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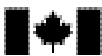
THE PURCHASER-SUPPLIER APPROACH IN LEGAL AID



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THE PURCHASER-SUPPLIER APPROACH IN LEGAL AID

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Highlights

The funding of legal aid in several common law countries is being affected by new ideas in public administration known as New Public Management (NPM). NPM emphasizes clear policy objectives, measurable outcomes and economic efficiency in contract-like relationships between the funders and suppliers of services.

In legal services this has given rise to the "purchaser – supplier model" (PS) for funding legal aid and other legal services. In the PS model a funding agency are viewed as purchasing clearly defined services that reflect its policy objectives. These services must be delivered with a level of accountability and efficiency consistent with the proper expenditure of public funds.

The PS model is coming to replace some elements of the mutual interest model (MI) that has characterized the past thirty years of government funding that has characterized government funding of legal aid.

In 1996-97 the Commonwealth government in Australia changed from a MI model to a PS model of funding legal aid in the states and territories. In large measure this was done as part of an effort to escape from a focus on expenditures levels and not on needs to an approach to federal funding reflecting the level of need for legal services.

The PS funding model in Australia is still an experiment. Only one Commonwealth State/Territory funding agreement has operated under PS principles. Another is just beginning. However, the experience to date has produced some improvements in the national legal aid system. It also displays several potential disadvantages.

The Australian experiment is still evolving. A pure PS model may not be the most appropriate one for the funding of legal services. A blend of the former MI model and elements of the PS model may provide the best framework for the funding of legal services in a federal state.

Executive Summary

Introduction

This paper is a preliminary paper. The 8 questions in the Terms of Reference (see Appendix A) address two models of legal aid funding legal aid. One model is the mutual interest (MI) or co-operative, partnership approach. The other model is the purchaser-supplier (PS) or contracting between funders/policy agencies and providers for the supply of legal aid services.

A demonstrable international shift towards the PS legal aid funding model prompted the Department of Justice to commission the paper. The Canada/Australia federal legal aid workshop that followed the International Legal Aid Group meeting last year assisted in clarifying the issues to be addressed.

Q. 1: The features of a MI approach to funding legal aid

Such an approach shares many features with other MI models of public policy projects. MI models are predicated on high levels of reciprocity and co-operation in inter-relationships between state/government agencies and other actors invited or required to participate in public policy projects. A high level of agreement exists with respect to policy fundaments. Operational responsibilities and functions are shared, and consultative techniques of decision-making and resource allocation deployed, in a general spirit of collective enterprise. In a legal aid context a MI approach operates as a social partnership, financed by the state, but built on mutual understanding, shared fundamental values and trust between governments, legal aid agencies and the legal profession.

Constellation around the socio-legal institution of legal aid is the distinctive feature of a MI approach to legal aid funding. That socio-legal institution serves as the template of MI legal aid schemes. Legal professional ideals of legal aid as providing lawyers for the poor dominate legal aid policy, and lawyers and the interests of the legal profession play a major role in the institutions, administration and supply of legal aid.

Q. 2: The features of a PS approach to funding legal aid

No ideal-type of a PS model exits. PS models are complex inter-mixed New Public Management (NPM) concepts that delineate and separate funding and policymaking and service delivery functions.

In practice the PSM has two general features. The PSM resorts to contract norms and techniques to manage public policy projects to supervise expenditure, ensure value-for-money and accountability, and to manage relationships between funding/policy agencies and suppliers of the services necessary to achieve expenditure targets and policy outcomes. Secondly delineating and separating functions in the PSM makes new demands on funding/policy agencies, including the need to increase to investment in applied, policy-orientated research. Such new investment is evident in both England and Australia.

Q. 3: The advantages of a MI model, based on the Australian experience

The principal advantage of the MI model in Australia was that it worked, providing a reasonably effective and generally efficient system of legal aid. An official report in 1990 suggested five reasons for its success: one, the MI model acknowledged the different socio-legal responsibilities of Federal and State/Territory governments; two, the model worked; three, in the 1970s and 1980s the MI model was consistent with other federal policies; four, it emphasized goodwill and co-operation, and drew on the expertise and experience of participant partners; fifthly, the MI model facilitated conflict resolution and positive outcomes in a complex, multi-interest public policy project.

Other contextual factors included a favourable ideo-political climate, widespread acceptance of the significance and importance of the socio-legal institution of legal aid, the influence of the first "wave" towards equal access to justice in post-war western society. A MI model of funding also had strong attractions to its partners, offering Federal and State/Territory governments a vehicle to cap or limit outlays on legal aid, appealed to the socio-legal predisposition of the legal profession, and benefited the economic and collective interests of its members.

Q.4: The disadvantages of a MI model, based on the Australian experience

Australia was never a big spender on the MI model. Comparatively low funding probably impacted on the availability of legal aid, and probably affected the performance of the MI model.

In the Australian experience the MI model advantaged a majority of its partners, notably State and Territory governments, legal aid commissions, the legal profession and CLCs.

Other partners were disadvantaged. The voices of social welfare organizations such as the Australian Council of Social Services were muted, and social welfare policymakers frustrated by the concentrated on "in litigation" legal aid services.

Whilst substantially funding the MI model Federal governments encountered problems in promoting/protecting Commonwealth interests, managing federal expenditure, difficulties in controlling and monitoring costs and ensuring national uniformity in access to legal aid in Commonwealth/Federal matters. To a significant degree the Federal government was hoisted on its own petard, concentrating in the 1980s on capping expenditure, and paying insufficient attention to national legal aid policy, and developing accountability mechanisms.

By 1990 a MI model was out of step with trends in federal public policy, and legal aid funding the object of critical scrutiny by the federal Department of Finance, and Federal and State/Territory managers and the legal profession faced new ands very real problems in demonstrating the effectiveness and efficiency of the MI model of funding legal aid. The MI model in Australia was also criticised for lacking a policy or solution oriented focus, emphasizing instead the delivery of in litigation services by lawyers.

Q. 5: The advantages of a PS model, based on the Australian experience

It is premature to evaluate the Australian experience. Nevertheless PS models promise funding agencies greater control over expenditure and greater co-relation of policy objectives and service delivery outcomes. PS legal aid funding is also likely to improve financial accountability and create flexibility and choice in policy and service delivery strategies.

Application of the PS funding model in Australia has already enabled the Commonwealth/Federal government to assert and exercise control over its legal aid expenditure, and escape the twin legacies of funding by case numbers and bloc funding of State and Territory legal aid commissions. The PS model has also improved lines of accountability, incorporated new performance and data collection standards, imposed new monitoring and reporting frameworks, and moved towards quality standards.

Adoption of a PS model has seen legal aid more closely integrated with other Commonwealth/Federal access-to-justice policies, including a system wide shift towards non-litigious, out of litigation legal services. It has also fostered new, commercially oriented relationships between the Commonwealth/Federal government and State and Territory governments in supplying legal aid, and encouraged pre-existing PS initiatives in legal aid commissions. Adoption of a PS model of funding has improved the capacity of managers to satisfy Department of Finance program evaluation criteria, and to bring legal aid funding into line with PS and other NPM administrative technologies in the Australian public sector.

Q. 6: The disadvantages and potential negative impacts of a PS model, based on the Australian experience

It is too soon to finally evaluate the shift from a MI model to a PS model in the Australian national scheme in 1996/97. Australian experience. A PS model has only just begun to operate nationally in a complete 3-year funding cycle.

Potentially the advantages of a PS model outweigh its disadvantages. Nevertheless the Australian experience of the transition to a PS funding model was dramatic and difficult. The balance of power in the national legal aid scheme shifted to the Commonwealth. State/Territory governments, legal aid commissions, CLCs and the legal profession viewed the actions of the Federal government as peremptory, bereft of consultation and devoid of sensitivity to their 20-year investment and performance in the MI scheme. Whilst creating great promise for policy targeting and accounting for federal expenditure introduction of the PS model left a bitter if slowly fading legacy amongst State/Territory legal aid commissions and staff, CLCs and the legal profession.

In shifting to a PS model the Federal government also significantly reduced Commonwealth grants to legal aid commissions. This exacerbated ex-partner concerns about process, and an already parlous funding situation. Restricting spending of federal grants to matters identified in funding contracts as Commonwealth/Federal matters and priorities and restrictive Means and Merits Tests and Guidelines negatively impacted on the availability of legal aid, adding to administrative costs in the States/Territories, and at times leading to iniquitous consequences for citizens with in litigation cases. Evidence presented to a parliamentary committee in 1997/98 indicated that changes to legal aid funding accompanying introduction of the PS model has significant adverse consequences for the health of the national scheme, and the interests of ordinary citizens needing financial assistance through legal aid to address legal problems.

The Australian experience aside the PS model has other potential disadvantages. Purchasing funding/policy agencies should take care not to elevate efficiency and effectiveness above the professional cultures, work practices and discretions that have sustained viable markets for the supply of legal aid services by practising lawyers. Nor does the PS approach overcome the risk of supplier capture. Taken to extremes PS and other NPM approaches potentially threaten the participation of the legal profession in legal aid schemes.

Q.7: The implications of a shift towards a PS approach to funding for legal aid as a socio-legal institution

Legal aid as a socio-legal institution will survive PS approaches to funding national legal aid schemes. Even if significant funding cuts or diversion of resources towards PDR and other non-lawyer focused solutions to enhancing efficient and effective popular access to law occur.

The significance of the socio-legal institution of legal aid will change. Shifting to PS models will not be a primary cause. The driving force behind changes to the socio-legal institution of legal aid is the new politics of law evident in market capitalist societies such as Canada and Australia. The forces behind such politics include changes in economic policy, the iconic role of the market and re-regulation for a networked global economy. Within the new politics of law NPM and access-to-justice, integrated approaches to public legal services have been particularly important in changing the significance of legal aid as a socio-legal institution.

Other new political factors include changes in the political economy of legal professions, legal workplaces and labour markets and state and consumer re-negotiation of the 20th century compact between the legal professions, state, and society. The eventual impact of a shift towards PS funding and the new politics of law on the socio-legal institution of legal aid are unknown. However such impacts have the potential to adversely impact on the participation of legal professionals in legal aid programs.

Q. 8: The implications of the shift towards a PS model in a federal state in which the national government is a major funder of legal aid

Many of the implications of a shift to a PS model are canvassed in answering earlier questions. The lessons of the Australian experience are applicable elsewhere provided the distinctive national experiences of socio-legal institutions are acknowledged.

Those lessons are generally applicable to legal aid public policy projects. In federal and unitary states shifting to a PS model policy-making processes should become efficient and effective, governments should invest in research and managers in funding/policy agencies need to ensure that staff administering PS programs have appropriate inter-personal, negotiation and bargaining, accounting and financial, contract, risk and change management skills. The implications for program management need further exploration, drawing on cross-national experiences, and the use of PS funding models in non-legal aid public policy projects. Nevertheless we can posit a preliminary description of the pluses and minuses of the PS model, compared to the MI model of funding legal aid (see Appendix B).

Particular implications of a shift to PS funding legal aid in federations such as Canada and Australia include raising the profile of central governments, increasing expectations of federal responsibilities and action, risk shifting to the centre, cost-shifting to regional provider/suppliers and re-emphasizing the need for effective, system penetrating intra-national communication between funding/policy makers and providers/suppliers of legal aid.

1.0 Introduction

This paper has its genesis in the cross-national inter-active approach to legal aid policy-making and research encouraged by the work of the International Legal Aid Group ("ILAG"). ILAG is an association of CEOs and policy-makers from national legal aid agencies and academic experts from Australia, Canada, England and Wales, Germany, the Republic of Ireland, New Zealand, Northern Ireland, Norway, Scotland, The Netherlands and the United States.

Since it was established in 1992 ILAG has held four meetings, in The Hague in The Netherlands in 1994, in Edinburgh in Scotland in 1997, in Vancouver in Canada in 1999, and in Melbourne in Australia in 2001. The next ILAG meeting will take place at Harvard Law School in the United States in June next year. The ILAG meetings have proved to be a unique forum for managers and policy makers to meet and exchange ideas and experiences about funding and providing legal aid on a national basis. ILAG meetings have also generated valuable collections of papers, and encouraged networking amongst managers, policy makers, researchers and academics (*see* Ministry of Justice 1995; Scottish Legal Aid Board 1997; Reilly et al 1999; International Legal Aid Group 2001). These networks are developing into a new and important resource for managers and policy-makers in participant countries who often face comparable problems in funding and administering national legal aid systems.

In the case of Canada and Australia such comparability extends beyond common issues in legal aid management. These two countries each have federal systems of government, share a comparable Anglo-colonial socio-legal heritage and social democratic traditions, and are examples of successful multi-cultural immigrant societies. Moreover like other English-speaking welfare capitalist societies the state and its public policies have undergone significant transformations in the past 20 years (Castles 1990).

Consequently the ILAG meeting in Melbourne in June last year presented federal legal aid managers and policy-makers in Canada and Australia with a cost-effective and timely opportunity to meet to exchange experiences, and discuss common problems. A proposal for such a meeting was put to senior executives in the Canadian Department of Justice and the Australian Commonwealth Attorney-General's Department. The initiative was readily agreed to, and strongly supported. The result was that on 18th June 2001 a day-long workshop attended by Ms Carolina Giliberti, Director-General, Programs Branch, and Dr Ab Currie, Principal Researcher, Access to Justice, Research and Statistics Division, of the Department of Justice and senior managers and policy-makers and operational staff of the Family Law and Legal Assistance Division ("FLLAD") of the Attorney-General's Department was held in Canberra.[1]

Participants exchanged overviews of the legal aid systems in Canada and Australia. Issues of common concern such as providing legal services to indigenous people, legal aid in refugee and

[1] The Family Law and Legal Assistance Division comprise the Family Law Branch, Legal Assistance Branch, the Policy Development and Coordination Unit and the Finance and Corporate Support Unit. The Division is responsible for the development, implementation and administration of Commonwealth policy on family law and legal aid, including access to and delivery of primary dispute resolution services. FLLAD also acts as the Commonwealth central authority in relation to international child abductions and adoption conventions and is responsible for administering arrangements for the recovery abroad of maintenance and the enforcement of overseas and international parenting arrangements. In addition, FLLAD provides some direct grants of assistance in matters arising under a number of Commonwealth statutory and non-statutory financial assistance schemes, and administers the appointment of civil and some religious marriage celebrants.

immigration matters, the problem of extraordinary, high cost cases, developing and monitoring program objectives, performance indicators, and data reporting requirements imposed on legal aid plans, the special requirements of rural and remote areas, and staged approaches to granting legal aid were identified and discussed.

The Canadian representatives outlined emerging directions in Canadian legal aid. In particular, the problems facing governments and managers in ensuring equitable distribution of federal legal aid funding, defining clear federal objectives and accountability frameworks, developing uniform national standards, and achieving a focus on federal priorities in service delivery. The Australian officials explained it was the presence of comparable problems that had prompted remedial Federal government interventions in 1996. They outlined the objectives of the changes to Commonwealth funding and policy, the unanticipated consequences of such changes, and the lessons learned by the Federal government and Attorney-General's Department legal aid managers.

Thereafter the workshop discussion concentrated on the practicalities of emphasizing central government funding and policy goals in national legal aid schemes in federal systems. Question such as appropriate federal objectives in a national approach to legal aid, what should be considered exclusively provincial/State responsibilities, and optimum policy instruments were discussed. The latter included priority fixing, prioritising federal funding paid to legal aid plans, and cost-effective delivery models. Workshop discussion also addressed the importance of 'needs' assessment in managing for efficiency and priorities, including the role of indicators, how indicators might be incorporated in the Federal/provincial or State funding formulae, and methods of reliably identifying client 'needs' for legal aid services. Policy issues such as equal access to services and managing for quality associated with maximizing the presence of central government funding and policy objectives were also discussed.

All involved in the Canada/Australia Workshop considered it to be a valuable exercise. From the Department of Justice perspective it highlighted the possibility that the post-1996 changes to Federal legal aid funding and policy in Australia could be relevant and applicable in the Canadian context. Accordingly the Department has commissioned this paper as an initial step in moving the lessons of the Canada/Australia Workshop forward.

The subject matter of the paper is the eight questions reproduced in the Terms of Reference in Appendix A. Three of these questions consider the features of the mutual interest model of legal aid funding, and the advantages and disadvantages of that model or approach, based on the Australian experience. In this context the "mutual interest model" or "mutual interest approach" is a concept used to describe the dynamics of the legal aid funding system in Canada, a system comparable to that operating in the Australian national scheme until 1996-97. The mutual interest model envisages the relationship between governments and agencies funding legal aid and providers of legal aid services as a "partnership", or a mutual or collective enterprise. Those funding legal aid schemes and those providing its services are regarded as sharing common if diffuse interests, and responsibility for expenditure, resource allocation and policy making is distributed, to varying degrees, amongst federal and provincial/State governments, legal aid plans/legal aid commissions, legal aid clinics/community legal centres ("CLCs"), law societies

and bar associations and practising lawyers.[2] A collective operational approach means that financial risk is distributed across participant funders and providers. The meaning of the mutual interest model or approach to funding legal aid is elaborated in the answers to Qs. 1, 3 and 4 (*see* 2.0, 4.0 & 5.0 below).

