading to a higher conviction rate. Although it should again be pointed out that most defendants in the summary courts plead guilty. It does seem that some private defence lawyers will try to exhaust prosecutors' and thereby witnesses' patience by extending the process as long as possible in order for cases to be abandoned by prosecutors. There was no significant difference in sentences received by clients of public defenders or private lawyers. Clients appeared to receive less "emotional" support form public defenders, who seemed to be more neutral in their behaviour, than private lawyers. However, most clients expressed confusion and anxiety with the criminal justice system.

Public defender programmes do appear to have advantages in the processing of cases in a timely manner in the criminal justice system. They appear to work well in mixed delivery systems. But they are often poorly resourced and subject to overload.

C. Plea Bargaining

Hand in hand with public defender programmes plea bargaining is part of the process adopted by courts to expedite the delivery of justice, as Bogira's book on Chicago criminal courts shows.[171] It is probably axiomatic, although not always admitted explicitly, that every court system depends on plea bargaining otherwise criminal justice systems would grind to a halt through overload.[172] Although courts may rely on plea bargaining for speedy disposition of cases, they are not the cause of the need for it. This probably results from "over-criminalisation" of behaviours by governments responding

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[169] Hacohen, M. (2004) "Building a Rights-Based Framework for Legal Aid in Israel" Feb *Justice Initiatives* at 51-56, ibid.

[170] Goriely, T. (2003) "Evaluating the Scottish Public Defence Solicitors' Office" 30 *Journal of Law and Society* 84.

[171] See note 147.

[172] Heumann, M. (1977) *The Experiences of Prosecutors, Judges, and Defense Attorneys* (University of Chicago Press: Chicago), the first major study of plea bargaining in which Heumann rejects argument that docket overload is cause of prevalence of bargaining; however, he does not offer alternative explanation; he does show that when courts had fewer cases because of judicial realignment trial numbers remained constant.

to felt needs of their constituencies. It has been suggested that government departments ought to undertake legal impact studies and cost benefit analyses before they introduce new laws, regulations or rules.[173]

There are two suppositions that appear to underlie plea bargaining: first, most defendants are guilty; and second, that too many cases are "garbage" cases that ought not to be in court.[174]

Plea bargaining separates into three categories: negotiating over the charge, negotiating over the facts, or over the sentence (or in some cases, all or some can be negotiated). Generally speaking there is more latitude over the first, where it exists, because jurisdictions are reducing the amount of discretion available in sentencing. As more mandatory sentences are introduced, the prosecutors and judges have less "wiggle" room in setting appropriate sentences. According to Aschuler, the sentence negotiation is mainly found within the US where prosecutors' recommendations on sentences are usually accepted, while charge and fact negotiations are undertaken in England, Scotland, Australia and New Zealand.[175]

We have set out an overview of plea bargaining as found in Anglo-Saxon countries versus the continental approach in the table in Appendix 6. We start with the United States as it is the jurisdiction which has the most developed system of plea bargaining.

(i) *United States:*

Before we discuss the elements of plea bargaining, it is interesting to look at jurisdictions where it has been banned.[176] One is Alaska in the US.[177] The result of the ban caused prosecutors to sift cases more carefully only selecting those where they thought they could file charges under the standard of beyond reasonable doubt instead of probable cause. Police therefore had to investigate cases more thoroughly to meet the new prosecutorial standard. The result was fewer cases in court but more trials. Two problems occurred as a result of the ban. One, although sentence bargaining was forbidden, charge bargaining flourished in its place, which the Alaska Judicial Council accepted. Two, in rural areas it proved impossible to eradicate any form of plea bargaining to the extent that judges and lawyers carried as before the ban.

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[173] See Australian Senate Legal & Constitutional References Committee *Legal Aid and Access to Justice: Fourth Report*, June 2004, at 28-29.

[174] Some commentators argue that certain cases, e.g., rape, should never be plea bargained. Gerber, P. (2003) "When Is Plea Bargaining Justified?" 3:1 *QUT Law & Justice Journal* www.law.qut.edu.au/about/ljj/editions/v3n1/gerber_full.jsp

[175] Alschuler, A. (1983) "Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System" 50 *University of Chicago Law Review* 931.

[176] Generally, the constitutionality of plea bargaining has been upheld in the US, although the National Advisory Commission on Criminal Justice Standards and Goals recommended the total abolition of plea bargaining in 1973. See Fisher, G. (2004) *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (Stanford University Press: Palo Alto).

[177] See Faruqui, M. (2005) "A Brief Look at Broward County Lawyers' and Judges' Attitudes Toward Plea Bargaining as a Tool of Courtroom Efficiency" http://law.bepress.com?expresso/eps/519

The key element of the plea bargain is for the defendant to plead guilty, but the process of determination of the bargain is one that takes place between prosecutors and defence lawyers (whether private practitioners or public defenders). Prosecution and defence negotiate. If the two sides can agree on the appropriate sentence, and assuming the defendant accepts the bargain, it is then put before the judge who, provided the defendant's plea is knowing and voluntary, accepts it and passes sentence. Occasionally, judges will be asked to arbitrate between prosecutors and defence lawyers where there is disagreement about the sentence.

Bogira's depiction of the criminal court in Chicago clearly shows the burden under which the criminal justice system operates. The criminal court in Chicago is the biggest and busiest in the United States. It has 32 courtrooms and eight suburban branches. According to US statistics in 2003 there were close to 2.1 million people in federal, state, and local gaols. In Chicago from 2001 and 2004, between 86% to 91% of all felony cases were disposed of by guilty pleas arranged through plea bargaining. And between 1994 to 2003 76% of all felony defendants were convicted and of those sentenced to prison or probation, 53% were imprisoned.

A judge has up to 20 cases to dispose of in a day. "Dispose" is the key word. If every case were dealt with thoroughly, the system could not cope. The key to disposition is to ensure that where possible cases are plea bargained. Although plea bargains must be entered into freely by accused, they are often "sold" to defendants by their public defenders. Prosecutors, defenders and judges collaborate in processing "dispos". All are scrutinised on their dispo rates and are called to account if they fall below the unstated norms. If one court slows its dispo rate, unfair burdens are placed on other courts. All disposition rates are published and disseminated when judges come up for re-election.

Defendants have to be taught their role in this process. Although constitutionally they can insist on a trial, the PDs will explain to them that a guilty plea can mean probation or a conditional discharge. An expensive and time-consuming trial will incur the antagonism of the judge who will impose a much greater sentence if the accused is found guilty. The "tax" will be steep and most defendants strive to avoid it. Once defendants have agreed to a plea bargain, the actual process takes little time. The judge recites the necessary admonishments, the defendant agrees: another disposition. These cases take about 15 minutes to process.[178]

The vast majority of defendants in Chicago are African American. They are born and raised in the ghettoes of Chicago. And as William Julius Wilson has shown, many grow up without any contact with white people.[179] When the

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[178] According to Bogira, in Cook County 86% of cases were disposed of by pleas in 2001, 90% in 2002, and 91% in 2004, at 361.