Questions 2, 5 and 6 of the Terms of Reference consider the features of a "purchaser-provider approach" to funding legal aid, and the advantages, disadvantages and potential negative impacts of that approach or "model", based on the Australian experience. In this context the "purchaser-provider approach" or the "purchaser-provider" model is a concept used to describe the administrative, quasi-contractual arrangements separating funding/policy and service delivery functions now widely used in the public sector in the English-speaking countries. The model applied to legal aid schemes envisages governments and funding/policy agencies as purchasers, enabled through policy and bargaining processes to determine which legal aid services are required to achieve policy objectives, what type and quality of services are appropriate, and which services governments and funding/policy agencies will buy, and at what price, from providers such as legal aid plans or commissions, in the case of Federal/central governments, clinics or CLCs, not-for-profit ("NFP") agencies, practising lawyers or other potential suppliers of legal aid services. The purchaser-provider approach is said to enable funders to maximise policy and expenditure outcomes and optimise cost-effectiveness in service delivery, although at the expense of the collectivities of the mutual interest approach, including risk sharing amongst all participants. The meaning of the purchaser-provider model or approach to funding legal aid is elaborated below (*see* 3.0, 6.0 & 7.0 below).

The remaining two questions in the Terms of Reference explore, first, the implications of a shift towards a purchaser-supplier approach to funding for legal aid as a socio-legal institution, and, secondly, the implications of such a shift in a federal state in which the national government is a major funder of legal aid (*see* 8.00 & 9.00 below).

The research contract with the Department of Justice specifically required answers based on the author's own views and experience, and limited the scope of any research to documents or other material already in his possession. The answers set out below have complied with these requirements, although in some instances reference is made to other documents or materials. As such the paper is a preliminary one, and should be read in the context of the research contract specifications, and recognising that the views it presents form part of more extensive public

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[2] In Australia regionally based institutions established by State and Territory legislation known as "legal aid commissions" have been the major legal aid providers since the mid-1970s. The eight State and Territory legal aid commissions are equivalent to the legal aid plans operating in the Canadian provinces, and are primarily funded by grants of federal monies, although significant funding is obtained from other sources such as State and Territory governments, interest from solicitors' fidelity or guarantee funds, interest from solicitors' trust accounts and contributions by legally aided persons and other self-generated revenue.

There are now almost 200 community legal centres in Australia. The centres are equivalent in philosophy and function to many of the Canadian legal aid clinics. Community legal centres are independent organizations providing legal advice and advocacy for a wide range of individuals and groups in the community, especially people on low incomes or otherwise disadvantaged in their access to justice. CLCs also provide direct legal advice and assistance, and carry out a range of related activities aimed at addressing systemic problems, including law reform, test case litigation, referrals and community legal education (such as books, pamphlets, classes, videos, radio programs, training kits etc.).

policy processes and in many cases highlight issues that will require exploration through additional, more systematic research.

2.0 The Features Of A Mutual Interest Approach To Legal Aid

Question One in the Terms of Reference asks, what are the features of a mutual interest approach to legal aid? The legal aid literature does not offer us an express model of a mutual interest approach. The charitable, Judicare, salaried and mixed models of legal aid (*see* Paterson: 1991) are essentially typologies of service delivery. They characterize legal aid schemes by reference to *which* lawyers serve as suppliers, or, in the case of the charitable model, *why* lawyers supply legal aid services. Such characterizations do not address the public policy dimensions of legal aid systems. Whether, for instance, a legal aid system is 'generous' or 'mean' in scope (Regan 1993: 000), embraces public administration of New Public Management ("NPM") techniques, or incorporates centralised, or de-centralised, unilateral, or consultative, styles of decision-making and resource allocation.[3]

A mutual interest approach is implicit in Cappelletti's history of modern legal aid (1972), and Cappelletti and Garth's portrayal of the new, post-war national schemes as a "first wave" towards equal justice (1978: 21). However, these are essentially historicist and apolitical conceptualisations, and do not explore the significance or features of the socio-legal mutualities of modern legal aid. Nor does the public policy or public sector management literature offer us a model of a mutual interest approach, or describe the features of such an approach applied in a legal aid system.

Mutual interest approaches are not unique to legal aid. The experience of public policy is replete with such approaches. The institutions and politics of social democratic states are mega instances of a mutual interest approach to the complexities of modern social governance. The politico-legal institutions of federalism are one example, as are particular expressions of the relationship between central and State or provincial governments, such as co-operative federalism in Australia in the late 1970s and early 1980s (Jones 1983). The multi-level, social partnership approach to governance in the EU is another, more contemporary instance of a mutual interest approach (Commission on the European Communities 2001: 11ff.). Examining such instances, including the 1976-96 version of the Australian legal aid system, highlights three features common to mutual interest approaches to public policy projects.

The first such feature is its ideological dimension. A mutual interest approach is predicated on high levels of reciprocity, agreement and co-operation in the inter-relationships existing between the state and the actors it invites or requires to participate. This does not mean that the state and other or all participant actors must agree on a single or common objective, or that disagreements might not exist or arise as to public policy emphases or resource allocation within the project. It does require a high level of reciprocated participant agreement or acquiescence in the fundaments

[3] An OECD report (1997) describes New Public Management as "'a new paradigm for public management aiming at fostering a performance-oriented culture in a less centralised public sector". NPM is characterised by nine main trends (*see* Kasemets 2000):
* Devolving authority, providing flexibility
* Ensuring performance, control, accountability
* Developing competition and choice, market-type mechanisms
* Providing responsive services, client orientation
* Improving the management of human resources
* Optimising information technology
* Improving the quality of regulation
* Strengthening the steering functions at the centre
* Private sector style management.

of a project, first, as to its core social functions, and secondly, as to the means, policies or instruments by which those functions will be translated into social action. In a mutual interest approach to legal aid, for instance, legislators, governments, the legal profession and other interested actors agree, or at least concede, that the social functions of legal aid is to meet needs for legal assistance, representation and advice, and that the socio-legal institution of legal aid should provide the principal, governing norms of legal aid policy.

The second common feature of the mutual interest approaches is its cultural aspect. The presence of high levels of agreement about fundaments encourages reciprocal expectations of shared purpose and responsibility for a public policy project, and the task of mobilizing its objectives. Thus, in a mutual interest approach we would expect to see a legal aid system envisaged as a collective project of governments, legal aid agencies and the legal profession. In Australia, for instance, the pre-1996 national scheme was officially described as "partnership" between governments, legal aid commissions, CLCs and the private legal profession (*see* National Legal Aid Advisory Committee 1990: 108-110). Similar ideals of social partnership, financed by the state, but built upon mutual understanding, shared fundamental values and trust was captured in the idea of a "legal aid community". In successful mutual interest approaches the collective culture goes beyond mutualism rhetoric. Non-state participants assert their expectations of shared purpose and responsibility, and are pro-active in mobilizing the objectives of a public policy project. The mutual interest approach to legal aid in Australia, for instance, saw legal aid commissions, CLCs, and law societies develop as de-centralised, pro-active and autonomous sites claiming the right to participate in policy making, and decision-making in the mobilization of resources. Much to the benefit of the national scheme, as considered in answering Question Three below, although frequently discomforting the Federal government and its legal aid managers.

The sharing of operational responsibilities and functions is the third common feature of a mutual interest approach. The culture of collective endeavour referred to above is translated, to a greater or lesser extent, into the administration and institutions of a public policy project. Thus, we would expect to see responsible state agencies and officials engage in inclusive, consultative techniques of decision-making and resource allocation. Whether such co-operative approaches are by design, or a pragmatic response to quasi-proprietorial stakeholder expectations engendered by a mutual interest approach. The influence the Federal government conceded to the meetings of the CEOs of State and Territory commissions in administering its interests in the Australian national legal aid scheme in the 1980s is an instance of the latter.

We would also expect that the institutions of a mutual interest approach would reflect the sense of collective enterprise. Whether informally in the developments of the mechanisms of meetings between central and regional governments, and bodies such as the Australian Directors.[4] Or formally through the establishment of the administrative legal machinery of the system. In Australia for instance the national scheme initially included a statutory commission including members nominated by the Law Council of Australia and the Australian Council of Social Service ("ACOSS") to oversight Commonwealth interests in the national legal aid scheme (see *Commonwealth Legal Aid Commission Act 1977*, s 5). The aim was to ensure that no single interest should dominate policy and other proposals (Attorney-General's Department 1985: 22-

[4] In the 1980s CEOs of State and Territory legal aid commissions began to meet regularly in informal meetings known as "Director's Meetings" which quickly made a significant contribution to legal aid program management (*see* National Legal Aid Advisory Committee 1990: 105-6. *See also* 4.0 & 5.0 below).

3). Different configurations of Commonwealth, State, legal profession, social welfare, and legal aid agency interests were successively incorporated into the Commonwealth Legal Aid Council and the National Legal Aid Advisory Committee ("NLAAC") in the 1980s.[5] Institutional recognition of the quasi-proprietary rights was also given in the State and Territory legal aid commission legislation. In Victoria for instance the Legal Aid Act 1978, s 4, provided that the governing board should include nominees of the Commonwealth, State, law society, and the Bar, the Council of Social Service. In some States provision was later made for representation of CLCs.

A mutual interest approach to legal aid is also distinguished from its application to comparable public policy projects. As discussed above the ideological premises of such an approach to legal aid are constellated by the socio-legal institution of legal aid. Consequently a mutual interest approach to legal aid does not merely reproduce state policies of the kind we find in other social welfare projects such as income support, health and education. One reason is that as a socio-legal institution legal aid pre-dates the emergence of the 20th century state welfarism. As a legal institution legal aid is said to have medieval if not ancient social origins (Cappelletti 1972: 347). In any event the socio-legal institution of legal aid in post-war Canada and Australia was a product of legal modernisation, and the reception of the modern Anglo-colonial legal systems in the mid-19th century. [6]

As an institution with a minimum 150-year pedigree we would expect to have a definitive account of the socio-legal institution of legal aid. However that is not the case. Modern legal aid displays what Abel describes as a condition of "value incoherence" (1985: 485). Even at the peak of the post-war expansion of legal aid systems it was not possible to definitely say what ideas lay behind legal aid. In Australia for example 20th century legislators, Attorneys-General, legal profession spokesmen and lawyers variously described legal aid as socio-legal institution designed to protect the legal rights of the poor, promote universal equal access to justice, achieve legal equality for 'rich' and 'poor' alike, to advance social justice or to mobilize the professional aspiration of lawyers, and sustain their occupational privileges (Fleming 1999).

Nevertheless it is generally agreed that the socio-legal institution of legal aid has three elements. First, it is the institutional response of modern law and society to the problem of providing lawyers for the poor (Cappelletti 1972: 347. The second element is that the legal profession is seen as the occupation responsible for the operation of the institution. In Australia in 1918, for instance, a State Attorney-General expected that lawyers would participate in a new legal aid scheme. In his view, they were doing "only what the doctors are already doing in the hospitals ... [a] poor person who has a disease or desires an operation is not denied the services of the most eminent medical men in Sydney" (Hall 1918: 2271). The third element is that lawyers are expected to participate in the operation of the socio-legal institution of legal aid because they are

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[5] The Commonwealth National Legal Aid Advisory Committee was established in 1987 to advise and make recommendations to the Commonwealth Attorney-General with respect to the need for legal aid in Australia, and the most effective, desirable, and economical means of meeting such needs. NLAAC was abolished in the early 1990s.

[6] The modernisation of western law and its institutions began in the 18th century (*see* Abel-Smith & Stevens 1967: 8-9; Atiyah 1979: 102*; see also* Galanter 1966). In England modernisation of law and government over 1830-50 saw, first, the export of modern centralised, mono-typical legal systems to its overseas colonies, and, secondly, "the shiny new components of an integrated national legal system ...bolted into place" in the 1870s (Arthurs 1985: 50-88). By 1900, comparable modern types of government and centralised legal systems had emerged in countries such as Belgium, France, Germany and Italy (*see* Galanter 1966: 19).

the responsible professional occupation. Such participation was the part of the bargain between legal professions and the 20th century Anglo-colonial state and society (*see* 8.0 below). In Australia, for instance, in 1943 another State Attorney-General observed that "the legal profession is a profession, and there is every good reason to expect that it should give the same social service as do other professions" (Martin 1943: 2714).

The other distinguishing feature of a mutual approach is that the socio-legal institution of legal aid serves as the dominant template. Its ideals and implicit lawyer/lawyers' services focus are imbricated into the legislative philosophy and legal machinery of a legal aid system. In Australia, for instance, the original functions of the State and Territory legal aid commissions were designed around the premise that providing and supplying legal aid was properly the business of the legal profession. In Victoria, for example, the *Legal Aid Act 1978*, s. 9(1) provided that the function of the legal aid commission was to provide legal services via its own staff lawyers or "by arranging for the services of private practitioners to be made available wholly or partly at the expense of the Commission". The legislation also enshrined the role of the legal profession in other ways. Section 4(3), for instance, required that the Chair of the Victoria Legal Aid Commission be a private legal practitioner of not less seven years standing. Of the other members of the Commission, two were required to be nominees of the law society and the bar. In practice it was likely that as many as six of the nine-member Commission would be members of the legal profession, either judges, private practising lawyers of legally qualified civil servants.

The template of the socio-legal institution of legal aid was also evident in other parts of the machinery of the Australian mutual scheme. The legislation protected the position of the legal profession, incorporating the assumptions of a protected occupational market implicit in its mid to late 20th century relationship with the state (*see* Q. 7; *see also* Paterson 1988, 1993 & 1996). Typically the legislation provided in the performance of their functions State and Territory legal aid commissions should:

- Carry out their activities consistently with, and not to prejudice, the independence of the private legal profession;
- Liaise with law societies and bar associations to facilitate the use, in appropriate circumstances, of services provided by private legal practitioners;
- Make maximum use of services that private legal practitioners offered to provide on a voluntary bases;
- Encourage and permit law students to participate, so far as the Commission considers it practicable to do, on a voluntary basis, under professional supervision in the provision of legal assistance.

The legal aid legislation also protected other rights claimed by the legal profession. In Victoria, a person granted legal aid was entitled to select a private practising solicitor of her or his choice from a panel of solicitors. Clients' legal privilege was extended to legally aided litigants and accused, thereby creating a lawyer/client relationship with the provider of legal aid services, whether private practitioner, or employed legal aid commission solicitor.

3.0 The Features Of A Purchaser-Supplier Approach To Funding

The next question asks, what are the features of a purchaser-supplier approach to funding legal aid? [7] There is no model or ideal-type of such an approach. In Australia, for instance, the application of the purchaser-supplier model ("PSM") to legal aid remains "in an early stage of development" (Bourke 2001: 10). Moreover different systems of government and administration will highlight particular PSM options. In England, for instance, centralisation of responsibility for funding and providing legal aid has favoured the use of performance-oriented contracts between the Legal Services Commission and solicitors and NFP agencies supplying legal services. The variety of legal aid work has meant that different types of service delivery contracts have evolved (Orchard 2001: 206). In any event the PSM is "not a single neat concept at all, but a complex mix of professional, managerial, and political concepts that have become intertwined" (Browning n.d.; *see also* Hanlon 1999: 000 & 1999; Campbell & Vincent-Jones 1996).

However the public policy literature, the Legal Services Commission experience and the Australian experience so far allows us to describe the features of a PS approach to funding legal aid. Essentially the PSM is "about the delineation and often separation of the planning and service control functions of government, from the role of provider or deliverer of services" (Aulich et. al. 2000:2; *see also* Boston 1996: 109). The enormous variety of functions performed by government and the services demanded by its administrative agencies means that delineating and separating the roles of purchaser and provider can often generate a "complex network of arrangements and agreements" (Aulich et. al. 2000: 3). Instances include performance 'contracts' for policy-responsible administrators, outputs/inputs, quality standards, cost, and reporting agreements between funding/policy agencies and other state or NGO and private service providers, and comparable agreements between such providers and third-party suppliers, if service delivery functions are sub-contracted. Specific PSM models have emerged in public sector areas such as health and aged care, education, training, and employment services (Browning n.d.; Hanlon 1997; Rowlands 1999: *see also* Senate Finance and Public Administration References Committee 1998).