[179] Wilson, W. (1996) *When Work Disappears: The World of the New Urban Poor* (Knopf: New York) (Wilson notes that unemployment rates in ghetto areas of major cities are often over 40%)

programmes to alleviate the conditions of African Americans evolved in the 1960s, huge amounts of money were poured into housing. Mayors made sure that the housing projects were congregated in a few areas far away from the prosperous white neighbourhoods. The city schools are underfunded and unemployment among African Americans is high. Mental illness, single parent families, and gang membership are also high. Narcotics' use is the most common form of escape from this environment: crack cocaine and heroin are cheap and plentiful but greatly addictive.[180] Addicts and small-time dealers now constitute a large amount of the court's caseload—both offending and re-offending—around 30,000 cases a year. The court's main function is to sort defendants into the requisite categories, discharge, probation, or prison. The "war on drugs" has meant the criminal justice system has become distorted.[181] For example, most of the small possession cases are so minor, they could be thrown out with a warning. But whenever Chicago's politicians have been presented with plans to downgrade the possession of a gram or less of heroin or cocaine to a misdemeanour, they have refused. In addition to refusals to downgrade crimes, there has been a move towards more determinate sentencing that reduces the discretion of judges to set proportionate sentences. Moreover, combinations of mandatory sentencing for certain crimes (especially drugs), and policies such as "three strikes and you're out" which entail a life sentence on the third felony conviction have resulted in greater numbers of accused appearing in courts.[182]

Not all plea bargains occur at the bottom end of the criminal scale. Many white-collar crimes are plea bargained. A notable example is the indictment of Michael Milken on 98 counts of racketeering and fraud in 1989.[183] He plea bargained and was finally charged with six securities and reporting violations. He was sentenced to 10 years in prison, of which he served 22 months; he was fined $200 million; and he paid $400 million in settlement of civil suits. He was also given a life-time prohibition from working in the securities industry. Often white collar crimes are generated by federal agencies such as the Securities and Exchange Commission, the Internal Revenue Service, or the US Treasury. Defendants are likely to have access to skilled lawyers who know how to negotiate over charges and sentences.

The two types of criminal activity and criminal disclose significant differences in approach and result. In the stereotypical drug possession case the defendant is poor, black, unemployed, possibly mentally ill, uneducated, and dependent on whatever means of representation are made available for indigent defendants. Within the major urban areas this will be a public defender service. It is probable that lawyer and client will have little time to communicate with each other and the public defender will be highly socialised

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[180] Heroin and cocaine use account for over half a million arrests a year, only outnumbered by marijuana arrests at three-quarters of a million: Bureau of Justice Statistics http://www.ojp.usdoj.gov/bjs/dcf/tables/drugtype.htm

[181] According to the US Bureau of Justice Statistics the highest arrest counts were for drug abuse violations at 1.7 million in 2004. The next highest total, 1.4 million, was for driving under the influence www.ojp.usdoj.gov/bjs/dcf/enforce.htm

[182] Mauer, M. (2004) "Lessons from the 'Get Tough' Movement in the United States" www.sentencingproject.org/pdfs/mauer-icpa.pdf

[183] Stewart, J. (1991.) *Den of Thieves* (Simon and Schuster: New York)

into a court system that rewards rapid disposition of cases. The defendant's ignorance will serve to render him more prone to accepting the advice of his lawyer which will be, in most cases, to take a plea bargain. In the high-value white collar crime case the defendant will be sufficiently wealthy to afford skilled defence attorneys. He will also be highly educated and able to grasp the intricacies of the negotiations that will take place about charge and possible sentence. Since the defendant may well be in a position to make restitution to victims, a plea bargained result may be more favourable than a straightforward conviction at trial.

The extremes show the perceived benefits to the criminal justice system of plea bargaining. It acts to divert cases which would tend to clog up the system and it sidelines a number of cases which could take inordinate time and resources to take to trial. There are always the questions of proof and jury understanding and durability in complex trials, all of which are put under severe strain. US experience appears to demonstrate more success in dealing with financial crimes than the UK.

While the United States is the paradigm example of how plea bargaining functions within the criminal justice system, other countries have adopted, either formally or informally aspects of the process.

(ii) *New Zealand:*

New Zealand has experienced problems with late pleas of guilty and the resultant "cracked trials". Part of the process in the New Zealand system is a prefatory status hearing during which both defence counsel and the judge can view the prosecution evidence and defence can ask the judge what the prospective sentence might be. If the sentence is acceptable to the defendant, the case can be determined at that point.[184] Moreover, the judge in status hearings is meant to be pro-active in initiating early resolution of cases. Research carried out by the Law Commission is largely inconclusive on the efficiency gains of the status hearing, as no before and after comparisons could be validly made. However, there are indications that they have reduced the number of trials and increased the numbers of early guilty pleas.

Current New Zealand rules for prosecutors prohibit them from initiating plea negotiations, which the Law Commission recommended should be changed in their favour. With respect to charges, the Law Commission recommended that overcharging should be prohibited while the present prohibition on substituting lesser charges than the evidence supports after discussions should be relaxed. This latter recommendation is made on the basis that there are alternative competing versions of "what happened". It is worth noting also that in New Zealand the victim/complainant plays a role in the criminal justice

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[184] New Zealand Law Commission (NZLC) (2004) *Reforming Criminal Pre-Trial Processes.* Preliminary Paper No. 55 www.lawcom.govt.nz/UploadFiles/Publications/Publication_97_242_PP55.pdf; see also NZLC (2000) *Criminal Prosecution.* Report 66 www.lawcom.govt.nz/UploadFiles/Publications/Publication_73_150_R66.pdf; NZLC (1997) *Criminal Prosecution—A Discussion Paper.* Preliminary Paper No. 28 www.lawcom.govt.nz/UploadFiles/Publications/Publication_73_148_PP28.pdf

process and that they would have to be consulted over negotiations but would not be able to determine the outcome.