Nevertheless, the PSM in practice has two general characteristics. The first is its resort to contract as a source of norms and techniques for managing public policy projects, both to supervise expenditure, and ensure value-for-money and accountability, and to manage relationships between a funding/policy agency and the suppliers of the services required to maximise its policy objectives. The second general characteristic of the PSM in practice is that delineation and separation of public policy functions makes new demands on funding/policy agencies.

Applying contract in managing the cost and quality of service delivery produces highly comparable outcomes in public policy projects. The form or content of contractual agreements used in PS approaches to funding legal aid have few, if any, unique features. This is especially true of the agreements made by agencies such as the Legal Services Commission, the plans in the Canadian provinces and the legal aid commissions in Australia which must contract directly with non-agency, independent suppliers such as solicitors' firms and NFPs to acquire the services that are necessary if the objectives of a legal aid system are too be achieved. Such contractual arrangements will feature provisions detailing issues such as the volume and type of services, specify unit or total costs, accountability and reporting requirements, impose quality standards

[7] Q. 2 in the Terms of Reference uses the phrase "purchaser-provider". This terminology is used extensively in the relevant public sector literature. However, Canadian usage favours the phrase "purchaser-supplier" to describe the purchaser-provider model, and that usage is adopted in the paper.

and performance measures and other cost containment, management and efficiency provisions, as we would also expect to see in PS approaches to funding health, transport or other public sector services.

We can illustrate the features of a PS approach to legal aid funding by reference to current practice in England. Since 1999 the Legal Services Commission has used four types of service contracts with solicitors' firms and NFP to fund the delivery of legal aid services. In civil out-of-litigation cases not requiring representation in courts (advice and assistance, negotiation, court appearances in mitigation, and legal representation before immigration and mental health review tribunals) it uses Legal Help and Controlled Legal Representation contracts. These contracts specify the categories of law, e.g., family, immigration, debt, welfare benefits or housing law in which solicitor and NFP contractees can provide legal aid services. Contractees can also provide legal aid in a limited number of out-of-category cases (Moorhead 2002). In the contract the Legal Services Commission specifies the total number of case starts, i.e., number of services to be provided, over a 3-year period, and the maximum total amount that it will pay to the solicitors' firm or NFP in a 12-month period. This amount is "based on estimates of length of case and average cost" (Orchard 2001: 206). Flexibility exists to the extent that the number of case starts and maximum payments to contractees are adjustable depending on affordability and work patterns (subject to contractual safeguards) (*see* Orchard 2001: 206-8).

The Legal Services Commission also uses PS-approaches in funding civil and criminal cases. In civil "in litigation" matters solicitors' firms are contracted to provide legal representation.[8] These contracts "are, in effect, licence contracts based on quality standards" (Orchard 2001: 209). In 2000 some categories of law, e.g., family, immigration, clinical negligence and personal injuries, were made exclusive to contracting firms. Since April 2001 the provision of legal representation in all civil cases is exclusive to such firms. Solicitors operating under contracts also provide criminal defence services. The contracts incorporate quality regimes such as lawyer and staff competence standards that the Legal Services Commission hopes to ultimately extend to the civil legal aid contracts. Whilst the provision of defence services is demand-led compliance audits of claims under legal aid contracts are conducted annually. The civil in-litigation and criminal defence legal aid contracts do not limit either the total number of permissible case starts or the maximum amount that can be paid over the life of the contract (*see* Orchard 2001: 209). The Legal Services Commission also deploys PS approaches to manage expenditure in high cost civil (£25000+) and criminal (£150000+) cases and serious fraud cases (see Orchard 2001: 209-10).

In Australia legal aid commissions have also used PS approaches in contracts funding legal aid provided by solicitors' firms. In 1999, for example, Legal Aid Queensland adapted former English Legal Aid Board franchise agreements to local market need to introduce a Preferred Supplier scheme (Hodgson 1999; *see also* Australian Law Reform Commission 2000). Other legal aid commissions are likely to follow the Queensland lead. It is also not unlikely that PS values such as quest for improved cost-effectiveness, outputs and quality have permeated informally into cost setting and payment processes, and the performance expected of lawyers supplying legal aid services.

However the Australian experience also demonstrates the application of the PSM to inter-governmental funding arrangements. In 1997 the Federal government required PS mechanisms to be incorporated into new Commonwealth-State legal aid agreements (*see* 7.0 below). In those

[8] "In litigation" services refer to legal advice and representation required to assist citizens in court cases. "Outside litigation" services comprising legal aid services such as advice, minor assistance and the provision of information about the law aid services being (*see* Regan 1999: 182-84).

agreements the Commonwealth purchases legal services, up to a maximum annual value, with indicative expectations of annual service outputs, from the major legal aid providers in the States and Territories (Senate Legal and Constitutional References Committee 1998: 216-7 & 222). In return the States and Territories agreed that legal aid commissions would only spend federal funds on providing legal aid in Commonwealth matters. The agreements define "Commonwealth matters" as matters arising under Commonwealth law, laws for which the Commonwealth accepts special responsibility, being matters of priority to the Commonwealth, and other defined services, such as child support legal services and Commonwealth matter arising from duty lawyer, legal advice and community legal education services (Senate Legal and Constitutional References Committee 1998: 216 & 222).

The 1997 and subsequent Commonwealth-State legal aid agreements contain other PS-type features. Detailed appendices of Commonwealth service priorities and guidelines for expenditure, including means and merits tests, seek to transmit macro-level federal policy, cost-control and efficiency requirements by controlling the allocation of federal legal aid funds at the State and Territory level (Senate Legal and Constitutional References Committee 1998: 225-8 & 229-44). The agreements also oblige State and Territory legal aid commissions to ensure that services in federally funded legal aid matters are provided in the most efficient and cost effective manner (having regard to the types of services a self-funding party would be likely to obtain), and for service delivery practices to be effective and efficient (Senate Legal and Constitutional References Committee 1998: 217-8). The agreements also impose new reporting and accountability requirements. State and Territory legal aid providers are required to install and use a specific computer software package, collect management information as determined by governments, and report on performance against Commonwealth Data and Performance Monitoring Requirements (Senate Legal and Constitutional References Committee 1998: 218). For instance the Australian agreements requires services to be provided in the most efficient and cost effective manner, having regard the types of services a self-funding party would be likely to obtain. The agreements also require service delivery practices to be effective and efficient (Senate Legal and Constitutional References Committee 1998: 217-8). In short, the PS-approach to funding in the post-1997 inter-governmental agreements in Australia the Commonwealth has created mechanisms to enable it to enforce its right to control the expenditure of federal legal aid funds.

The second general characteristic of the PSM in practice was that delineation and separation of public policy functions makes new demands on funding/policy agencies. The PSM allows such agencies to concentrate on the mix and standard of services to meet community needs (*see* Boyd & Cronin 1994; Aulich et. al. 2000: 3). In doing so it creates a fresh emphasis on policy-making and development, and the need for officials with policy-making skills in funding/policy agencies. The use of contract norms and techniques in PS-mechanism also demands staff with the socio-legal skills of contract-making, such as high-level communication, negotiation and bargaining skills, as it requires staff with legal, auditing and financial management skills for the on-going contract administration.

Applying the PSM model also generates new information needs. In part to enable funding/policy bodies to administer and monitor performance and outcomes in contracts for services. The Legal Services Commission contracts referred to above, for instance, build upon a sophisticated knowledge of costs and processes in solicitors' firms, other aspects of lawyers' work, and markets for legal services, including by NFPs and non-lawyer service providers (*see* Sherr 2001). As importantly PS-approaches to funding generate new needs for information to enable funding/policy agencies to effectively exercise their newly delineated policy-making functions.

The result is that in the application of a PS-approach to funding we would expect the purchasing funding/policy agency to increase its investment in applied, policy-oriented research. Since 1988 in England, for example, a well-funded legal services research unit has been a feature of planning legal aid policy, developing contract specifications and monitoring contract performance. This unit has created a staff with well-developed research skills, and also contracted out a significant amount of research. On a much lesser scale the Australian experience has been similar. Since 1997 the Federal government has re-engaged with policy-oriented research, commissioning research into legal aid needs, provision of legal services in family law, and similar research (see Hunter 1999 & Hunter 2000; see also Fleming 2000 & 2002).

Another feature of a PS-approach to legal aid funding is that it opens up possibilities. Focusing on policy development means that funding/policy bodies are likely to develop wider visions. For instance, in England the CEO of the Legal Services Commission refers to the fact that "we can also make grants, subject to different forms of contracts, to support the overall objectives of the Community Legal Service and fund different methods of delivery (Orchard 2001: 208). This is part of the culture of contracting, and it means that funders will look beyond traditional service providers. This is also the case in Australia.

4.0 The Advantages Of A Mutual Interest Model

The third question in the Terms of Reference asks, based on the experience in Australia, what are the advantages of a mutual interest model? The principal advantage of the mutual interest model in Australia was that it worked. The co-operative scheme established in 1976 proved to be "reasonably effective and generally efficient" (National Legal Aid Advisory Committee 1990: 108). A national parliamentary inquiry that reviewed the Commonwealth-led changes to the federal legal aid system in 1996/97 (*see* 6.0 below) noted that the "partnership" approach previously taken "has been recognised as a very good model internationally and that its main failing is widely acknowledged to be simply a lack of resources" (Senate Legal and Constitutional References Committee 1997: 22-3). The "partnership" or mutual interest model was not without its critics, or beyond criticism (*see* 5.0 below). However widespread agreement exists that it was generally a successful experience.

Why did a mutual interest model work so well in Australia? One answer was offered in 1998-89 by NLAAC in its review of funding, providing and supplying legal aid. NLAAC favoured retention of the co-operative approach "as the basic structure of the national legal aid system", and outlined what its members believed were the five principal advantages of a mutual interest model (1990: 108; *see* also 1989). First, NLAAC believed a national mutual interest approach to legal aid acknowledged the different socio-legal responsibilities of Federal and State governments and "and the public interest manifested in efficient and effective legal aid programs". Secondly, it believed that a co-operative approach demonstrably worked, "a fact which ought never be underestimated". Thirdly, NLAAC considered that such an approach was consistent with "Federal government administrative policy". Fourthly, NLAAC emphasized the significance of the mutual approach. It believed the goodwill and "community of spirit" that existed in the partnership between governments, legal aid commissions, community legal centres and the private legal profession that had evolved since 1976 was a "tangible asset" in legal aid program management. Within the partnership was "a wealth of practical experience of administering legal aid programs to meet community needs". Fifthly, NLAAC considered that a co-operative approach had facilitated conflict resolution, and positive and constructive outcomes in the conflicts that inevitably arise in multi-interest public policy projects (*see* National Legal Aid Advisory Committee 1990: 108-110).

NLAAC's assessment cannot be considered conclusive. Its report was, to a degree, deliberately defending the legal aid status quo. By 1990 legal aid's star in the public policy constellations of the federal welfare state was well and truly fading. Federal legal aid and finance officials were becoming impatient with inadequate accountability measures in the national scheme, and access to justice, its new perspectives, and different interest groups were gaining the ascendancy. Moreover NLAAC had a narrow brief, and it was neither required to nor did investigate wider socio-political contexts of the experience of the national scheme. The existence of such contexts needs to be understood to explain the reasons why the mutual interest model worked so well. What follows is not an exhaustive or comprehensive account of the sociology or politics of the national legal aid scheme in Australia in the 1970s and 1980s. There are important published sources that would add significantly to the detail of the account below (*see for example* Tomsen 1992).

A central contextual factor was that for much of the life of the pre-1997 national scheme the ideological pre-conditions for a mutual interest approach to public policy were present. Until the late 1980s it was generally agreed that governments should allocate resources to increase the significance and expand the popular reach of the socio-legal institution of legal aid. It was also widely accepted that a publicly funded federal scheme of legal assistance was the appropriate

instrument to do so. Legal aid reformers in the mid-1970s strongly supported such ideas (*see* Commission of Inquiry into Poverty 1975 (a)-(c) & (e)-(f), 1976 & 1977 (a)-(c)). So too did those seeking general reform of the social conditions of the poor (Hollingworth 1972; Commonwealth Commission of Inquiry into Poverty 1974 & 1975 (d)). These ideas of legal aid as a public project to benefit the poor were to become deeply imbedded in the national scheme.

In principle the legal profession always supported Federal involvement in legal aid (Regan & Fleming 2002). Although its perception at times was that insufficient emphasis was placed on allocating resources to legal aid services provided by private sector lawyers. Similarly there was cross-partisan political support for the principles of legal aid, and Federal participation in the organized national provision of legal aid services (*see* Murphy 1973; Howard 1975). Moreover until the late 1980s social democratic and conservative governments were willing to allow the national legal aid scheme and its "partners" to serve as the premier public policy instrument funding and facilitating better access to justice for poorer Australians.

The political contexts were other important factor in the success of the mutual interest model. At the mega-political level the socio-legal institution of legal aid was a key domain assumption in the omnipresent legalist/social democratic constructions of law in post-war Australian society and its legal system (*see* Gouldner 1973; *see also* Arthurs 1985). There may also be a prevailing tendency towards co-operative and reciprocal approaches to public policy in federations, at least as between central and regional governments. When the mutual model of the national scheme was established in 1976 the ideals of "co-operative federalism" were certainly influencing Commonwealth-State relations (Jones 1983).

At the micro-political level a mutual interest approach offered key actors significant benefits. Initially the plans for Federal intervention into legal aid were not based on a mutual interest model. In 1973-5 a social democratic government created a Federal legal aid office, the Australian Legal Aid Office ("ALAO"), with a national network of street-level offices to provide legal aid (Harkins 1976; Fleming & Regan 2002). This initiative was actively opposed by the Federal Opposition parties, and vigorously resisted by the law societies, bar associations and many practising lawyers. Thus, the conservative parties dismantled the ALAO and abandoned the centralised approach to federally funded legal aid when elected to office in late 1975. It may be that some within the conservative parties may have preferred to withdraw from Federal involvement in legal aid. The new government was determined to reduce Commonwealth outlays and Federal programs, and, in Australia as elsewhere, the retreat from the scale of the national post-war welfare states had begun (Jones 1983; see *also* Castles). It has also been suggested that some senior officers in the Commonwealth Attorney-General's Department viewed legal aid as a demeaning professional foray, and would not have been sorry to see the end of Federal involvement.

However the new Commonwealth Attorney-General was committed to legal aid in principle. He proposed to end the centralised approach to federally funded legal aid, and to abolish the ALAO. Instead he proposed to establish a new national scheme, funded by the Federal government for Commonwealth matters and people, and involving the States and Territories through the establishment of statutory legal aid commissions. This proposal was agreed to by State and Territory governments, and accepted by the interest groups, if, in some cases, begrudgingly, and was the foundation of governance in the national legal aid scheme for the next 20 years.

Thus, the adoption of a mutual interest model in Australia was a compromise. It appealed to the Federal government as a means of capping federal outlays on legal aid, of devolving responsibility for providing legal aid in Commonwealth and Federal matters to the States and

Territories and was consistent with its sympathies for the law societies and the bar associations and a public interest in maintaining a healthy, self-employed, private enterprise legal profession. A mutual interest national approach to legal aid also suited other governments. The States and Territories had displayed little interest in legal aid services, with a few notable exceptions such as the establishment of Public Solicitors (or the equivalent) in the 1920s, the law society scheme in South Australia in the 1930s, and initiatives in New South Wales in 1941-3. State and Territory governments were long accustomed to minimal expenditure on both civil and criminal legal aid, and had generally not welcomed pressure from the legal profession in the 1950s and 1960s to support the law society legal aid schemes. Governments found a joint Commonwealth-State approach to legal aid very attractive. Especially given that the Commonwealth would provide the majority of the funds, and State and Territory government contributions would be calculated to include interest earned on solicitors' fidelity funds, and later trust account interest. Clearly another attraction was State and Territory governments stood to benefit politically from the establishment of legal aid agencies to serve their constituencies. As was, from a federal perspective, the prospect of a substantially Commonwealth-funded but State-administered, if not controlled, public policy project.

The compromise also suited the law societies, bar associations and lawyers in private practice. The mutual interest model ensured continued Commonwealth involvement and federal funding of legal aid. It also terminated the efforts of Federal governments to institutionalise the ALAO and dissipated fears of nationalization of the legal profession. The fact that the Commonwealth and State government agreed on the social significance of the socio-legal institution of legal aid made it likely that the legal profession would exercise considerable power in the new national legal aid scheme. The rejection of a centralised Federal approach also allayed fears about competition from salaried lawyers, and more principled concerns about safeguarding professional independence, professionalism and lawyers' occupational privileges. Moreover, as outlined in 2.0 above, the institutions and policy objectives of a mutual interest model favoured expenditure on work performed by private lawyers, and protected their interests in the legal profession.