(iii) *Australia: New South Wales*

New South Wales is indicative of Australian policy on plea bargaining. As with New Zealand, plea bargaining over sentence is barred and the only permitted bargaining is over the charge and this must be conducted before arraignment.[185] Commentators have noted that “Australian plea discussions do not appear to rely on unjustified relinquishment of some certain claim or advantage, nor a promise to give an undeserved advantage.”[186] Nevertheless, Australian policy embraces charge negotiations as a force for economy in the courts. For example, between 1998 and 2001 in the NSW District Court there were 1,890 cases committed for trial of which 591 were charge bargained for guilty pleas. This was 32% of the case docket saving approximately 2,509 trial days or 500 sitting weeks. Further,

> it has been calculated that the cost of a day in the District Court in a criminal trial, excluding the cost of legal aid, public defenders, corrective services, crown prosecutors, legal counsel, police service, depreciation and courtroom/chambers, is $4526 (£1905)[187]. The figure for the Supreme Court on the same basis is $6011 (£2539). So, rounding off the figures, the cost of 2500 days in the District Court would be $11,250,000 (£4,734,700); and in the Supreme Court $15,000,000 (£6,312,934).[188]

Once a guilty plea is accepted the discount rate on the sentence is within the range of 10% to 25%, at the court’s discretion. Victims too must be consulted on the proposed bargain. The decision to accept a guilty plea in exchange for a charge bargain is purely within the purview of the prosecutor in Australia.[189]

(iv) *Italy:*

Italy is a civil code country with an inquisitorial tradition in its criminal justice system. Yet in recent years, Italy has introduced some adversarial elements in its 1988 Code of Criminal Procedure (CPP), as Italy has the “biggest backlog and the slowest pace of litigation” in the west.[190] In Italian law it is a basic premise that a finding of guilt is made by the court and that an accused cannot therefore declare guilt unless the court so declares. But the CPP allowed for two means of penalty reduction to favour cooperative defendants: summary proceedings and “application of penalty upon the request of the parties”. From 1988 until 1999 the Italian Constitutional Court raised a number of challenges to the principles of negotiation. In 1999 Italy amended the constitution in order to enable plea bargaining without interference. Negotiations can take place on

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[185] Samuels, G. (2002) “Review of the New South Wales Director of Public Prosecutions’ Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts” www.cso.nsw.gov.au/report/lpd_reports.nsf/files/Report%201.PDF/$FILE/Report%201.PDF

[186] Andrew, D. (1994) “Plea Bargaining” April *Law Institute Journal (Victoria)* at 236.

[187] Exchange rate at 13 Nov. 05, £1=AUS$2.38 www.oanda.com/convert/classic

[188] Supra note 183 above at 12.

[189] *Maxwell v. The Queen* (1995) 184 CLR 501.

[190] Fabri, M. (1994) “Theory versus Practice of Italian Criminal Justice Reform” 77 *Judicature* 211.

1. Evidence: This is a form of trading between prosecution and defence over what evidence will be considered admissible. This can operate to include evidence that, under normal rules, would be excluded.
2. Defendant's right to apply for a summary adjudication: If a defendant waives his right to a trial and accepts to be judged on the basis of the investigation findings, he will receive an automatic one-third reduction in his sentence. It applies to all offences. Moreover, it may take place in camera. This type of plea bargain is unique.
3. Sentence (application of a penalty upon request): These negotiations have different aspects at different stages of the process. In principle they are meant to refer only to minor offences, but it seems more offences have been brought within their ambit. However, when first introduced in the early 1990s it met with a mixed response: lawyers in the north favoured it, while in the south lawyers distrusted the procedure as it "diminished their resources". A new law in 2003 has re-invigorated the process and if undertaken early, they can result in a form of charge bargaining. One curiosity of sentence bargaining is that does not actually result in a conviction/finding of guilt even though the defendant admits guilt and a penalty is inflicted. There are five incentives: first, the defendant does not have to appear publicly in court; second, the defendant can file on the grounds he receive a suspended sentence and if it is refused a trial would ensue; third, the outcome has no effect in related civil or disciplinary hearings and the defendant can claim "innocence"; fourth, the defendant's record is cleared after a few years; and fifth, defendants do not have to pay the costs of the proceedings.

Finally, it is possible to bargain on the sentence at the appellate level—since both prosecution and defence can appeal—and if successfully done again the hearing is in camera.

It is clear that plea bargaining occurs in most jurisdictions in one guise or another. The extremes may be represented by the US, where the full gamut of bargaining is possible, and New Zealand, where it is limited to charge bargaining. In between lies the example of Italy, which seems to have adopted elements of both. Plea bargaining is a necessary part of the criminal justice process, which would suffer without it. In those jurisdictions that forbid it, it has a tendency to surface in less visible, more informal ways. The problem with prohibition as a policy is that it, in effect, drives the activity of plea bargaining underground. It is preferable that it be made an explicit, recordable activity which can then be properly regulated.

D. Problems in Multiple Representation of Clients

The representation of multiple clients, co-accused, is one that is problematic. Both courts and bar associations monitor this situation carefully. In three jurisdictions we have examined (and been able to extract information from), namely, the US, Australia, and New Zealand, joint representation of clients is permitted but within strict limits.

(i) *United States:*
The Model Rules of Professional Conduct Rule 1.7 concerns conflicts in representation.[191] It is the lawyer's obligation to find out if a conflict exists or would be likely to exist. In essence, a lawyer is required to undertake a risk analysis. Two situations envisaged by the rules exist where despite any consent given by a defendant/client a conflict is presumed to exist: one is in

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[191] Appendix 7 list summaries of all published successful conflict of interest claims in the US since 1982
www.capdefnet.org/hat/contents/constitutional_issues/conflict/conflict_right4.htm#IVLocal

capital cases with multiple defendants and the other is in cases where clients' interests are "aligned directly against each other". To some extent attorney-client privilege is also attenuated with common representation and clients have to be aware that information will be shared. Ultimately, the rules take the view that "The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant."[192]

(ii) *New Zealand:*
New Zealand takes the view that an indigent defendant has the right to assistance but not to choose his or her representative. Furthermore, the quality of representation is relevant only where it becomes apparent to the judge that the lawyer's behaviour was incompatible with the interests of justice.[193] Here then the possibility for joint representation exists, again subject to judicial scrutiny.

(iii) *Australia:*
The Law Institute of Victoria states clearly:

Can I act for multiple defendants in criminal proceedings?
There is no blanket prohibition against acting for two or more co-accused. However it does significantly increase the risk of a conflict arising, for example if one client wants to lead evidence against the other.
Some key points to remember:

- Where a conflict exists, you cannot act. You have an obligation to act in the best interest of every client.
- You cannot "cure" a conflict by instructing separate counsel for each client.
- Where there is a potential conflict, it is also strongly inadvisable to act. The fall-out if and when a conflict arises later can be very serious - for example:
  - Damage to the firm's reputation and goodwill.
  - Affecting the good administration of justice.
  - Causing detriment to the clients.
  - Opening the way for disciplinary proceedings if the conflict is not handled appropriately.

If you act for multiple criminal defendants, it is wise to give clear written advice to each of them about the potential for a conflict and what it might mean for them.

As well as complying with your obligation to communicate effectively with a client - Rule 39 Professional Conduct and Practice Rules 2005, written advice provides some level of protection for you if a complaint is later made. Guidelines are available to help you work through these issues. The guidelines also include some information for clients and may be provided to them.