Another reason why the mutual interest model worked so well is that it engaged the energies of the legal profession. How did this occur? The legal framework of the national scheme institutionalised the role of the legal profession in legal aid, and assigned important functions to the law societies, the bar associations and practising private lawyers (*see* 2.0 above). Moreover over 1976-96 the bulk of criminal defence and in-litigation services in civil law were supplied to legal aid commissions by practising private lawyers.

Legal profession engagement also occurred on a much wider front. The legal aid sector tends to accept practising lawyers self-identification as constituting "the legal profession". However a professional category the legal profession at least includes "all those formally qualified and practicing law", law students and law teachers, and, in many instances, judges (Abel 1989: 14-5). Other authoritative scholars would include all those who have professionally educated in law, and whose sense of self and work remains shaped by legal professional paradigms (Freidson 2001). It is quite credible to claim lawyer civil servants, in agencies such as the Department of Justice and FLLAD, law educated managers in legal aid agencies, lawyers employed in legal aid agencies (such as CLCs, clinics, legal aid commissions and legal aid plans) and even law educated minister of state as members of the legal profession.

These non-practitioner legal professionals participated in the mutual model as Commonwealth and State civil servants, judges chairing legal aid inquiries, CEOs of legal aid commissions, law educated managers, employed lawyers providing legal aid or serving as

board members, workers and volunteers in CLCs. They helped the law societies, bar associations and their practising lawyer colleagues to constitute the mutual interest model as a mini-professional project of the legal profession. Together they energised and colonised the national scheme and its institutions. In fact, there are parallels between the role of the Australian legal profession in legal aid in the 1970s and 1980s, and the role played by the legal profession in shaping the ideals and institutions of the modern Anglo-colonial legal systems in England in 1830s to 1870s (*see* Arthurs 1985).

What accounts for this level of professional engagement? One reason was the legal profession welcomed Federal funding of legal aid. It offered a solution to the chronic funding shortages faced by the semi-charitable legal aid schemes run by the State and Territory law societies. Practising lawyers were also major beneficiaries of the funds allocated in the Commonwealth-State agreements for the provision of legal aid. Those funds also paid a large part of the salaries of lawyers employed as service providers in legal aid commissions. The legal profession probably benefited more financially from expenditure in the national scheme than any other group, excluding recipients of legal aid services. This fact has often been an object of attention by the profession's critics. We need to keep in mind however that the legal profession was not the only elite occupational group in the 20th century that benefited from expenditure on public policy projects. Others such as the medical profession, university lecturers, schoolteachers, social workers and engineers also achieved significant financial gains and professional spin-offs, in projects, such as health, education and public works, funded on a much grander scale than legal aid.

Moreover legal aid funds tend to be spent on family law and criminal law, both of which rarely generate high incomes for lawyers' practices. Moreover in 1976 solicitors' practices in Australia had already begun to bifurcate into a high income, commercial/corporate hemisphere and a middle/lower income hemisphere of personal plight practice, a phenomenon that accelerated in the 1980s (Mendelsohn & Lippman 1979; *see also* Nelson et. al 1992). It was the latter firms that dominated service delivery in referred legal aid cases. In this context it is not insignificant that in the 1970s a healthy market existed for personal plight legal work, lawyers still controlled conveyancing, and the traditional work practices of the profession were in place (Hetherton 1978 & 1981; Weisbrot 1990; Ross 1997).

In any event the legal profession's participation in the mutual legal aid scheme was not merely a tactical or opportunistic engagement. In the post-war period the socio-legal institution of legal aid remained a central plank of the political economy of the Australian legal profession. The degree to which its members energised and colonised the national scheme was also a strategic activity. Engagement with the politics, institutions and administration of legal aid was part of the wider socio-economic project of the legal profession. We might describe this project as a professional project of market control (Abel 1988). Alternatively we might describe it underpinned by the bargain or "contract" between the legal profession and the mid-20th century modern state, in which participation in legal aid was a key element of the access quotient (Paterson 1988, 1993 & 1996; *see also* 8.0 below). Whichever there is a powerful case that active engagement in, if not control, of the post-war public policy project of legal aid was a socio-economic imperative for the legal profession in the common law world.

The expansion of legal aid did not only benefit mainstream legal professionals and practising lawyers. In Australia the expansion of the higher education sector in the 1960s significantly increased the size of the legal profession, and its composition. As in other western societies this occurred in a context of other major cultural shifts. Small but politically active underbellies of new, young and radical lawyers entered the western legal professions (*see* Abel 1985). These

lawyers were dismayed at the plight of the poor and indigenous peoples in the legal system, critical of the moral shortcomings of the legal profession and sought to develop alternative, street-level, community-responsive forms of legal services delivery. It was from these young lawyers that the law shop response in The Netherlands, the CLCs and Aboriginal Legal Services in Australia, the law centres in England and the clinics in Canada emerged (*see* Abel 1985). Hopes for new, socially conscious styles of lawyering and legal professionalism were also evident amongst the recruits to the Australian Legal Aid Office ("ALAO") in 1973-75 (*see* 6.0 below).

In Australia the mutual interest approach arose from the ashes of the ALAO, and a short-lived centrally funded and administered Commonwealth/Federal national approach to legal aid (*see* 6.0 below). These initiatives were a rallying point for radical minorities in the legal profession, as they were for liberal, reformist lawyers in the professional mainstream. The adoption of a mutual interest approach in 1976 provided little spiritual solace to these predominantly young or younger lawyers. The establishment of the legal aid commissions and a steadily expanding CLC sector did provide them with congenial, professionally fulfilling and well-paid employment, and eventually alternative career opportunities, as the legal aid commissions and CLCs were absorbed into local legal professional communities (*see* below; *see also* Abel 1985). Opportunities for absorption into the legal aid commissions and other non-mainstream law careers clearly benefited the members of dissident or critical professional minorities. It also benefited the mainstream legal profession. New jobs increased the size of the legal profession as a whole. Employment and participation in legal aid commissions and CLCs did not silence the profession's vocal critical minority. But it did co-opt them into the legal profession, as the professional mainstream in the States and Territories co-opted the legal aid commissions and CLCs as a whole. Albeit a mainstream legal profession that to some extent was itself changed as a result of the views of its own minority critics, and their participation in local professional affairs. The legal profession was thereby invigorated, and a threat to its collectivities removed.

Engagement with legal aid was also a professional imperative. Today we are familiar with the diminished resonance of social democratic ideals, and the faded glory of the modern socio-legal institutions such ideals inspired (Hobsbawm 2000; Gray 1999). It was not so 30, or even 20, years ago. In Australia in the 1970s social democratic ideals and institutions were vibrant, if not climactic. Together they rallied lawyers to their causes for reasons than can easily be forgotten in contemporary market capitalism, or else explained solely in terms of tactical advantage accruing to the legal profession. Since the early 1990s third-way politics in the English-speaking societies has seen public-private partnerships displace the social welfare state, and pro-competition policies and consumerism commodify the social regimes of modern professionalism. In the 1970s and 1980s the situation was different. Many if not a clear majority of practising lawyers in Australia had a genuine, deeply held commitment to the socio-legal institution of legal aid, probably in significantly greater numbers than today (*see* Commonwealth Commission of Inquiry into Poverty 1975(a) & 1977(c)). In the 1960s in particular practising lawyers had given tangible support to the law society legal aid schemes, as well as assisting "battlers", the Australian version of the deserving poor (Commonwealth Commission of Inquiry into Poverty 1977(c)). When the state harnessed the socio-legal institution of legal aid to a public policy project to assist poorer litigants and accused it was not surprising that it should mobilise their support.

There are two other reasons that help to explain the imperative nature of legal professional engagement with the mutual interest model. The first is that in the 1970s professionalism had not lost its ascendancy in modern society and government. Participation in the national legal aid scheme was a means to express the patrician-like but other regarding sense of social responsibility that the legal profession shared with other all professional occupations. Moreover the power of the professions in the 1970s was far less adumbrated than today. So to

was the authority delegated by the state and the society (*see* Hanlon 2000; Freidson 2001. *See also* Australian Competition and Consumer Commission 1997). Thus, the legal profession expected to participate in legal aid. Its members probably found difficulty to conceive of a legal aid project that did not demand the participation of the legal profession.

The second reason that helps to explain the imperative nature of legal professional engagement is the access to justice response. In the 1960s, 1970s and 1980s the state, governments, social reformers, lawyers, courts and judges in societies like Canada and Australia are often said to have made concerted efforts to democratise and realise effective access to law and the legal system. In that model the post-war expansion of legal aid is seen as a "first wave" towards equal justice (*see* Cappelletti et. al. 1975; Cappelletti & Garth 1978). Genuinely noble if naive hopes were held by the legal profession particularly in the 1970s for the transformative power of law and its institutions (Arthurs 2001). It is not surprising that national legal aid schemes should have provided a vehicle to tangibly express such objectives.

Other factors also influenced the success of the mutual interest model in Australia. Until the mid-1980s power in the practising legal profession was concentrated in the courts and judges, law societies, bar associations and local lawyer elites in the States and Territories (Weisbrot 1990). De-centralising the functions of funding and providing legal aid services meant that inter-actions between lawyer elites and other sites of legal professional power and State and Territory legal aid commissions were inevitable. Initially such inter-actions were sometimes fractious and tense. However the legal aid commissions and the lawyer managers/practitioners working within them quickly became part of local legal professional establishments. They also absorbed and reflected the micro-cultures of the States and Territories. Local socio-cultural differences were very evident to anyone visiting the legal aid commissions in the different States and Territories, particularly in the first 15 years of the scheme.

Professional and regional integration had disadvantages (*see* 6.0 below). But it also brought positive benefits. Professional and regional integration was a positive lubricant in the involvement of the legal profession in the administration of the national scheme. Professional involvement was a key feature of the Australian mutual interest experience (*see* above). Capital city locations placed legal aid commissions at the heart of the needs for legal aid and the sites of expertise in providing legal services and running large scale solicitors' practices in the States and Territories. Integration meant that legal aid commission managers were in touch with local legal professional politics. The managers themselves became local political actors, often to the benefit of the administration of their legal aid commission. Co-location also exposed legal aid commissions to the operation and procedural idiosyncrasies of courts and other parts of the legal system in the States and Territories. As it also did to local fee-charging and cost calculation practices, and generally the composition of local markets for legal professional services, and the economies of lawyers' practices in different law categories and jurisdictions. De-centralisation also placed legal aid commission managers in a position to be familiar with local needs for legal aid, and conversant with community groups, judges, police, schools etc.

De-centralisation and professional and regional integration also encouraged diversity. As legal institutions the State and Territory legal aid commissions were similar. As social institutions and administrative organizations/cultures they were different. Legal aid commissions, some more than others, experimented with menus of legal aid services, investing in applied research, emphasising community legal education and other preventive legal services and the provision of services in areas of special need, such as rural and remote areas and the needs of young people, particularly in early phases of the Australian experience (*see* Boer 1980). Any visitor to the States and Territories found distinctively different socio/professional/organization cultures in

the legal aid commissions. Nevertheless the legal aid commissions had one important similarity. By the early 1980s systemic/institutional design, de-centralisation of responsibility for expenditure and supplying legal aid and professional and regional integration had combined to establish the State and Territory commissions as confident, competent and vigorous semi-autonomous legal aid providers, producers and policy-makers.

These qualities worked to the great advantage of the national scheme. From the early 1980s the Commonwealth/Federal government concentrated its efforts of controlling its financial exposure. It substantially disengaged from other legal aid policy and management issues (*see* 5.0 below). In large part the carriage of the mutual interest project fell de facto to the State and Territory legal aid commissions, and to a far less extent, the CLCs and the organised legal profession. The legal aid commissions and their managers were the custodians of the national scheme, and the States and Territories centres of policy-making, research, cost-control and program management, for the best part of ten years, from when the Commonwealth/Federal government began to concentrate on controlling its financial exposure in the early 1980s (*see* above; *see also* 7.0) until its re-engagement with the totalities of legal aid policy in the early 1990s (*see* 7.0). An important expression of this role was the decision to establish informal, regular meetings of the CEOs of the State and Territory commissions, known as “Director’s Meetings”, which evolved into National Legal Aid in the 1990s.[9] These meetings were intended to improve co-operation amongst State and Territory legal aid commissions, develop national strategies, and generally to perform the supra-oversight role originally intended to be fulfilled by the Commonwealth/Federal government.

In assuming this role the legal aid commissions and the Director’s Meetings were not devoid of self-interest. Strengthening their position vis a vis the Commonwealth/Federal government, or, as it was known colloquially, “Canberra”, in the national legal aid scheme was a highly desirable objective for legal aid commissions and CEOs, as it was for local legal professions, CLCs, and State interests in Commonwealth-State relations. Nevertheless the initiatives of the legal aid commissions and Director’s Meetings were invaluable. Benefits included the development of a Uniform Means Test, forum tests, co-ordination of contributions policies, exchanging of good and bad experiences in service delivery, in addition to steering the direction of the national scheme. Indeed, the Australian experience of the mutual interest model would not have been as successful if the legal aid commissions had not stepped in to fill the gap whilst the Commonwealth/Federal government was distracted by its expenditure problems.

[9] National Legal Aid represents the Directors of each of the eight State / Territory legal aid commissions in Australia.

5.0 The Disadvantages Of A Mutual Interest Model

Q. 4 in the Terms of Reference asks, based on the experience in Australia, what are the disadvantages of a mutual interest model? We need to preface the answer to this question with two qualifications.

The first is that Australia was never a big spender on the mutual interest model. From 1987 at least four public inquiries and the Law Council of Australia and other interest groups claimed the national scheme was seriously under-funded (National Legal Aid Advisory Committee 1990; Senate Standing Committee on Legal and Constitutional Affairs 1992, 1993(a) & 1993(b); Law Council of Australia 1994; Senate Legal and Constitutional References Committee 1998). [10] In comparison with other countries best estimates suggest that Australian expenditure was low, certainly in the last 5 years of the mutual interest model. In the early 1990s per capita expenditure on legal aid was AUS$13, compared to AUS$16 in New Zealand, AUS$18 in Canada, AUS$22 in The Netherlands and AUS$65 in the UK (Senate Legal and Constitutional References Committee 1997: 24; *see* also Fleming & Regan 1995).

The level of funding impacted adversely on the performance of the mutual interest model. Comparatively low funding resulted in a legal aid scheme restricted in scope, with less access to legal representation and assistance, although wider access to free legal advice, than in comparable national schemes, and narrow or “mean” eligibility criteria (Regan 1999). The result was that Australian citizens must be “poorer than in most other societies” and their “case needs to be in a narrower range, to be granted legal aid” (Regan 1997:5). To a degree it is arguable that comparatively low levels of expenditure were a product of diffusion and decentralisation of responsibility between the Commonwealth and the States. As such one interpretation of the Australian experience is that problems in funding were endemic, and an inherent disadvantage of the in mutual interest model. The paper does not pursue this issue. Neither does it speculate whether the quality of the Australian experience may have been different if expenditure on the mutual interest model had been greater.

The other prefatory qualification is that its multi-party, partnership components means that we cannot identify the disadvantages of the mutual interest model from a single perspective. The experience of the mutual interest model impacted in different ways on its component parties, such as the Commonwealth, Federal governments, legal aid commissions and the legal profession. Each of these parties had a different perspective of the mutual interest model, and the operation of the national scheme had different impacts on their respective and different interests. In answering this question the paper does not attempt to explain the disadvantages of the mutual interest model from every perspective of its participant actors.

No public policy project is capable of keeping everyone happy, all of the time. However the experience of the mutual interest model of legal aid in Australia was that it generally worked to the advantage of a majority of the participants (see 4.0 above). The interests of social welfare groups and the Commonwealth/Federal government were the two exceptions to the general experience, as discussed below. The mutual interest model does not appear to have significantly disadvantaged State and Territory governments. The Commonwealth-State legal aid agreements guaranteed their financial exposure, and in many respects provided them with new institutions in State law that were substantially funded by non-State revenues, including grants from the Federal

[10] The Law Council of Australia was created in 1933 as the peak national body representing the Australian legal profession.

government. It also relieved the State governments from the pressure that had often been applied by the law societies to increase public spending on legal aid from State revenues.