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[192] American Bar Association. "Model Rules of Professional Conduct ,Client-Lawyer Relationship Rule 1.7 Conflict Of Interest: Current Clients" www.abanet.org/cpr/mrpc/rule_1_7_comm.html. See also *Holloway v. Arkansas*, 435 U.S. 475 (1978) (trial judge compelled attorneys to accept multiple representation: reversed by Supreme Court). See also Barr, R. and Friedman, B. (2002) "Joint representation of criminal co-defendants: A proposal to breathe life into Section 4-3.5(c) of the ABA standards relating to the administration of criminal justice" *Georgetown Journal of Legal Ethics* Summer www.findarticles.com/p/articles/mi_qa3975/is_200207/ai_n9129795
[193] Section 24(f) of the Bill of Rights Act 1990 www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/section24.html

The Australian position is close to that of the American and New Zealand, the common features of which are that joint representation is permissible provided there is no conflict or perceived conflict of interest.

PART THREE: Alternative Means of Dispute Settlement

This section examines alternatives to court-based outcomes to legal (criminal) disputes within the jurisdictions under review in this report. The use of alternative means of dispute settlement can be seen as yet another factor explaining disparities between jurisdictional expenditure on legal aid.

A. Alternative Dispute Resolution (ADR)

If the use of ADR in civil procedures is a widespread concept across jurisdictions, it is far less common in criminal procedures. However, the concept has developed in recent years and is becoming more frequent. In 1999, the Council of Europe adopted Recommendation N° R(99) 19 of the Committee of Ministers to Member States concerning mediation in penal matters[194] and on 24 July 2002, the UN Economic and Social Council adopted resolution 2002/12 on the use of restorative justice in criminal matters.[195]

The term ADR, when used in the context of the criminal justice system is usually associated with restorative justice and includes the following practices: victim-offender reconciliation/mediation (called penal mediation in continental Europe),[196] family group conferencing,[197] victim offender panels,[198] victim assistance programs,[199] community crime prevention programs,[200] sentencing circles,[201] ex-offender assistance,[202] community service, plea-bargaining and school programs.[203] Those practices were first developed in Canada in the early 1970s, followed by the United States, the UK and Europe. [204] For ease of reference, the term ADR will be used throughout this section to refer to any of the above dispute resolution mechanisms.

Due to inconsistencies within the range of available data as well as existing disparities in the various jurisdictions' approaches, the data could not be presented in a systematic manner. While some jurisdictions have a more

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[194] Council of Europe, Committee of Ministers, Recommendation N° R(99) 19, 15, September 1999.
[195] E/2002/INF/2/Add.2
[196] This practice uses trained mediators to bring victims and their offenders together in order to discuss the crime and its aftermath and eventually reach an agreement on the steps that need to be taken to restore justice.
[197] This practice is similar to the one above except that the family of the victim and/or the offender are involved in the process as well as community representatives.
[198] This practice brings together groups of victims and offenders who are affected by a common kind of crime.
[199] This type of schemes provides services to victims of crime as they proceed through the criminal justice system.
[200] This is a strategy aimed at reducing crime by addressing its underlying causes.
[201] This is an informal process based on restorative justice principles whereby member of the community contribute to sentencing decision making in cases involving community members.
[202] This type of scheme provides assistance to offenders upon their release from prison.
[203] This involves the use of restorative justice principles to foster school discipline.
[204] Lewis, M. and McCrimmon, L. (2005) *The Role of ADR Processes in the Criminal Justice System: A view from Australia* (Australian Law Reform Commission) at 4 www.alrc.gov.au/events/speeches/LM/20050509 accessed 11 Novemeber 05.

formalised approach to alternative dispute resolution and it is possible to provide an inventory of all existing schemes, other jurisdictions use ADR in a more informal manner and thus any attempt to list all the schemes is not realistic.

Among the countries under review, the United States is the jurisdiction with the most restorative justice initiatives. Illinois is indicative of the United States policy on the use of alternatives to court proceedings.

(i) *United States*

An increasing number of jurisdictions in *Illinois* offer alternative dispute resolution for a variety of cases, including juvenile and criminal misdemeanour. In 1987, the Illinois General Assembly passed the Illinois Not-For-Profit Dispute Resolution Centre Act[205], authorising the creation of a dispute resolution fund in the judicial circuits to support such centres. In Chicago, for instance, the Centre for Conflict Resolution mediates more than 2000 cases a year, 25% of those cases are referred from the criminal misdemeanour and juvenile courts.[206]

Criminal misdemeanour and juvenile offences are most commonly dealt with under victim-offender reconciliation programs (VORPs). Several of those programs have been established across the state of Illinois and all rely on volunteers to conduct the mediations. Below are a few examples of VORPs in the State of Illinois:

Table Fourteen: Victim Offender Reconciliation Programs in Illionis

Scheme	**Referral**	**Type of Cases**
Cook County (Est. Jan. 1999)	State's Attorney's Office - after a charge against a juvenile has been filed	*Juvenile* only
Champaign and Woodford Counties	County Probation Department	*Juvenile* and *criminal misdemeanour* Most mediation are of juvenile cases that involve battery or theft under $50.00
Sangamon County (Est. Jul 2002)	Springfield Police Department and Sangamon County Probation Department	Non violent offences committed by *juveniles*
Ford County Accountability Conferencing Program (Est. May 1999 by the county probation depart)		First-time *adult* and *juvenile* offenders—participation is limited to those who admit to committing a crime
Community Panels for Youth (CPY)	State's Attorney Office	*Juvenile* Offenders—allows the offender to appear before a panel of trained volunteers who also live in the community

[205] 710 ILCS 20/1, et seq.

[206] Shack, J.E. and Loevy, D. "Summary of Court annexed ADR in Illinois", originally written in March 2001, last updated 16 September 2004, pp. 4-5 www.caadrs.org/studies/adr_summary.htm accessed 11 November 2005.

The above table indicates that most of the schemes are oriented towards juvenile justice. This differs from France where “penal mediation” only applies to offenders above 18 years of age.

(ii) *France:*
In France, penal mediation has developed in the 1980s, as a response to criminal behaviour resulting from increased urbanisation and social fragmentation. Today, penal mediation is mainly used as a means of dealing with urban violence. It is governed by the *Law dated 4 January 1993*, expanded by Laws dated 18 December 1998 and 9 June 1999. It provides the public prosecutor with an alternative between filing the case for no further action and bringing a prosecution.[207] It is interesting to note that in France, penal mediation is only applied to adults[208] in contrast with most jurisdictions where restorative justice is focused on the juvenile system.

Unlike criminal prosecutions which are dealt with by magistrates, penal mediations are handled by justice conciliators, penal mediators or public prosecutor delegates. Except for justice conciliators (*conciliateurs de justice*) who are volunteers appointed directly by the parties, the process is initiated and controlled by magistrates.

Penal mediations take place in local agencies especially set up as alternative to courts. These include: *Maisons de justice et du droit* (155 as of 31.01.05)[209], *Centres départementaux d'accès au droit* and *Antennes juridiques et de médiation*.