Nor did the mutual interest approach work to the disadvantage of the legal aid commissions, their staff or the CLCs. The State and Territory legal aid commissions were creatures of the mutual interest approach. Management, administration, and service delivery provided secure, and gradually more prestigious, employment and status enhancement for lawyers, and career paths to other professional workplaces. , In relationships with federal legal aid managers, in local professional cultures, and amongst solicitors and barristers supplying legal aid services the power of the legal aid commissions and their managers progressively increased from the early 1980s. Their control of 'street level' expenditure of Federal legal aid funds and the composition of the costs of service delivery was also significant (*see* below). The emergence of community legal centres pre-dated the mutual interest model (Basten et.al.1983). However Federal and State funds provided through the national legal aid scheme financed the rapid growth in numbers in the 1980s and early 1990s. Community legal centres enjoyed a high degree of autonomy, and their lawyers and workers exercised significant control over access to legal aid, and the types of services provided. By the end of the 1980s both the legal aid commissions and the community legal centres challenged the legal profession when it came to the politics of legal aid.

Nor was the legal profession disadvantaged. In fact, for the reasons discussed in Q. 3, the legal profession was the big 'winner' of the mutual interest approach. The Law Council of Australia, law societies and bar associations may have preferred a federally funded Judicare scheme. Even in the late 1980s some law societies still pressed for introduction of cash vouchers to enable legally assisted litigants and accused to choose their own lawyer (National Legal Aid Advisory Committee 1990: 165-6). Yet, the Australian experience indicates that the legal profession was a major, if not the principal, beneficiary of the mutual interest model, collectively, institutionally and economically (*see also* 4.0).

However there were two "partners" in the Australian experience whose interests were clearly disadvantaged by the mutual interest model. The first were social welfare organizations such as ACOSS and the State and Territory Councils of Social Services. Such organizations had nominees in key institutions of the mutual model such as the Commonwealth Legal Aid Commission and legal aid commissions (*see* 2.0 above). However it was the assumptions of the socio-legal institution of legal aid (*also see* 2.0 above) and the legal profession that dominated legal aid policy, and expenditure on legal representation by practising lawyers that dominated service delivery budgets. The concentration on casework in legal aid commissions and legal aid funding frustrated social welfare organizations. In 1989, for instance, ACOSS described legal aid casework as "a treadmill leading nowhere", and argued for greater use of the experience gained in legal aid delivery to plan new, more accessible, affordable and effective strategies to increase the access of poorer and disadvantaged people to the legal system (National Legal Aid Advisory Committee 1990: 18-9).

The principal "partners" of the Australian mutual interest model, the Commonwealth, successive Federal governments and federal managers and administrators, felt the disadvantages of the mutual interest model most keenly. It was Commonwealth funds that provided the bulk of the funding. In the 1980s, for instance, Commonwealth funds averaged 50% of total funding of the national scheme (National Legal Aid Advisory Committee 1990: 79).

Nevertheless the Commonwealth/Federal experience of the mutual interest model was not entirely negative. Until the early 1980s the model probably worked to the advantage of the Commonwealth/Federal interest. To a degree the initial Commonwealth-State legal aid

agreements had capped annual Commonwealth spending at 1976-80 case levels (*see* below), and both the Commonwealth Legal Aid Commission and a predecessor to FLLAD had active research programmes (*see for example* Commonwealth Legal Aid Commission 1980 & 1981; Hanks 1980 & 1987; O'Connor & Tilbury 1986; Cass & Western 1980).

However there were already problems. The Commonwealth-State agreements concentrated more on capping Commonwealth outlays, than on creating accountability/monitoring mechanisms for expenditure on Commonwealth/Federal legal aid matters. The formula for calculating future Commonwealth contributions to the national scheme was problematic (see below). Moreover the timing of the creation of a national legal aid scheme was unfortunate. By 1976 the federal welfare state was beginning its retreat from open-ended commitments to social welfare-type programs. A new Federal government had professed its intention to reducing Commonwealth outlays on such programs (Jones 1983: 65). There were also difficulties in effecting the transition of the ALAO into the State and Territory legal aid commissions, and there were other teething problems. So in a real sense it was not until 1980 that the mutual interest model was fully operational.

The early 1980s were on the cusp of the sea change in the federal welfare state (Castles 1990: Fleming 1997). This was also the time of a new interest of the Commonwealth in managing its participation in the national scheme (*see* Attorney-General's Department 1985; *see also* Cooper 1983). The principal management problems for the Commonwealth/Federal interest was lack of micro/service delivery data, inadequate mechanisms to limit Commonwealth outlays and control costs and expenditure and inadequate monitoring mechanisms to ensure federal funds were spent on providing citizens with legal aid in Commonwealth/Federal matters. The Commonwealth/Federal government was "providing the largest portion of legal aid funding without having any say in who gets legal aid, the types of matter in which assistance is granted, or the manner in which assistance is delivered" (Attorney-General's Department 1985: 2 & 12-40). In the early 1980s there were also concerns that legal aid commission costs in Commonwealth/Federal legal aid cases were rising at a greater rate than in matters of State or Territory law, and that increases in the cost of providing legal aid had not been matched by corresponding increases in the numbers of people assisted.

In 1984-85 a Federal legal aid task force concluded that "the commission system has not protected the Commonwealth's interests" (Attorney-General's Department 1985: 2). The report of the task force contained detailed recommendations to impose conditions on Commonwealth/Federal funding with respect to the provision of legal advice, operation of duty lawyer services, financial eligibility and contributions, the types of matter for which legal assistance should be available, monitoring and conditions of legal assistance, restriction on solicitor of choice, participation in the setting of legal aid fees scales (including the approval of the use of counsel, and to reduce expenditure on non-essential services (in house social workers, the research and education function (Attorney-General's Department 1985: 45-120)).

The task force was especially critical of the funding formula used in the Commonwealth-State legal aid agreements. In the agreements the Commonwealth agreed to annually reimburse the legal aid commissions for the cost of providing legal assistance in a Commonwealth/federal cases. The number of such cases paid for by the Commonwealth in any year was not to be less than the total number of cases funded by the ALAO in the final year of its operations. In South Australia, to take a hypothetical example, the ALAO may have funded 5000 cases of Commonwealth/Federal legal assistance in its final year of operation. The effect of the agreement between the Commonwealth and South Australia was that the former agreed to meet the costs of not less than 5000 Commonwealth/Federal legal aid cases each year,

irrespective of the total costs of service delivery. This was the so-called “numbers system”. The task force was very critical of the numbers system, pointing out that it encouraged legal aid commissions to manage by reference to Commonwealth case quotas, resulted in a disproportionate number of referrals of Commonwealth/Federal legal aid cases to private lawyers, with little control over costs, and disclosed serious administrative difficulties. The latter referring to a suspicion held by task force and other Federal officials that State and Territory legal aid commissions used uncertainties about the definition of Commonwealth/Federal matters to load the Commonwealth quota with high cost cases.

The task force was also concerned about an absence of national uniformity in the availability of legal aid. Its was also concerned that legal aid commissions were pursuing a collective or community welfare approach, i.e., funding preventive legal aid and community legal education programs. Whereas it was the intention of the Commonwealth/Federal governments that federal legal funds should be spent on assisting individuals in need of legal assistance. As such the task force favoured greater direction by the Federal government as to the specific purposes on which Commonwealth legal funds should be spent. Overall its members considered that the Commonwealth ambition of achieving “a comprehensive legal aid scheme in Australia involving a co-operative exercise between the Commonwealth and the States in the provision of legal aid ... has not been realised” (Attorney-General’s Department 1985: 22).
To be fair it needs to be said that these criticisms proceed from the Commonwealth/ Federal perspective. The views of the task force were contested by legal aid commissions and law societies and bar associations. Nevertheless they do identify major disadvantages of the Australian experience from the viewpoint of its principal funder. However it also needs to be said that to some extent the Commonwealth/Federal government was hoisted on its own petard. It is probably not surprising that the 1984-85 Federal task force discovered diversity and difference in legal aid delivery and provision, and the existence of multiple heads of criticism of the management, cost and targeting of service delivery. The national scheme after all designedly incorporated a mutual interest approach. Moreover until the early 1980s the Commonwealth/Federal governments had concentrated on establishing the infrastructure of the national legal aid scheme, and not on questions of financial management or service delivery policy, as the authors of the 1984-85 task force conceded (Attorney-General’s Department 1985: 14). In other respects Commonwealth inaction also disadvantaged its position in the national legal aid scheme. Once the Commonwealth Legal Aid Commission was abolished in 1981:

> “the Commonwealth effectively surrendered all control over Commonwealth funded legal aid delivery by legal aid commissions. It is true that the Commonwealth still held the purse strings but it had no say any more in fundamental matters such as” who would receive legal aid, in what matters would legal aid be granted, what the eligibility criteria would be, what contribution policy should be adopted, and what fees would be paid, except in family law” (Attorney-General’s Department 1985: 25).

Similarly the task force was critical of inadequate Commonwealth/Federal investment in monitoring and protecting its policy and financial interests. It reported that in 1984-5 “a small under-resourced area of the Department” examined programs and financial estimates submitted by the State and Territory legal aid commissions (Attorney-General’s Department 1985: 25). The task force report also claimed that the Commonwealth sought inadequate information, so that the information supplied by the legal aid commissions was often “insufficient to allow meaningful analysis of those programs” (Attorney-General’s Department 1985: 25). It also claimed that there was a lack of timely involvement and interest by the Commonwealth Department of Finance (Attorney-General’s Department 1985: 25-26).

These problems continued to blight the Commonwealth/Federal experience of the mutual interest model into the 1990s. Various efforts were made to improve the organizational base of managing Commonwealth/Federal interests, including the establishment of an Office of Legal Aid Administration, creating the NLAAC and a National Legal Aid Representative Council, and the slow but steady pursuit of remedies to deficiencies in program management data and information. The latter, for instance, saw the development of the CLASS and LASSIE data systems, and eventually data sharing agreements with legal aid commissions in the late 1980s saw the first uniform statistics on legal aid delivery in the national scheme. A much greater degree of control over Commonwealth expenditure was achieved in 1986. New funding formulae in Commonwealth-State legal aid agreements replaced the numbers system with Average Weekly Earnings and CPI indexing at 1987/88 funding levels (National Legal Aid Advisory Committee 1990: 11).
In the late 1980s the federal Department of Finance reviewed the justifications for maintaining existing levels of federal expenditure on a number of Commonwealth programs (Department of Finance 1989). The Department was not satisfied that the efficiency and the effectiveness of the Federal legal aid program had been established. In 1989 a senior finance officer was appointed Federal director of legal aid. The Department of Finance was concerned about "the significant increase in expenditure on legal aid (particularly by the Commonwealth) in the 1970s and 1980s, and ... the absence of outcome or evaluation data at least at the national level on a uniform basis" (Thorne 1989: paras 1-2; National Legal Aid Advisory Committee 1990: 11-12).

The Commonwealth/Federal interest also confronted problems of "capture".[11] The legal profession dominated the mutual interest model (*see* 2.0 & 4.0 above). The interests of the law societies and bar associations and practising lawyers permeated service delivery and administration at the State and Territory level. The presence of other members of the legal profession in management roles spun its web over the mutual interest model. The evolution of strong institutional and personal networks surrounding the administration of the State and Territory legal aid commissions exhibited many positive features (*see* 4.0 above). From a Commonwealth/Federal perspective it had downsides. The Federal task force complained that some States claimed precedence of local legislation establishing legal aid commissions over the Commonwealth-State agreements (Attorney-General's Department 1985: 24). Its members also alleged that in some States interest groups had sought to argue that the Commonwealth/Federal government was prevented from disagreeing with decisions taken by legal aid commissions. The presence of its nominees on boards of management was said to produce a quasi-estoppel, membership and participation in decision-making preventing the Commonwealth from departing from decisions taken by the management board of a State or Territory legal aid commission (Attorney-General's Department 1985: 24). In these and other ways the task force believed that capture by the legal profession and the legal aid commissions worked to the disadvantage of Commonwealth/Federal interests in the mutual interest model.

[11] The idea of "capture" borrows from the law and regulation literature from at least as early as the 1960s. "Capture" may occur in legal aid projects in at least two circumstances. One, if, for instance, regional providers such as legal aid plans in Canada or legal aid commissions in Australia or legal professions exert disproportionate influence on the funding and service delivery policies of central legal aid agencies, such as the Department of Justice and FLLAD. Two, "capture" may also occur if captive markets exist. Purchasers may be "obliged to buy a particular product as a result of some special circumstances, such as the absence of an alternative supplier or product (*see* A Dictionary of Business 2002: 86). A situation approaching captive markets can exist in the mutual interest model if central funding agencies such as the Department of Justice or FLLAD find it difficult to purchase services from other than provincial legal aid plans, in Canada, or State/Territory legal aid commissions, in Australia. In turn, provincial and State/Territory legal aid providers may confront captive markets in purchasing legal services in regional markets or sub-markets for lawyers' services.

Time also took its toll of the mutual interest model. By 1990 it was out of step with public policy trends in the Australian welfare state. The workers' welfare state originating in the 1890s and 1900s had been substantially transformed by neo-liberal economic policy, NPM, privatisation and corporatisation and other market-inspired institutional transformations since 1980 (*see* 8.0 below). The alliance between the state and the legal profession that had placed the socio-legal institution of legal aid at the forefront of the national scheme was fading (*see also* 8.0 below). The Commonwealth/Federal government had given notice that the work practices of the professions, including the legal profession, would be reviewed (Trade Practices Commission 1990: 1). In late 1992 it commissioned an Independent Committee of Inquiry into a National Competition Policy to design "a competition policy framework" for the Australian economy (Scales 1996: 69). The Committee of Inquiry reported the following year, and the Federal government accepted and endorsed its framework of recommendations for micro-economic reform (National Competition Policy Review 1993).

In 1993 the Commonwealth Attorney-General commissioned the Access to Justice Advisory Committee to recommend reforms to the legal services system, including the provision of legal aid. He specifically instructed the Access to Justice Advisory Committee to apply competition framework principles in assessing the evidence, and in formulating its recommendations (*see* Access to Justice Advisory Committee 1994). In 1995 the Prime Minister accepted the Access to Justice Advisory Committee report, and an access-to-justice approach, shaped in the shadow of National Competition Policy, which Australian governments also endorsed in 1995, replaced legal aid ideology as the keystone of the Commonwealth/Federal public policy project of legal aid (*see* Attorney-General's Department 1995; *see also* 8.0 below). In the early 1990s Federal ministers, legal aid managers and the Department of Finance were less and less patient with a national legal aid system unable to report and demonstrate its efficiency to their satisfaction. Such reporting outcomes were necessarily inherent problematic, given the inherently different expectations and interest of the "partners" in the national legal aid scheme.

The disadvantages of the mutual interest model in the Australian experience can also be considered more generically. In its review NLAAC took a sympathetic view of its relationships (*see* above). Instead its report sought to address areas needing improvement (National Legal Aid Advisory Committee 1990: 101). NLAAC identified, for instance, shortcomings in communication between the Commonwealth and the States, and recommended changes (*see* National Legal Aid Advisory Committee 1990: 112-3). It reported that operationally the legal aid system was overly focused on service delivery, and recommended substitution of a "solution oriented" or policy driven service delivery approach. A services focus had limited opportunities for integration of legal aid with other social welfare programs, and retarded awareness of alternatives to court/lawyer based solutions (National Legal Aid Advisory Committee 1990: 121-4). NLAAC also reported in detail on other weaknesses evident in the mutual model in 1988-9, including inadequate program management criteria, a lack of uniform and comparable national statistics and evaluation mechanisms, the need for more applied research, insufficient costs data and problems in eligibility criteria and review conditions (National Legal Aid Advisory Committee 1990: 128-9; *see generally* at 99-178). It also reported that significant gaps remained in the scope of the national scheme, and made detailed recommendations identifying unmet and new, unmapped needs for legal aid services (see National Legal Aid Advisory Committee 1990: 253-82).

6.0 The Advantages Of A Purchaser-Supplier Model

Fifthly, the Terms of Reference ask, based on the experience in Australia, what are the advantages of a purchaser-supplier model? A comprehensive answer to this question would require interviews and access to data from FLLAD and State and Territory legal aid commissions. Similarly the Australian experience of the PS model is recent and limited. PS-mechanisms (*see* 3.0) were first incorporated in Commonwealth-State legal aid agreements in 1997-8 (Fleming 2000). 2001-2 is the "first year of a national approach to a purchaser/provider model of funding for legal aid services" (Bourke 2001: 34). The provider/supplier experience of PS techniques in legal aid service delivery is also limited so far, compared, for instance, the experience in England and Wales (*see* 3.0), and in other Federal and State public policy projects.

Moreover the Australian experience of the PSM is still evolving. The Federal government and FLLAD, for instance, are not committed to the PSM in the current Commonwealth-State legal aid agreements. They are prepared to experiment with different models, provided that such models contain PS mechanisms adequate to implement Commonwealth policy and priorities (Bourke 2001: 10). Similar evolutionary possibilities are evident in the States. Changes to its constituent statute now require Legal Aid Queensland, for instance, to "pursue innovative ways of giving persons legal assistance to minimise the need for individual legal services in the community" (*Legal Aid Act 1997*; *see also* Hodgson 1999).