Statistics for the year 2002 show that out of 5 083 465 cases brought before the criminal courts, 289 485 were dealt with by alternative dispute resolution and thus did not result in prosecutions – out of the 289 485 cases, 33 700 were dealt with through mediation.[210] Further details are set out in Appendix 8.

The chart below provides some indication as to the proportion of criminal cases that are filed with no further action, proceed to trial or are dealt with by means of ADR.[211]

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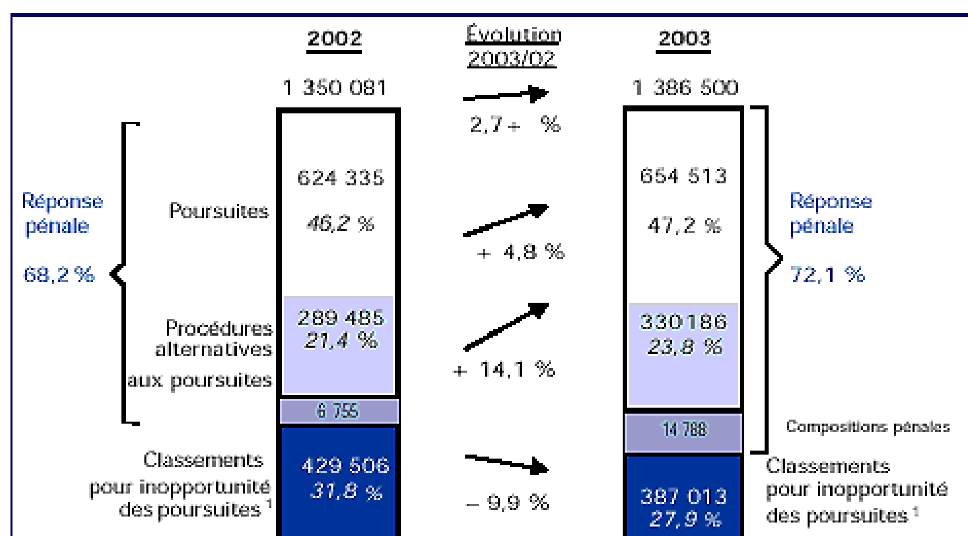
[207] La Documentation française, *Les modes alternatifs de règlement des conflits*, http://www.vie-publique.fr/politiques-publiques/justice-proximite/modes-alternatifs-reglement-conflits/ [Accessed 28.11.05]
[208] Article 41-2 of the Code of Penal Procedure
[209] Data from the Ministry of Justice www.justice.gouv.fr/ville/mjd.htm [Accessed 28.11.05]
[210] Annuaire Statistique de la Justice 2004, available at www.justice.gouv.fr/publicat/5activiteparquets05.pdf [Accessed 28.11.05]
[211] Data from the Ministry of Justice available at www.justice.gouv.fr/chiffres/penale04.htm#3 [Accessed 28.11.05]

Figure Six: Allocation of Criminal Cases in France

■ **Orientations données par les parquets aux affaires poursuivables**



1. Motifs : recherches infructueuses, désistement ou carence du plaignant, état mental déficient, responsabilité de la victime, victime désintéressée d'office, régularisation d'office, préjudice ou trouble peu important.

Source : Cadres du parquet, SDSED (données provisoires)

(iii) *New Zealand*

In New Zealand, the use of restorative justice by the courts began within the juvenile justice system in the 1990s, following the enactment of the *Children, Young Persons and Their Families Act 1989*. Formal recognition of the use of restorative justice within the formal criminal justice did not take place until the early 21st century with the enactment of the *Sentencing Act 2002*, the *Parole Act 2002* and the *Victims' Rights Act 2002*. In addition, the Ministry of Justice in May 2004 published best practice principles on the use of restorative justice processes in the criminal courts.[212]

There are several programs in New Zealand operating under restorative justice principles. Those include: family group conferences for young offenders, community managed programs with facilitated panel or victim offender conferences for less serious offences and court-referred restorative justice conferences for more serious offences.[213] The latter scheme was evaluated over a period of four years in Auckland, Waitakere, Hamilton and Dunedin District courts - the findings were recently published by the Ministry of Justice[214] and generally positive, indicating a small but significant reduction in re-offending.

Like in the United States, the running of restorative justice schemes largely depend on volunteers.

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[212] Available from the Ministry of Justice at www.justice.govt.nz/restorative-justice/rjprinciples.pdf [Accessed 28.11.05]

[213] Law Commission (2004) *Law Commission Report, Report 85, Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (Wellington, New Zealand) at 77-82.

[214] A summary of the findings can be consulted at www.justice.govt.nz/pubs/reports/2005/nz-court-referred-restorative-justice-pilot-evaluation/just-published.html [Accessed 11.11.05]

(iv) *Australia:*

Australia has followed the New Zealander model of family-group conferencing. It takes place in each of Australia's six states and two territories even though there is a large degree of jurisdictional variation. All of the states and territories except Victoria have conferencing schemes enshrined in legislation which form part of the overall strategy in response to youth crimes.[215] In New South Wales for instance, conferencing is recognised under the *Young Offenders Act 1997 NSW*. In addition, the Australian Law Reform Commission is currently working on a review of sentencing of federal offenders, including restorative justice[216] which suggests increased recognition of such practices in Australia. Depending on the territory, schemes are run by the police (NSW), the courts, the youth lobby, ethnic groups or political parties.[217]

Overall, it would appear that the number of offenders referred for conferencing still represents a small percentage of the total number of cases dealt with by the courts. In New South Wales for example, figures indicate that in the early 21st century, the police were referring only 3.4% of cases to conferencing compared to 62.8% to the courts.[218]

(v) *Netherlands:*

While victim-offender mediation in the Netherlands is not specifically governed by statute, there are currently four programmes operating in the country, all controlled and run by the Ministry of Justice.[219]

Table Fifteen: Victim Offender Mediation Programmes in the Netherlands

Scheme	Description	Type of offence	Target
HALT Programme (Dutch acronym: 't**h**e **alt**ernative')	Mediation between the offender and the victim – if a settlement is reached, prosecution is avoided	Minor offences such as vandalism, shop lifting and petty crimes	Juveniles
Justice in the neighbourhood (JiB)	Reconciliation programme located in socially deprived areas—operating from the public prosecutor office	Minor offences	Adults
Claims mediation	A successful mediation followed by payment to the victim will lead to the case being dismissed (less serious cases) or will be taken into account in sentencing (more serious cases) - handled by either the police or the prosecutor.	Applies to all offences but the case must be straightforward	Adults
Restorative mediation	Normally take effect following sentence – supplements the criminal law but does not replace it	Applies to more serious offences such as robbery, manslaughter or rape	Adults

[215] Lewis and McCrimmon supra n 204 at 9.
[216] Australian Law Reform Commission, Issues Paper 29, Sentencing of Federal Offender www.austlii.edu.au/au/other/alrc/publications/issues/29/ [Accessed 28.11.05]
[217] Miers, D. (2001) "An International Review of Restorative Justice", Crime Reduction Research Series Paper 10, The Home Office, UK at 62-63.
[218] Ibid at 63.
[219] Ibid at 39-43.

It is interesting to note that all the above schemes are run and financed by the Ministry of Justice and the municipalities unlike in the United States or New Zealand where restorative justice schemes are entirely run by volunteers.

B. Impact of the use of ADR on Legal Costs

Most of the literature available on evaluations of restorative justice schemes addresses the impact of those schemes on victims and the community as a whole (reparation) as well as their impact on preventing re-offending. Systematic empirical research on the impact of ADR on cost and time effectiveness is yet to be undertaken.

It is unsurprising that such data is difficult to find since costs per case for mediation vary considerably across jurisdictions, type of organisation, seriousness of the offence and whether or not volunteers are used. It has been acknowledged, however, that overall, victim-offender mediation considerably decreases both the time and costs normally required to process offences throughout the traditional court approach. Moreover, the use of ADR reduces costs of incarceration by substituting prison sentences for minor offences by creative alternatives such as community service as well as reducing the caseload of the courts.[220] As illustrative of this point, research conducted on the Restorative Resolutions Project in Manitoba found that most offenders referred would have received a prison sentence through the traditional system.[221]

The literature provides limited data on the costs of schemes but the following is informative: Umbreit, Coates and Kalanj's research into mediation programs in the U.S. found that a referral to the program cost approximately $230 and an actual mediation session cost less than $700[222]. Furthermore, in a survey of 116 mediation programs across the United States, program budgets ranged from $1 to over $400,000 with a mean cost of $55,077.[223]

We have set out in Appendix 9 some data from the North Carolina Courts System which reflects court fees for criminal proceeding including mediation.[224]

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[220] See the website of the Victim-Offender Reconciliation Program Information and Resource Centre at www.vorp.com

[221] Bonta, Wallace-Capretta and Rooney (1998) *Restorative justice: An Evaluation of the Restorative Resolutions Project* Ottawa, Ontario: Solicitor General Canada in Latimer J. and Kleinknecht, S. (2000) The Effects of Restorative Justice Programming: A Review of the Empirical, RR2000-16e http://canada.justice.gc.ca/en/ps/rs/rep/2000/rr00-16a.pdf [Accessed 28.11.05]

[222] Umbreit, M., Coates, R., and Kalanj, B. (1994). *When victim meets offender: The Impact of Restorative Justice and Mediation* (Monsey, NY: Criminal Justice Press) in Latimer and Kleinknecht above note 207 at 15.

[223] Umbreit, M., Fercello, C., & Umbreit, J. (1998). *National survey of victim offender mediation programs in the US*. Draft prepared for the Office for Victims of Crime, U.S. Department of Justice. Center for Restorative Justice & Mediation, School of Social Work, University of Minnesota in Latimer & Kleinknecht above note 193 at page 15.

[224] Anon. court Costs and Fees, www.nccourts.org/Courts/Trial/Documents/CourtCosts.pdf [Accessed 28.11.05]

In the UK, costs per case for victim-offender mediation generally range from £150 to just over £300 and costs for the New South Wales Community Justice Centres are around £500 per case resolved; this contrasts with the average cost of a prosecution of about £2,500 per case.[225]

It is clear that the use of alternative to courts settlements is inherent to most jurisdictions, even though it takes different forms and is more or less developed. It is also clear that the use of ADR plays a role in reducing case overload for the courts and thus has an impact on costs.

[225] Marshall, T. F. (199) *Restorative Justice, An Overview* (The Home Office) at p.19 www.homeoffice.gov.uk/rds/pdfs/occ-resjus.pdf [Accessed 28.11.05]

CONCLUSIONS

By any measure the UK spends significantly more on legal aid than any other country in the world. While we can see the differences, we are not clear why these differences occur. We start by emphasising one particular item: the legal, professional and judicial cultures of different countries are as variable as their number. Because countries may have shared common "family" legal cultures at some point in the past—eg, UK, Australia, and the US or France, Spain and Italy—does not mean that similar values have endured in each. One example can be used to illustrate the differences. The key principle of advocacy in the UK and the US is orality, everything is presented in court by word of mouth and the role of the judge is to *listen,* then formulate a judgment.[226] On the whole the UK has clung to this value and, despite the introduction of "skeleton" briefs, most advocacy remains oral. In the US orality is still the defining principle, but an important part of the advocate's, or litigator's, role is to brief the court beforehand. That is, much of the factual matters and the legal issues are presented to the judge in the form of written briefs prior to any hearing. Moreover, the judge will have read and understood the briefs before the court hearing. In certain cases, mainly appellate, advocates are given time limits on their presentations via a system of "traffic lights" in court.[227] Thus in the US orality and textuality go hand in hand, whereas in the UK orality still reigns. Of course a system like the former that demands these types of levels of preparation is one that is amenable to management.

Technology and Management:
Technology is a key element of any plan of cost containment in the legal process. Admittedly the start-up costs are significant,[228] but long-term gains will follow. The potential for moving more court-related processes online should have two advantages. First is that relief from shifting large quantities of documents around, with their ancillary labour costs, should reduce overheads. Second is that online services, such as the US federal EPA systems and Canada's "access: defence", can contain an element of user pays which would help to defray costs and even generate revenue to support systems, as the EPA has done. If these type of systems were combined with a move away from oral-based systems of delivery, as now, towards a more document-intensive process (i.e., more akin to the inquisitorial rather than accusatorial systems), it should be possible to reduce the amount of time lawyers spend on cases. The corollary to this is that the burden on judges may well be increased as they will need to undertake far more case preparation than now.

[226] See C. Glasser. 1993. "Civil Procedure and the Lawyers—The Adversary System and the decline of the Orality Principle" Modern Law Review, vol 56, pp. 307-324.
[227] Note that the European Court of Justice operates time limits on advocates' presentations, something which caused consternation among British advocates when they first appeared there.
[228] For instance, "there is some evidence to suggest that in some jurisdictions enthusiasm for electronic filing within the legal profession is limited. [The reasons include] the costs associated with adopting electronic filing such as software and the impact on traditional charging of disbursements and other costs" McKechnie, D. (2003) "The Use of the Internet by Courts and the Judiciary: Findings from a Study Trip and Supplementary Research" 11:2 *International Journal of Law and Information Technology* 109 at 130.