It is also necessary to acknowledge particular features of the PS approach incorporated in the post-1996 Commonwealth-State agreements. These agreements contained a PS-mechanism whereby the States and State and Territory legal aid commissions contract to provide legal aid services, expertise and infrastructure for Commonwealth/Federal purposes, on specified terms and conditions (*see* 3.0). The Commonwealth/Federal government reserves the right to vary the conditions in which State and Territory legal aid commissions are authorised to spend Federal legal aid funds, for instance, with respect to changed or new Commonwealth/Federal policies, new targets for Commonwealth/Federal expenditure, variations to eligibility criteria, and changes to costs caps in particular types of matters. Provider/supplier compliance with the conditions of funding is monitored by the FLLAD.

As such Commonwealth-State legal aid agreements create a hybrid or two-dimensional relationship between the parties. In part the States/legal aid commissions are contracting as direct service suppliers, i.e., if Federal funds are expended on Commonwealth/Federal legal aid cases serviced by internally employed lawyers. In part the States/legal aid commissions are contracting as indirect service suppliers. That is, the PS-mechanism in the Commonwealth-State agreements assumes that legal aid commissions will also act as purchasers of services from private practising lawyers for the purposes of providing legal aid in Commonwealth/Federal matters (Bourke 2001: 9; Hodgins 1999).

Moreover Commonwealth/Federal government and the States/legal aid commissions acknowledge the special character of the PS-arrangements in the legal aid agreements. They agree that the PS relationship "is not strictly commercial" (Bourke 2001: 10; Hodgins 1999). Instead the parties all conceive of the new relationship as ultimately based "on a shared undertaking of each other's roles and responsibilities and a shared purpose to implement government policy of providing reasonable access to justice through responsive high quality legal services and giving value for money" (Hodgins 1999; *see also* Bourke 2001: 10).

The principal advantages of the PSM have accrued to the Commonwealth. This is not to say that its former “partners’ in the mutual interest approach have not benefited, or are potentially beneficiaries. A PS-approach to financing legal aid offers potential management, financial planning, and marketing benefits to solicitors’ firms and other practising lawyers. It may also offer means of developing and enriching professional work (*see* 9.0). The CLCs have also benefited from the new, integrated approach to legal aid/access to justice policy that paralleled adoption of a PS approach to funding. Federal governments have increased expenditure on community-based legal services, and increased the number and reach of CLCs, particularly in rural and remote areas (Williams 1999(a)).

State and Territory legal aid commissions have also begun to experience the advantages of the PSM, as indicated above, and outlined in Q. 2. Locally inspired PS-approaches were evident in legal aid commissions pre-1997. Partly as a product of the spread of NPM throughout the Australian public sector since the 1980s, and partly as a result of local pressures and initiatives to improve cost-effectiveness in service delivery (see Williams 1999(a)). The demands of the post-1997 Commonwealth-State funding agreements expanded the province of PS-approaches in the States and Territories. Some States responded by modifying the statutory functions of legal aid commissions. The functions of Legal Aid Queensland, for instance, now include the provision of legal aid as a service provider under a PS arrangement, whether with the Commonwealth or otherwise (*Legal Aid Act 1997*, s. 7). Even in States and Territories where the legal aid legislation was not specifically amended the PS funding model in Commonwealth-State agreements has had a significant impact. Since 1997 legal aid commissions have improved information, cost management and control and other systems to comply with funding conditions and service delivery expectations fixed by the new Commonwealth-State legal aid agreements. As the CEO of Legal Aid Queensland describes:

> “The purchasing role played by commissions on behalf of the Commonwealth also requires responsibility to ensure that the method of providing services is determined in accordance with contestability requirements. It is vital to know the unit cost of inhouse legal services. To this end, considerable effort has been made to install activity based costing systems and also time recording systems and also time recording systems to accurately cost inhouse legal services. Legal aid commissions are expected to make meaningful decisions about the proportion and type of services provided by inhouse practitioners” (Hodgins 1999).

Application of PS-approaches, allied to the background influence of NPM, has encouraged some State and Territory governments to re-structure legal aid commissions, and re-define their role and functions. In those instances the institutions of internal governance have been streamlined. Managing boards are smaller, corporate, and far less collegial in design. The functions of such re-structured legal aid commissions have a far greater commercial emphasis than before. Since 1997 Legal Aid Queensland, for instance, has been statutorily enjoined to ensure that legal assistance is given to persons in the most effective, economic, commercial and efficient way” (*Legal Aid Act 1997*).

Legal aid commissions are also significant purchasers of legal services. In this role we would expect that the application of the PSM would reflect its generic benefits, both in the case of services purchased from outside, private sector practising lawyers, and also in the case of services supplied by practising lawyers employed inside legal aid commissions. Such generic benefits of the PSM include:

* Assisting in clarifying agency needs (via contract specification and negotiation processes) and increasing competition;

* Increasing leverage of funder/policy agency (purchaser) over outputs;
* Increasing management autonomy of service providers;
* Minimising tension between multiple and conflicting agency roles;
* Moderating competing goals of policy/funding agency purchasers (service standards, quality, and efficiency), and service providers (ensuring funding/winning contracts);
* Reducing opportunities for client capture (*see* Boyd & Cronin 1994; Aulich et. al. 2000: 3).

The literature also suggests that application of the PSM is likely to improve financial accountability, management, create flexibility and choice in policy and service delivery strategies and target policy outcomes to meet identified needs for service delivery. In some circumstances a PS approach is said to enable funding/policy agencies to create or intervene in occupational markets (*see* Boyd & Cronin 1994; Aulich et. al. 2000: 3).

Obviously the Commonwealth and Federal government also stand to reap these generic benefits. Moreover the experience in England suggests that a PS approach encourages innovation and experimentation in delivery methods (*see* Orchard 2001). The FLLAD has indicated that it is open to such future opportunities.

However the principal advantage of the PSM so far is that it has enabled the Commonwealth to exercise control over its legal aid expenditure. The Federal Government and FLLAD believe that the PS mechanisms in the post-1997 Commonwealth-State agreements "operate effectively to ensure its priorities in the legal aid area are met" (Bourke 2001: 10; Williams 1999(a). The new funding mechanism has allowed the Commonwealth to escape from the legacy of the "numbers system" and bloc funding of the State and Territory legal aid commissions (*see* 4.0). Neither of these funding arrangements was linked to tangible needs, especially for legal aid in Commonwealth/Federal matters. Since 1997 the Federal government and FLLAD have invested money into needs research, and have developed formulae for assessing demand for legal aid in Commonwealth/Federal matters. These formulae now provide the basis of allocating Federal legal aid funds to the respective States and Territories, and are incorporated into the current Commonwealth-State legal aid agreements (Bourke 2001: 13). This is seen as not only achieving a more rational and objective basis to allocation of Federal funds for legal aid, but together with the articulation of Commonwealth policy and eligibility criteria to promote equity and national consistency in the availability and access to federally funded legal aid services (Bourke 2001: 22-24). At the same time the PS approach and these associated developments have created the potential for even greater strategic focus of legal aid funding (Williams 1999(a): 6).

Adoption of a PS approach in Federal funding of legal aid has also improved lines of accountability. Incorporating improved measures performance information collection, and a monitoring and reporting framework, including financial information and reporting on quantity and quality. The Commonwealth/Federal government also believes there is potential to increase reporting criteria, including quality standards (Bourke 2001: 13). Other advantages of the PS-approach are that it has required the Federal government and the FLLAD to articulate and publish its legal aid policies (*see* 2.0 above), continue its investment in data control and monitoring technology and personnel and prompted investment in applied, policy-oriented research (*see* 2.0 above).

The benefits accruing to the Commonwealth/Federal government are not restricted to new funding/policy relationships with legal aid commissions. It has also applied PS-approaches to

funding CLCs, and has installed case recording systems in CLCs to improve reporting of case outcomes with Federal funds (Williams 1999(a). Moreover in asserting control over Federal expenditure the Commonwealth/Federal government has raised its profile in national legal aid/legal services policy, to a greater degree than at any time since the mid-1970s (Fleming 2000: 371). On the other hand the de-lineation of Commonwealth/Federal fields of responsibility in the new legal aid agreements also focused State and Territory government on needs for legal aid in their own legal systems. In some States there were small but significant increases in government funding of legal aid commissions (Fleming 2000: 372).

The advantages of the PSM in managing Federal legal aid funding cannot be seen in isolation. In 1994-95 Commonwealth/Federal government policy towards funding and providing public legal services officially swung away from the socio-legal institution of legal aid. It was replaced by an access to justice approach, broadly conceived of as global approach to delivering equality in fair, appropriate and affordable access to an efficient and competitive national legal system (*see* Access to Justice Advisory Committee 1994 & Attorney-General's Department 1995; *see also* 8.0 below). This new approach had two important consequences for the dynamics of legal aid. One such consequence, the diminished significance of the socio-legal institution of legal aid is discussed below (*see* 8.0). The other important consequence is that Commonwealth and Federal legal aid policies are "now more broadly defined", and in policy-making there is an "increasing shift towards non-litigious solutions to legal problems" (Bourke 2001: 1).

Such a shift involves "integration of a range of services ... federal legal aid service delivery arrangements today include not only service providers such as legal aid commissions (LACs) and community legal services, but also a range of other service providers such as mediation organisations, counselling organisations, conciliation and similar services" (Bourke 2001: 20). This new integrated approach has demanded a far more pro-active role of the FLLAD. Its role in the Family Law links Project, reforms to the Aboriginal and Torres Strait Islander Legal Services and various Preventive Dispute Resolution ("PDR") programs demonstrate its new and expanding functions as a co-ordinator of Federally funded legal services. In this context the Federal government and FLLAD see the PSM as a mechanism to ensure better integration and co-ordination of service delivery, maximising efficiency and effectiveness in expenditure of the available Federal funds, and encouraging a customer-focus in legal services delivery (Bourke 2001: 3; Williams 1999(a).

The PSM has other advantages in the context of the public sector. Controlling expenditure through PS-mechanisms equips program managers to satisfy Finance department's requirements that expenditure was policy-linked and policy-driven, and that public funds were spent efficiently and effectively on acquiring quality services. In England, for instance, the Legal Services Commission cites such a capacity as a significant benefit of its PS approaches to funding and providing legal aid through supplier contracts (Orchard 2001). In the Australian context the management information flowing to the Federal government and the FLLAD from the post-1997 Commonwealth-State agreements is probably not yet sufficient to satisfy all performance criteria imposed on the Federal legal aid program by the Commonwealth Department of Finance. Nevertheless program managers are likely to be far closer to this goal than in 1996. Moreover application of the PSM has probably also demonstrated to Department of Finance officials the bona fides of Federal legal aid managers in seeking to demonstrate the requisite standards of cost controls, accountability and efficiency.

PS-approaches to funding and associated changes to the management of the national legal aid scheme since the mid-1990s such as the appearance of competition and efficiency paradigms, private enterprise styles of corporate governance and other NPM administrative

technologies have created another important link with the Commonwealth/Federal and State and Territory public sector (Fleming 2000: 371). Within legal aid commissions, CLCs and the legal profession there has been resistance to the idea of applying NPM to funding and providing legal aid. With good reason, in some cases. Applying the PSM and other NPM techniques to legal aid has its dangers (*see* 8.0 & 9.0 below). However rightly or wrongly to other government departments and to many Federal and State civil servants the mutual interest model was a relic of the 1970s. It can only work to the advantage of the national legal aid system to improve its interface with contemporary public management approaches to public policy projects. Moreover Commonwealth public sector organizations such the Department of Family and Community Services, the Australian Quarantine and Inspection Service, Centrelink and Telstra have demonstrated the virtues of the PSM and other NPM administrative technologies to improve flexibility in service delivery to citizens consonant with social policy and social justice objectives (Prothero 1999; Johnston 1999; *see also* Fleming 1997 & 2000).

7.0 The Potential Negative Impacts Of A Purchaser-Supplier Model

The sixth questions in the Terms of Reference asks, based on the experience in Australia, what are the disadvantages and potential negative impacts of a purchaser-supplier model?

There has been no evaluation of such impacts. In principle the advantages of a flexible, cost-sensitive mechanism such as the PSM that offers funding/policy agencies greater control over expenditure and greater co-relation of policy objectives and service delivery outcomes seem obvious. However any change to an established order will provoke opposition. The demise of the mutual interest approach to legal aid in Australia was such a change. The pros and cons of such a change can be debated (*see* 4.0, 5.0 & 6.0). Certainly State and Territory governments, the legal aid commissions, the CLCs and the legal profession strongly opposed the new Commonwealth legal aid policies (*see* below). The reason is that effectively the price of the Commonwealth asserting its financial power was to change the balance of power in the national scheme, at least as regards funding, providing and meeting needs for legal aid in Commonwealth/Federal matters. However, its former partners were not necessarily opposed in principle to the application of the PSM. But they were opposed to the process, the accompanying cuts in Federal funding, and the end of the special relationship State and Territory governments, legal aid commissions, the legal profession and CLCs had previously enjoyed with the Commonwealth/Federal government in the administration of a national approach to legal aid.1976.

We need to look briefly at the history to see why this was so. The introduction of a PSM in federal funding of legal aid was a result of two major changes in Commonwealth policy. The first was the decision in early 1996 by a newly elected Federal government to abandon the mutual interest approach reflected in the Commonwealth-State legal aid agreements that expired on 30 June 1997. The second change was its subsequent decision to change the amount of Commonwealth outlays by cutting Federal funding. These decisions alone would have been sufficient to upset the co-operative expectations of the parties to the mutual scheme, but it was the spirit and process that inflamed and exacerbated the negative impact of the new Commonwealth/Federal policies.

Based on pre-election statements the legal aid commissions, legal profession and CLCs "felt assured" the new conservative government would continue to support the existing national scheme (Senate Legal and Constitutional References Committee 1997(a): 1). In effect, that it would continue to support a mutual interest approach to legal aid. However the government unexpectedly and promptly moved, in response to an AUS$10bn budget deficit, to reduce federal outlays by AUS$8bn dollars in 1996-98. Shortly afterwards it gave 12 months notice terminating the existing Commonwealth-State legal aid funding agreements, and agreed to meet with State governments "to discuss the principles for the re-negotiation process and how negotiations should proceed" (Senate Legal and Constitutional References Committee 1997(a): Appendix 3 at page1). The demands of the 1996/97 Federal Budget pre-empted this meeting, and the government unilaterally cut AUS$33m from its proposed AUS$128m 1997/98 payments to State and Territory legal aid commissions (*see* Fleming 2000: 346-7 & 357).

Among the interest groups the reaction to the proposals of the Federal Government "was one of heartfelt outrage" (Fleming 2000: 348). Even conservative State Attorneys'-General expressed "disbelief that this could be actually happening" (Senate Legal and Constitutional References Committee 1997(a): 9). The fact and size of the reduction in Federal funding angered State and Territory governments, commissions, the legal profession, and CLCs. Particularly given the

evidence of NLA and others that inadequate funding saw the national legal aid system "in a parlous, if not desperate, condition" (Fleming 2000: 348; National Legal Aid 1996: 7; Senate Legal and Constitutional References Committee 1998).

However it was not only funding cuts that damaged relationships. The interest groups had over 20 years invested a great deal in making the mutual interest scheme work, and had a considerable sense of ownership of the scheme (*see* 4.0 above). They believed the mutual interest approach "had succeeded in creating a sustainable, mixed delivery legal aid system, albeit flawed and limited in scope" (Fleming 2000: 348). Above all it was the timing and style of the process that replaced the mutual interest approach to legal aid that deeply dismayed the interest groups, including State and Territory governments (Fleming 2000: 350):

> "Some believed that the Attorney-General and his officers, confronted with the need to deliver expenditure cuts, had singled out the national scheme as a "soft" policy programme in an increasingly commercialized ministerial portfolio. Even if untrue, the interest groups believed the government had acted abruptly, and without adequate consultation. Moreover, many in the legal aid community were left in doubt as to whether the Howard government really understood the importance of the "partnership", or mutual character, of the national scheme. And, if it did understand, whether its peremptory style signalled an undisclosed agenda to dismantle these informal alliances which had been crucial to its success" (Fleming 2000: 349).

Furthermore the interest groups and State governments had believed that the Federal government was committed to a mutual interest approach. Thus, they interpreted its actions as a breach of good faith (Fleming 2000: 366). For them the modus operandi of the Commonwealth Attorney-General and his advisers in FLLAD's predecessor had created an indelible impression. It appeared that "the federal government was either acting with undisclosed *mala fides* towards the national scheme, or with reckless and negligent disregard for the consequences of introducing its new legal aid policies" (Fleming 2000: 367). Such concerns were not allayed by what State and Territory governments, legal aid commissions and others saw as the ex post facto, token interest of the Federal government "in consultation, while clearly intending to stamp its will on the new legal aid agreements" (Fleming 2000: 368; Senate Legal and Constitutional References Committee 1998: 152).

The process also raised concerns about the real Federal agenda for the "future of the national scheme, and organized national, public provision of legal aid" (Fleming 2000: 368). Many considered the division of responsibility into Commonwealth/Federal and State/Territory matters and recipients revived a funding mechanism discredited in the early 1980s. Other saw demarcation of responsibilities for legal aid as contradicting mainstream national regulatory trends favouring co-ordinated responses to legal regulation and problems of governance. Such responses were evident, for instance, joint Commonwealth-State responses to cross-vesting superior court civil jurisdiction, the AJAC access to justice strategies and the corporations scheme and related developments in companies and securities law (Fleming 2000: 368-9). Co-ordinated national responses were also favoured in National Competition Policy, the role of the Australian Competition and Consumer Commissions, the Australian Law Reform Commission inquiry into civil justice, the mutual recognition legislation and Commonwealth/Federal government strategies to develop a national market for legal services. The Federal government may have had good reasons for departing from this regulatory trend, and re-introducing the Commonwealth-State divide in funding and providing legal aid. If so, it did not articulate them clearly, and neither were its former partners in the mutual approach nor others observing the process convinced by its policy rationales:

> "The … demarcation between the funding of Commonwealth and State law matters is not only harsh but is impractical and, in many instances, absurd. Our society says that the legal system in this country has reached a point where many areas of law involve inextricable overlap between state and federal law and remedies, and that this is a process which cannot and should not be unravelled or reversed at this state" (Senate Legal and Constitutional References Committee 1997(a): 15).

The Commonwealth/Federal government's actions in announcing and implementing its new policies had a profoundly damaging impact upon its relationship with other stakeholders in legal aid. Especially State and Territory governments, the legal aid commissions and their managers, the Law Council of Australia and the law societies and bar associations and practising lawyers. The new policies were far less damaging at least in the short to medium term for the community sector (see 9.0). However, it was the State and Territory governments and the legal profession that had served as senior partners with the Commonwealth/Federal governments in the management of the national public interest in legal aid through a mutual interest approach. For such actors the introduction of a PS-approach to Federal funding allied with cuts in Commonwealth/Federal expenditure and separating provision into Commonwealth/Federal and State/Territory realms denied their deep investment and involvement. The new Commonwealth policies also affronted many of the values of the socio-legal institution of legal aid, social citizenship under the 'rule of law' and professionalism which had informed and justified the participation of the legal profession in the national legal aid scheme. Inevitably, the result was to produce a dramatic loss of trust and confidence in the Commonwealth/Federal government and its legal aid administration. As one Commonwealth insider described it in 1999, the State and Territory governments, the CEOs in NLA and the lawyers "don't trust us any more" (Fleming 2000: 370-1).

The events and experiences described above occurred in 1996-7. However at the Canada/Australia Workshop in 2001 the FLLAD CEO was asked when he thought the States and Territories, legal aid commissions and the legal profession might "forgive" the Commonwealth. He replied "not in my lifetime". This may be an understandable overstatement from an official who was personally involved if not an architect of the changes to Commonwealth/Federal policy. In the last five or six years there have been changes to key personalities in legal aid in the States and Territories. NPM and the PSM have more deeply pervaded the public sector. Moreover it was never entirely obvious that all legal aid commission managers, for instance, were committed opponents to PS-approaches. In any event the perceived disadvantages of PS in Federal legal aid is inextricably linked to the total amount of Federal funding, and the on-going politics of Commonwealth-State relations. The vigour with which the Federal government and FLLAD have re-shaped legal aid into an integrated, legal aid/access to legal services public policy project, the spread of access to justice ideals and changes in the legal profession and its relationship with the state have also contributed to diluting the bitterness of the legacy of the events and experiences of 1996-97.

A PS-approach to legal aid has other potentially negative impacts. In the Australian experience a 25% cut in Federal funding preceded the adoption of PSM Commonwealth-State legal aid agreements (*see* above). Federal funding was increased in late 1999 when the Federal government announced it would increase expenditure on legal aid by AUS$63m over four years (Williams 1999(b)). This only partly restored the States/Territories and legal aid commissions to their previous position. In 1996 prima facie evidence suggested that national per capita expenditure on legal aid was relatively low, and the mutual scheme insufficiently funded to satisfy even expressed needs for legal aid (*see* 5.0 above). The Australian experience has occurred in a context in which the adequacy of state expenditure on legal aid is at least highly

contested. This may be coincidental. Governments and central funding/policy agencies may not always seek to tie reductions in total state outlays or expenditure with the application of PS-approaches to control legal aid funding and maximise policy outcomes. However both the Australian and English experience evidence such a connexion. We need to at least consider the possibility that the onset of conservative approaches to overall public expenditure may be a tangential disadvantageous tendency of governments applying the PSM to funding and providing legal aid.

The Australian experience also demonstrates other possible negative impacts of a shift to a PS-approach. Evidence presented to a parliamentary inquiry in 1997-8 suggested that the Federal government/FLLAD had narrowed the focus of it management interests in the national legal aid system. Witnesses and the inquiry were concerned that Federal managers were taking "insufficient steps ... to collect, analyse and publish meaningful data" on the impact of the changes to Commonwealth/Federal legal aid policy, and issues such as the impact of legal aid in the legal system, including the numbers of unrepresented litigants and accused (Senate Legal and Constitutional References Committee 1998: 30-6). The parliamentary inquiry urged that the Federal government/FLLAD should continue to provide national statistical and clearinghouse functions (Senate Legal and Constitutional References Committee 1998). Similarly it recommended that Federal legal aid administration should "retain an active role in promoting co-ordination and cross-fertilisation of innovations and research amongst the various legal aid bodies in Australia, notwithstanding its decision to fund only Commonwealth matters' (Senate Legal and Constitutional References Committee 1998: 24).

Moreover particular features of the PS-arrangements were also criticised. The bifurcation of service delivery in the new legal agreements and the separate accounting requirements for expenditure on Commonwealth/Federal and State/Territory matters is said to have "imposed additional administrative burdens and costs on the legal aid commissions" (Senate Legal and Constitutional References Committee 1998). The Federal government/FLLAD was criticised for insufficiently acknowledging the impact of such costs, and also the costs incurred by legal aid commissions in the transition from the pre-1996-7, mutual interest approach to the national scheme.

There is reliable prima facie evidence that the application and substance of the service delivery components of the PS-mechanism impacted negatively on the provision of legal aid. Such evidence relates to the 1997-2000 version of the Commonwealth-State agreements. It may be that the service delivery requirements in the current legal aid agreements have redressed some of these problems. In any event witnesses before the 1997-8 parliamentary inquiry pointed to flaws in the definition of Commonwealth Priorities in the new legal aid agreements. It was claimed these criteria were insufficiently specific for decision-making purposes. The list of Commonwealth Priorities failed to establish a hierarchy of actual preferences for the provision of legal aid from a limited pool of Federal funds. One consequence was that "the demands of one category identified as a priority might starve another of funds" (Senate Legal and Constitutional References Committee 1998: xviii). It was alleged that another consequence was that otherwise eligible applicants were sometimes refused assistance in Commonwealth/Federal cases because of insufficient funds remaining in a particular "Commonwealth Priorities pot" of Federal legal aid funding (Senate Legal and Constitutional References Committee 1998).

Similar prima facie evidence suggested that the operation of the initial Commonwealth Guidelines impacted negatively on access to legal aid. The Means Test was also said to be overly stringent and inequitable. Witnesses before the 1997-8 parliamentary inquiry claimed, for instance, that the Means Test failed to address differences in the cost of living across Australia.

The Merits Test in the Commonwealth Guidelines was also said to have inequitable consequences. In particular, the requirement that Federal funds made available to an applicant should be limited to the level of resources available to an "ordinarily prudent self-funding litigant" (Senate Legal and Constitutional References Committee 1998: 229-30). This requirement was said to disadvantage poorer people who might need to take action to recover an amount of money, for instance, the loss of which could be readily absorbed by a more affluent person.

There is also evidence that application of the Commonwealth Guidelines had other adverse consequences for access to legal aid. In family law matters the PDR such as counselling and conferencing was generally required before a grant of legal aid would be considered. Witnesses before the parliamentary inquiry believed the Commonwealth Guidelines insufficiently acknowledged the occasions when culture and language rendered PDR inappropriate (Senate Legal and Constitutional References Committee 1998). In bifurcating responsibility for legal aid the Commonwealth/Federal government eliminated Federal funding from domestic violence matters arising under State or Territory law. This was criticised for its serious impact on timely access of victims of domestic violence to the courts (Senate Legal and Constitutional References Committee 1998).

The allocation of funds prescribed in the Commonwealth Guidelines also attracted criticism. In addition to widely expressed criticism of the "Commonwealth Government's decision to no longer accept responsibility for the funding of any matters arising under state and territory laws" (Senate Legal and Constitutional References Committee 1998: xvi). Commonwealth Guidelines capped the maximum amount of Federal funds provided to any legally assisted litigant. In 1998 AUS$10000 was that amount in family law cases. Critics conceded that funding caps improved efficiency in managing legal aid funds. But evidence presented to the parliamentary inquiry suggested that in practice funding caps "created many problems", and many witnesses believed maximum allowable funding levels were far too low (Senate Legal and Constitutional References Committee 1998).

The operation of the Commonwealth guidelines in criminal law was also criticised, particularly in the context of major drug trials. The parliamentary inquiry condemned the Commonwealth/Federal government for choosing "to erect an artificial distinction of legal aid funding" in such trials, particularly given "the law enforcement effort against drugs increasingly demands the putting to one side or jurisdictional boundaries" (Senate Legal and Constitutional References Committee 1998: xx-xxi). The inquiry also noted that previously the Commonwealth had operated a scheme to fund legal aid in high cost trials in matters of Commonwealth criminal law. This scheme and its funds had been absorbed into the Federal funds provided to legal aid commissions under the new Commonwealth-State agreements. In "no longer providing the top-up funding" the Commonwealth/Federal government was said by its critics to be "squeezing the resources of the legal aid commissions, forcing them to reduce the use of Commonwealth funding to other areas, in order to meet the costs of major criminal cases" (Senate Legal and Constitutional References Committee 1998: xxi & 112). In civil matters the parliamentary inquiry reported that the "general thrust of the evidence" before it "was that the availability of legal aid" in civil matters "was too restricted" (Senate Legal and Constitutional References Committee 1998: xxi). It noted the Commonwealth Guidelines allowed little, if any, legal aid in immigration matters and noted criticisms of the availability of legal aid in social security, product liability, veterans' and discrimination case (Senate Legal and Constitutional References Committee 1998: xxi).

The application of a PS-approach to funding legal aid has other potential negative consequences. The PSM is a species of NPM (*see* 2.0 above, below & 8.0 below). NPM and its technologies were not always welcomed into the public sector, and pockets of significant resistance remain. Resistance to NPM is not only opposition to change. It is also principled opposition, and on-going if not widely acknowledged struggles between corporatism, consumerism and professionalism within states and societies (*see* Freidson 2001). Incorporating PS-mechanisms in contracting between funding/policy legal aid agencies such as the Department of Justice and FLLAD and providers such as legal aid commission and legal aid plans is unlikely to have any significant adverse consequences attributable to NPM per se. Public sector agencies already work in NPM contexts, and there are advantages to expanding interfaces between NPM and legal aid programs (*see* 6.0 above).

However, as an NPM-technology the PSM potentially holds negative consequences for providers contracting with agencies such as legal aid commissions and legal aid plans for the supply of legal services. In particular, for legal professionals supplying legal aid services under PS contracts. One reason is that legal professions are participants in the contests with corporatism and consumerism referred to above (*see again* Freidson 2001). Another reason is that the PS contracts provide a vehicle for NPM-based networks to infiltrate professional workplaces and legal professional work. There is a significant literature on the negative consequences for professionals and their work resulting from bureaucratisation through measures such as time-costing and corporatisation in private sector law firms, and quality management, cost and output monitoring in legal aid (*see* Sommerlad 1995 & 2002. *See also* Watkins & Drury 1994; Abel & Lewis 1989; Nelson et. al. 1992; Hanlon 1997). Similar literature exists with respect to the impact on professions working in other parts of the public sector, including health and education (*see* Hanlon 1999; Browning n.d.: 2).

Discussing this literature in any detail is outside the scope of this paper. One example is Sommerlad's 1999-2002 studies of solicitors' firms contracting with the Legal Services Commission in England. She interviewed solicitors to collect data with respect to working practices and firm culture, professional culture, including construction of the meaning of legal practice and the justice system, and the impact of quality management ("QM") reforms (2002: 365). Invariably interviewees viewed the reforms and the changes to legal work entailed by QM processes as "'inextricably part of the new managerial culture'" (Sommerlad 2002: 378 quoting Kronman 1993: 273-83). The solicitors conceded that such reforms had tangible benefits. However in fostering an instrumentalist conception of practice the reforms were "viewed as having a moral and professional cost in that they were antithetical to what the political solicitors characterised as an holistic approach to legal service" (Sommerlad 2002; 378-9). Sommerlad's research clearly demonstrates that the PS-contracting with legal professionals in legal aid can have adverse consequences, including, depending on particular contractual requirements (*see* below) adversely affecting the quality of services provided to clients. She concludes that these

adverse potentialities of a PS-approach need greater recognition by policy-funding agencies when contracting for professional services:

> there is a pragmatic argument for taking into account the views reported here as a principle of organisational learning in that, arguably, the re-negotiation of the bargain between society and this sector of the profession has been too forced. It is acknowledged that the rate of change in the sector has been very rapid, creating tensions between the need to drive change forward and to build partnerships with those who must implement that change. Further, the imposition of an accounting logic risks losing the culture of performance evaluation which depended on conscience, self-discipline, and the approval/disapproval of a community. To be successful in deepening and improving the existing concept of quality, and also improving access by retaining with the scheme 'good' solicitors, there should be collective consensual process which takes note of professionals' concerns to build a culture of trust and the mutual reinforcement of high standards (Sommerlad 2002: 380-1) [citations removed].

In PS-contracting as in other contracts the ability to shape terms and conditions rests with the party with the greatest economic power. In the legal aid context at the inter-governmental level that party is the major funding/policy agency such as the Department of Justice or the FLLAD. At the State or provincial level it is the regional legal aid commission or the legal aid plan. Q. 6 above rehearses the advantages that can accrue to such agencies from a PS approach, many of which also potentially offer benefits to providers. As in all contracting the dominant party can use its economic superiority to achieve win/win outcomes for both purchaser and provider. Conversely outcomes can unduly favour the position of the purchaser. A PS-approach, for instance, can enable the purchaser to create or intervene in professional markets, for good or ill. A purchasing funding/policy agency can use its economic power and market influence to drive down the price paid for legal aid, or to impose onerous conditions on providers. Whether such providers are legal aid commissions or plans, or practising lawyers or NGOs. Markets for legal aid in Australia are already price sensitive. The price paid by legal aid commissions for the supply of services has been insufficient to maintain participation in the national scheme. Many, if not a majority, of solicitors' firms no longer undertake legal aid work (*see* Dewar et. al.; Hunter 2000; Fleming 2002), a phenomenon that appears to be replicated in Canada (*see* Canadian Bar Association 2001). Supplying legal aid services is now predominantly a function of sole practitioners and small, two-partner law firms, as it is also in New Zealand, England and Wales and The Netherlands (*see* Fleming 2002). These practices are typically amongst the least remunerative, and lawyers' incomes far *less* than national maxima. Great care must be taken in deploying PS-approaches for purchasing agencies not to act as over zealous cost controllers, at the price of the already fragile nature of the markets serving national legal aid schemes.

There are other, latent disadvantages to the Australian experience. The adoption of a PSM did not necessarily extinguish problems of capture by service providers. But the nature of such problems in PS-approaches to public policy projects changes, highlighting the need for good contract management, and a realistic understanding of the socio-legal dimensions of contract (*see* Campbell & Vincent-Jones 1996). Similarly the application of PS-mechanisms risks commodifying the role of professionalised service providers, with potentially adverse effects for providing legal aid, for reasons that are discussed in answering Q. 7 below (*see* 8.0).

8.0 The PS Approach And Legal Aid As A Socio-Legal Institution

The penultimate question in the Terms of Reference asks, what are the implications of a shift towards a purchaser-supplier approach to funding for legal aid as a socio-legal institution? The answer is that there are implications, but we should take care not to overstate them, and to properly understand their significance.