This could be alleviated by the use of judges' clerks (American judges employ between one and two judicial clerks out of law school each year) as preliminary sifters of material. It could also reduce the amount of court hearing time needed by judges. Although, interestingly, research on the public defender system in New Zealand found that when public defenders started submitting more paperwork than private practice lawyers normally did, judges welcomed the written submissions because it eased their work. The complaints came from the private practice lawyers who regarded this as making the judges' work *too easy* since they regarded the judge's role to be on of *listening* to submissions not *reading* them.[229]

Two IT components should be mentioned in particular for their cost saving potential: case management systems, which includes document processing, and virtual court environments, which includes video conferencing. Case management appears to be effective in reducing costs in a number of countries from North America to Europe, e.g., US, Canada, Austria, France, UK.

Virtual courtrooms and video conferencing should enable a more efficient use of lawyer and judge time. Inordinate costs attach to collecting the necessary personnel together in the appropriate place at the correct time. There are few incentives and fewer penalties attaching to appearing when called, regardless of whether one is a police officer, witness, defendant, lawyer, or other official. It leads to unnecessary adjournments and waste of resources. Creating an environment where lawyers, judges and others can meet in virtual space would assist cost containment. The example of Canada's video remand project illustrates one aspect of this. It has also been adopted in other countries with remote facilities, eg, Australia. Another aspect is where the preliminary matters of cases are handled in virtual environments rather than in physical space, eg, VPDH in Manchester. Again this requires a change in the work practices of judges moving away from court hearings to document-based enquiries. The approach outlined here emphasises the point made by Johnsen that court work is composed of two entities: *work time* and *queuing time*. Work time is when lawyers, police, judges and others are actually doing something with the case; queuing time is downtime when nothing is happening because witnesses are absent or the lawyers are working on other cases. The problem is that the latter constitutes three-quarters of the total time.[230] The question now becomes what is the optimal time for a case? This is a policy decision, but we get an idea of how others treat it when we recollect on the times robbery cases take to disposition: Iceland=80 days, UK=100 days, France=200 days, Germany=220 days, and Switzerland=480. It ought to be possible to calculate a reasonable time span.

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[229] J. Paulin & K. Baelher. 2005. *The Public Defender Service Pilot Evaluation: Interim Report One* (Wellington: Victoria University) at 39.

[230] J. Johnsen. 2005. "Speeding Up Judicial Systems: Lessons To Be Learned From The Report On European Judicial Systems 2002" <http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Efficiency_of_justice/Johnsen%20speech%20La%20Haye%202005.asp#TopOfPage>

Finally, case management necessitates modifications to the ways in which judges themselves, manage themselves and each other. In the UK we may describe the system as laissez-faire, while in other jurisdictions there is more oversight. Two lines of enquiry emerge from our research. One is that the election of judges, as in the US, enables a more finely-grained oversight owing to the periodic necessity of judges having to account for their activities. Bar associations and public groups demand to know how judges have deported themselves: have they been efficient? slow? tough in sentencing? lenient? courteous to lawyers, witnesses and defendants? Many of these factors are now collated through judicial performance evaluations which scrutinise judges through external reviews from lawyers and public and by observation of their peers (including self-reflection).

The balance here has to be between the independence of the judiciary and the efficiency of the courtroom. The two are not mutually exclusive and the monitoring of judges ought to be practicable with the limits imposed by judicial autonomy. This approach could, by improving judicial efficiency, save wastage in judicial resources, which are among the most expensive and scarce in the legal system. They need careful husbanding.

Salaries, Appointments, Supervision/Management of the Judiciary
In inquisitorial systems where being a judge is an early career decision, there is potentially far more state control over the judiciary. Such systems also tend to have larger judiciaries than in common law countries. And whereas there is a tendency for judicial salaries to be lower on average in inquisitorial regimes, than among common law judges, according to CEPEJ, the results may be weighted against bigger numbers of judges on the one hand and higher judicial salaries on the other.

Control over judges may be exercised from two directions, namely, the top and below: first, from the state (top down), i.e., judicial administrations such as judicial councils or chief judges; and second, from the prosecutors (bottom up), in conjunction with investigating magistrates, who are able to determine the cases that judges will actually hear by virtue of pursuing or not pursuing cases.

There is also the role of specialised courts, which may help tp process cases in a more rational manner. For example, countries, such as Germany, have a high number of specialist courts as opposed to the more generalist approach of the UK. In North Rhine-Westphalia administrative and other types of courts are fragmenting in a drastic specialisation. On the civil side, for example, specialist courts include amongst others: telecommunications law; construction planning law; refugee law; civil servants law; right to vote law; colleges of higher education law; medicine law; military service law; police law; etc.[231] On the criminal side, they include: criminal cases concerning environmental lawsuits; customs duties; military criminal cases; economic

[231] P. Dyrchs et al. 2005. “Internal Case Assignment in North Rhine-Westphalia” in P. Langbroek and M. Fabri (eds) *Internal Case Assignment: A Report on a Comparative Study into the Rules and Practices of Case Distribution in Courts in Five European Countries* 153 (Utrecht Institute for Legal Studies: Utrecht) (included with present report).

criminal cases, etc. Thus who gets what case is more easily determined than in random allocation systems.

Lawyers and Work Practices:
What is a lawyer varies across countries: for example, barristers and solicitors in the UK, Australia and New Zealand; attorneys in the US; avocats and notaries in France constitute some of the varieties available. In some countries the prosecutors are almost part of the state judicial apparatus, e.g., Italy and Russia. This makes interpreting the roles and numbers of lawyers difficult.

In the particular case of criminal legal aid defence a mix of lawyer types was the norm in most countries. These combined elements of salaried lawyers—public defenders—with judicare, including assigned lawyers, and lawyers in legal clinics or community centres. Although the public defender system was originally introduced to curb the anticipated runaway costs of *Gideon*, it has not provided the bonuses that policy makers expected. In part, the fault lies with the gross under-funding of the programmes, which leads to high caseloads and poor quality.[232] Yet it is a system that is amenable to cost controls via state budgets but also because it breeds specialisation. Public defenders are geared to one type of legal activity, criminal cases. This is the reason for the Open Justice Initiative funding two public defender programmes in Lithuania and Bulgaria. In the US public defenders comprise the largest segment of the legal aid lawyer contingent, handling 82% of the 4.2 million cases handled by indigent defence lawyers in 1999. Generally, evidence from the UK, Canada, US, Australia, and in a limited way from New Zealand suggests that public defender services are cheaper than private practice lawyers. However, the range of savings varies from significant to very low.

It does seem apparent that where there is a mix of systems, legal aid costs are not as high as in the UK. Other systems are also more open to explicit plea bargaining schemes where the disposition of minor or clear cases can be dealt with quickly and fairly. If, however, the numbers of minor cases are “garbage” cases then responsibility must lie with government ministries for over-criminalising behaviour, which can only rack up costs. If government departments are responsible for the costs of their policies, via a cost-benefit analysis, then the amount of laws might decline. At the moment there are no incentives or penalties to reduce the numbers of laws, ill-thought out or otherwise.[233]

Plea bargaining falls into three categories: charge bargaining, fact bargaining, and sentence bargaining. One or more of these ought to be possible to institute in an explicit and transparent manner without compromising human rights. A series of experiments, like those carried out in Florida, would enable

[232] See the example of public defenders in Massachusetts mentioned above at 2.a and compare with the plight of New Zealand lawyers at 2.a (iv).
[233] This resonates with the lack of incentives and penalties elsewhere in the system. It seems the public sector has no mechanism for monitoring and costing the impact of its behaviour in the legal system, especially in relation to legal aid.

more rational conclusions to be drawn, i.e., an evidence-based system should be the driver, not prejudice. The Australian statistics suggest considerable savings can be made through truncating proceedings, i.e., close to £2000 per day in trial courts when the costs of personnel and space are taken into account. Within the UK it seems that legal aid costs are affected by the numbers of criminals arrested, but not nearly as much as the costs involved in bringing higher and higher numbers to trial instead of routing them out of the system at earlier stages.[234] One point should be noted: where plea bargaining is prohibited, i.e., sentence bargaining, some other form of plea bargaining will emerge in its place, usually charge bargaining.

In serious cases with a number of defendants, experience elsewhere indicates that costs could be trimmed unless lawyers are brought up against conflicts of interest rules. The key point is that while accused are entitled to representation, this does not necessarily mean that they have the right to choose which lawyer or how many should represent them. This kind of limitation would not contravene the European Convention on Human Rights. And as Goriely, Tata and Paterson state:

> "[A]lthough Western European countries have devised criminal legal aid schemes to meet the same constitutional requirements,[235] they spend significantly, different amounts. High expenditure does not ensure full compliance with the Convention and low expenditure does not necessarily reflect a high rate of non-compliance."[236]

Particularly illustrative of this point is the fact that in New Zealand a Bill, to amend the Legal Services Act 2000, is currently making its way through parliament, which will result in more people being eligible for legal aid.[237] As a result legal aid grants are expected to increase by 25,000 to 85,000.[238] However, this is with an increase in legally aided recipients obliged to repay of 14,000 to 22,000.[239] The legislation will also introduce changes to assessment of eligibility for aid. The Minister of Justice[240] in relation to the changes said:

> With major public investment in legal aid to ensure access to justice, it is equally important that proper safeguards are built into the system to ensure that spending is justified. Overall the new system will be fairer, both in ensuring access to justice does not depend on an ability to pay, as well as ensuring that people seeking public assistance genuinely need it and will contribute to the cost.[241]

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[234] E. Cape & R. Moorhead. 2005. *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (Legal Services Commission: London)

[235] See article 6 ECHR at page ??? above.

[236] Goriely, T., Tata, C. and Paterson, A. (1997) *Expenditure on Criminal Legal Aid: Report on a Comparative Pilot Study of Scotland, England and Wales, and the Netherlands Legal studies Research Findings No.9* (Scotland: The Scottish Office Central Research Unit) at 6.

[237] Legal Services Agency (2005) "Legal Aid Eligibility Extended" 5:2 *Legal Services Agency News* May at 1.

[238] Ibid.

[239] Ibid.

[240] Hon Phil Goff.

[241] Legal Services Agency (2005) "Legal Aid Eligibility Extended" 5:2 *Legal Services Agency News* May at 1.

Alternative Means of Dispute Settlement:
The main use of ADR in the criminal sector is in connection with restorative justice programmes where they mostly focus on juvenile crime, with the exception of France. It is a way in which juveniles can be diverted out of the criminal justice system without stigma yet expressing contrition and making reparation. It would be reasonable to assume that diversion programmes would make a considerable saving over taking the defendant through to trial with its attendant costs. While it is difficult to put a number to the savings, the limited data available suggest that referrals and mediations are low-cost schemes. Moreover, in jurisdictions where ADR is used, case overload in courts has been reduced.

This report has covered a wide range of ideas, initiatives and interesting approaches. They fall into three main categories of organisations, work practices, and ADR. We have arranged them this way in an attempt to bring some coherence to what is happening in the sphere of legal aid and criminal justice. It is apparent that there is no single solution or cause to the woes of the criminal legal system. It is both a victim of its success and a victim of its incapacity to do all that is expected of it. However, we have shown a number of possibilities that would enable the costs of legal aid to be curtailed without compromising human rights. Collectively, they could realise substantial gains.

If we were to rank these possibilities in relation to feasibility and cost, they would be case management processes, ADR techniques, and a transparent form of plea bargaining. We do not exclude public defenders but they are probably the most expensive item and would require significant front loading.

Despite all that we have reported, there are some elements that may be beyond the remit of the present review that have profound effects on the system as it is. We have in mind the cultural and professional mindset of the legal profession and the judiciary. The present organisation, which is merely a historical artefact, stifles innovation and acts to maintain monopoly rents. It is not necessary for the two wings of the legal profession, solicitors and barristers, to fuse, but the restrictions on movement between the two could be made more permeable so that the choice of whether to become a barrister or solicitor was one only of title and not content. Moreover, the British judiciary, which views itself as a group of highly talented individuals, must be persuaded to take a more collective approach to judicial professionalism, which will entail significant increases in oversight and evaluation. This will be necessary if substantial changes in legal aid expenditures are to occur.

Finally, we consider the relationship between quality and cost and the impact on justice. Conserving resources does not of itself mean a diminution in quality of service. Indeed, it could result in better service because resources would be allocated where they would be needed most rather than frittered away. The problems appear to arise when the state takes advantage of its position as monopolist. The extent to which it attempts to increase or improve efficiency and productivity must be finely calibrated unless everything tips the other way resulting in overload and a drastic reduction in quality. This is the

case, for example, with some of the public defender programmes in the US. They have plea bargain mills. And the consequences are unfortunate as there is nothing bad or wrong in principle with either public defenders or plea bargaining. But once they are shorn of value and quality, they become an embarrassment, politically and legally. If new ideas and programmes are introduced with transparency, full information and reasonable financial support, then problems, as encountered in New Zealand with their PDS, can be avoided.[242]

Our impression is that within the UK there is a tremendous waste of resources in the criminal justice system, e.g., the way in which judges are shunted around the country, the way cases are allowed to drag on, the way small groups of lawyers abuse their monopoly through the exercise of professional restrictive practices. The system may desire to be likened to a Rolls Royce, but its one that has been allowed to become old and rusty and is occasionally tinkered with but never properly serviced and overhauled; whereas modern production techniques have created many cheaper cars that run far more efficiently and economically than their elite brethren. New techniques of case management and IT, appropriate uses of ADR and a careful balance of incentives and costs for the accused ought to provide for a modern, functioning criminal justice system that would not consume a disproportionate share of our resources.

[242] This is the sort of difficulty that met the Crown Prosecution Service when it started.