A shift towards a PS-approach to funding does not threaten the survival of legal aid as a socio-legal institution. Legal aid is a modern, if not ancient, institution (*see* 2.0). As such it is part of the immeasurably larger institutional project of the Anglo-colonial legal system and its companion liberal centralist law ideology. In countries such as Canada and Australia the socio-political significance of this project and its law has changed since the 1970s, some of the reasons for which are discussed below. Nevertheless institutionally the modern legal system remains "a giant machine for making and applying law [and for] social control … which is exercised through law" (Friedman 1985: 2), and no one can avoid its impositions, "everyone is involved with law" (Stager 1990: 61). The capacity of changes in legal aid funding to change its socio-legal institutions including legal aid is necessarily limited.

Moreover the ups, downs and turnarounds in funding probably have far less impact than we might imagine. We can easily over-estimate the significance of money in sustaining legal aid as a socio-legal institution. The early 20th century and pre-1970s charitable and Judicare schemes in Canada, Australia and elsewhere were not dependent on state funds. Yet both the schemes and legal aid survived. Similarly we can over-state the significance of money in the post-war expansion of legal aid that saw new, national responses in the advanced capitalist societies. The political significance, profile and "noise" surrounding such responses far exceeded the economic significance of the new legal aid schemes. In most countries national expenditure on legal aid were a fragment of GDP, and represented a small proportion of the economy of the legal services industry (Abel 1985). In Australia in 1990, for instance, total national expenditure on legal aid represented approximately 1% of the gross income of the legal services industry, comprised of solicitors' firms and other practising private lawyers (National Legal Aid Advisory Committee 1999). There is little doubt that as a socio-legal institution legal aid will survive PS-approaches to funding national legal aid schemes, even if such approaches involve significant funding cuts, or diversion of resources away from lawyers' services towards PDR and other solutions.

A PS-approach to funding does imply changes to the significance of legal aid as a socio-legal institution. It does so because the PS-approach is symptomatic of other changes, external to the processes of funding and providing legal aid. In this context the most profound of such changes is the emergence since the post-war legal aid response of a new politics of law. In the 1980s and 1990s the role and functions of law, its capacity to meet the needs of governments, business, and citizens, the cost of legal services, and the activities of courts and lawyers assumed an unprecedented social significance. Over 1987-97 in Australia, for instance there were four major public inquiries into the problems of the cost of legal services, legal aid, and inequality in access to the legal system (*see* Senate Standing Committee on Legal and Constitutional Affairs 1993(a) & 1993(b); National Legal Aid Advisory Committee 1990; Access to Justice Advisory Committee 1994; Senate Legal and Constitutional References Committee 1997(a) & (b)). In Australia, Britain, and Canada the civil justice systems were reviewed to achieve new efficiencies, and concerns with effective access to justice replaced legal aid as the centrepiece of state law and social justice policies (*see* Woolf 1996; Ontario Law Reform Commission 1996; Australian Law Reform Commission 2000).

The reasons behind the emergence of a new politics of law are complex. The driving force was the sea change in public policy that began in the Anglo-American societies in the late 1970s. In Australia, Canada, New Zealand, the United Kingdom, and the United States, both social democratic and conservative governments abandoned long-standing national maxims of social policy in favour of the neo-liberal, laissez-faire norms of market capitalism (Castles 1990).

The interposition of the market as the governing icon of public policy had two direct effects on the politics of law. First, it renewed the focus of the legal system, its officials and the legal profession on servicing the needs of business, finance, and public contracting. Secondly, the "financialisation" of public policy saw governments' retreat from their post-war role as legal guarantors of social wellbeing (Dore 2000: 2-6). The growing social distance of the state and its agencies fractured the modern configurations that had governed its relationship with officialdom, including administrators, courts and judges, and the legal profession, and its citizens since the previous century. This development was compounded by new restrictions on expenditure, access, and eligibility for social welfare services such as education, health, and legal aid. For waged and middle-class citizens the result was to frustrate the promises and material expectations of social citizenship that had flourished in the 1970s. The new, consumer style of citizenship made them more reliant on access to legal advice, lawyers, and the courts in increasingly price and resource conscious private and public markets for legal services, thereby adding to their collective sense of frustration.

The emergence of the market welfare state also changed the politics of law for the poor, and others with ambivalent attitudes to the legal system. Social justice was amongst the liberal democratic socio-legal ideals with a fractured resonance in public policy in the 1980s and 1990s. Moreover the demise of social welfarism reduced the safeguards against social disenfranchisement that modern public administration had long provided. For the poor therefore the new politics of law included an element of a return to their earlier marginal status in the modern legal system. For others with cause to be ambivalent about the legal system dismantling of the gendered and cultural assumptions of the wage earners' welfare state and the fracturing of the hegemony of liberal legalism offered fresh opportunities to engage with the politics of law. Law's identity, institutions, sites, and functions became newly susceptible to the voices, claims, and ideas of indigenous peoples, feminists, environmentalists, women, ethnic and linguistic minorities, and gay communities.

Changes in public policy alone did not account for the new politics of law. Since the end of WWII the politico-economic supremacy of the United States had expanded its cultural frontiers, proselytising its civic ideals across the Western world (Strong 1980: 50-1). In particular, in the 1950s and 1960s its version of legal centralism had shaped the images and social construction of law in the culminant phase of western modernisation, and media disseminated global culture (Rustow 1980: 30). The other Anglo-Saxon societies were not immune from these processes. By the 1990s in Australia, for instance, popular conceptions of legal citizenship were modelled on the pro-active American ideal, and its expectations of lawyer-accessed, court-processed vindication of socio-political rights.

Other external factors contributed to the new politics of law. Globally the late 20th century saw what Hobsbawm describes as the decline of the western empire, and the illusion of stability its modern states brought to national and international social ordering (Hobsbawm 2001: 31-59). Furthermore technological advances in western society since the 1970s made the managed economies of post-war welfare capitalism unsustainable (Gray 1999: 19-20). The unemployment, redeployment, social exclusion, and re-ordering which accompanied the rise of market capitalism and the 'network economy' produced forgotten levels of economic insecurity and unemployment

throughout the former welfare capitalist world (Rifkin 2000: 5). Moreover regionalisation and globalisation "blurred and splintered" the reach of the modern nation state, and in various respects the spread of refugees on an unprecedented scale is challenging the social integrity of many advanced capitalist states (Snyder 1999: 7; *see also* Hobsbawm 145-6). Moreover the dictates of the new world economic order, international treaties such as NAFTA and GATT, and new institutions such as the WTO "have further weakened traditional rights of sovereignty" of the modern nation state (Rifkin 2000: 227-8).

The new politics of law has changed the social significance of all the institutions of the legal system, including the socio-legal institution of legal aid. A PS-approach to funding legal aid is also symptomatic of two micro but nevertheless highly important aspects of the new politics of law. One such micro-feature is the transformation of the culture of government. In Australia, Britain, Canada and New Zealand modern public administration paradigms of social regulation in the "public interest" under the 'rule of law' have been displaced progressively since the 1970s (*see* Deakin & Michie 1997; Wettenhall & Beckett 1992; Easton & Gerritsen 1996). Public administration was replaced by NPM, "managerialism" or "new managerialism", philosophies of government that adopt 'economic efficiency' as core values, i.e., the central managing test is whether what has been, or is proposed to be done, represents the maximum output for the minimum input of resources. NPM has not only revived contract and contract-like controls such as the PSM "as the foremost organising mechanism of economic activity" (Deakin & Michie 1997 1). It also has an uneasy relationship with the civic-governmental assumptions of pre-1970s, modern law and society. The "discourse of management sits uncomfortably with, and by its logic tends to preclude, reference to substantive public service obligations like maintaining the rule of 'law', upholding citizen' rights of access to fair and equitable government administration, and providing high quality legal services (Yeatman 1987: 341; *see also* Pusey 1991). There is an ambivalent relationship between NPM and modern socio-legal institutions such as legal aid.

The other micro-feature of the new politics of law impacting on legal aid as a socio-legal institution is the access-to-justice approach. Like legal aid itself the access-to-justice approach is a slippery phenomenon, its concepts also inherently incapable of ultimate definition (*see* Gouldner 1973). In Cappelletti and Garth's formulation it is a third wave of reform towards equal justice (1978: x-xi). In any event, designedly system-wide, coordinative approaches to improve popular access to civil and criminal justice and law now dominate state public policy legal system projects. In each country the historical prompts to an access-to-justice approach differ (*see* Rueschemeyer 1989), as do the contemporary public policy configurations. In Australia, for instance, Commonwealth/Federal government access-to-justice strategies have been closely linked to consumer interest reforms of the market for legal services and work practices of private lawyers, and the re-regulation of the legal profession through National Competition Policy (*see* Williams 1997; *see also* Access to Justice Advisory Committee 1994; Attorney-General's Department 1995; Australian Law Reform Commission 2000).

Not unexpectedly however the access-to-justice experience in countries such as England, Canada, Australia and New Zealand has many similarities. One such similarity is the diminished role of the socio-legal institution of legal aid as a public policy template for the state project known as legal aid. Governments now insist that legal aid systems do more than react to citizens' needs for legal representation by providing free or subsidized lawyers' services. In the access-to-justice approach state legal services policy "is about ensuring that people with problems are able to find the information and services that best meet their needs to achieve the right outcome" (Williams 2001: 15). Legal aid systems and their managers are now expected to pro-actively manage, and, to an extent, engineer new socio-legal relationships, so as to mobilise legal services to maximise resolution of citizens' legal problems, free of the need representation by lawyers, other than in

criminal defence, and in-court type civil litigation. This is particularly true of national funding/policy agencies, such as the Legal Services Commission in England, the Department of Justice in Canada and FLLAD in Australia. The result is that "legal aid" and "legal aid" policy have become proxy terms for the new, legal services mobilisation policies and strategies of the access-to-justice approach. When we refer to "legal aid" policy today in reality we are referring to access-to-justice/state legal services/state legal mobilization policies. Such policies still extend to the provision of publicly funded lawyers' services. But both their scope and the functions of national legal aid systems are no longer defined or confined by the socio-legal institution of legal aid.

Other dimensions of the new politics of law have also diminished the importance of the socio-legal institution of legal aid, independently of the shift towards a PS-approach legal aid funding. Since the 1960s significant changes have occurred in the political economy of national legal professions, including changes to its work and workplaces, the composition of the legal labour market, and the relationship between the legal professions, the state and the community (*see* Abel & Lewis 1988). In part these changes are a result of historical trends and socio-economic transformations underlying the new politics of law. In some countries state intervention has influenced the pace and direction of change. A role played since the late 1980s in England and Australia, for instance, by de-regulation and pro-competition policy interventions (*see* Farmer 1994; Paterson 1996; Deighton-Smith et. al. 2001; Office of Fair Trading 2001).

Neither the immediate nor the ultimate impact of such changes is known. One interpretation is that the legal profession has lost control it exercised historically over the numbers and personal qualities of lawyers admitted to practice, and that practising lawyers have lost control over production, i.e., the work they do, workplaces, and how they work (Abel 1988; Abel 1989(b)). Its advocates argue that the legal profession is in terminal decline, and that for "the mass of lawyers ... occupational life will mean either employment in a large bureaucracy, dependence on a public paymaster, or competition within an increasingly free market" (Abel 1988: 66). Others reject or are less convinced by the market control thesis, and are less pessimistic. Paterson, for instance, interprets the new dynamics of legal professionalism as evidencing processes of re-negotiation, in which the state and consumers are re-defining the role and their expectations of the legal profession. Such re-definitions include the access side of the equation that formed the basis of its relationship with the state and the community since the mid-20th century, and is impacting on the significance of the socio-legal institution of legal aid (*see* Paterson 1988, 1993 & 1996).

Instances of re-negotiating legal professionalism are already evident. In Australia, for instance, the legal profession has embraced the challenges of NCP (*see* Law Council of Australia 1994 & 2001). Another instance is pro bono, a project that substitutes professional corporate responsibility for the traditional ideals enshrined in the socio-legal institution of legal aid. Cause-lawyering is another new version of the socio-political responsibilities of the legal profession (*see* Sarat & Sheingold 1998 & 2001). Vanguard theorists are re-discovering or articulating alternative points of reference to conceptualise the role of the legal profession. Parker, for instance, recently articulated a republican perspective (1999). Others have argued legal professionals should recover their 19th century role as architects of civil society, a role insufficiently performed last century (Halliday 1987; Halliday & Karpik 1999). These instances of renegotiating legal professionalism relegate the socio-legal institution of legal aid and its transformative ideals to a lower status than it previously enjoyed.

For these reasons a PS-approach to funding has only a marginal impact per se on legal aid as a socio-legal institution. Its diminished significance as a consequence of the new politics of law, access-to-justice approaches and the changing dynamics of legal profession does have the

potential to adversely impact on the participation of legal professionals in legal aid programs. Price is obviously an important factor influencing participation in legal aid, as salaries for legal professionals employed in legal aid agencies, and as fees paid to provider lawyers and firms supplying legal aid services. We would not expect otherwise. Private practising lawyers must operate profitable businesses, pay competitive salaries and secure their own incomes, and salaried legal aid lawyers are not unaware of their saleability in other employment markets.

Lawyers, like other professionals, do not work for economic reward alone, notwithstanding popular mythology, and glaring instances to the contrary. Historically the altruistic/social service/social justice ideals of the socio-legal institution of legal aid have been important factors motivating practising lawyers to undertake legal aid work (Abel 1985). In 1998-2000, for instance, such ideals were present amongst lawyers undertaking legal aid cases in Australia, England, New Zealand, the United States, the Netherlands and Canada (*see* Fleming 2002).

Such socio-legal ideals act to confer a sense of nobility of purpose on legal aid work, and those who perform it. Such personal and professional fulfilment may sometimes be associated with pie-in-the-sky idealism. But the desire for paid work to include a super-added, non-economic quality is not restricted to lawyers who undertake legal aid work. That work should have a special character is by definition an expectation of working in a professional occupation such as the legal profession. There is a body of literature and anecdotal evidence which records the disillusionment of highly paid, young lawyers working in the bureaucratised environments of large commercial law firms. Often these lawyers are said to be amongst the best and the brightest. The problem is that much work at lower levels in large law firms has become routinized, requiring little input of professional skills, judgment, autonomy and discretion. This phenomenon is often referred to as the proletarianization of professionalism.

To a degree the altruistic/social service/social justice associations of legal aid work is a remnant of 20th century legal professionalism (*see* above). Nevertheless the opportunity to perform personally and professionally fulfilling work will not alone guarantee lawyer participation, or ensure competent practising lawyers continue to supply legal aid services. Price, profitability and income outcomes are important, and ultimately decisive factors (*see* 7.0 above). If the price paid for legal aid drops too far below profitability or salary horizons two major groups of lawyers are likely to remain as participants. One group is the least competent, or the least marketable. The other group is the most socially/personally committed. In the United States, for instance, consistently low salaries and adverse working conditions since the 1970s mean that lawyers working in Legal Services are said to be the "top ½ of 1 percent of lawyers in the country on the "altruistic motivation" scale (Fleming 2002: 17).

However the decision to abandon legal aid may be easier in legal professions and workplaces in societies such as Canada, England and Australia in which the socio-legal institution of legal aid has a diminished resonance, arguably far more so that in the United States. Similarly PS contracting which unduly emphasises cost-cutting, shaving output costs and minimizing trust and exercise of discretions by legal professionals will add to the commodification already present in much legal work, and increase the cocktail of disincentives for lawyers to withdraw from legal aid programs. Alternatively PS contracting and contract management that is sensitive to the pluses of maintaining legal professionalism, whilst sceptical of its claims to privilege past their use-by-date, has the potential to foster workplaces in legal aid delivery that will be attractive to private and salaried agency lawyers alike, whilst also creating new and different bridges with law societies, bar associations and law academe in the re-negotiation of legal professionalism.

9.0 The Implications Of Shifting Towards A PS Model In Federal States

The final question in the Terms of Reference asks, what are the implications of the shift towards a purchaser-supplier model in a federal state in which the national government is a major funder of legal aid?

Whilst this is a discrete question the paper has already sketched many such implications. Australia is a federal state in which the central government is a major funder of legal aid. Answering Q. 6 (*see* 7.0 above) highlighted the problems in its transition to a PS-approach, notably in Commonwealth-State relationships, and the relationship between the Commonwealth/Federal government and the legal aid commissions, CLCs and the legal profession. Some of those problems were avoidable, if the Commonwealth/Federal government had not prefigured the transition to PS with cuts to legal aid funding, and had relied on change management processes to achieve its ends. Indeed the answer to Q. 5 (*see* 6.0 above) outlines the advantages that a PS-approach has brought to legal aid management in Australia so far, particularly from a Commonwealth/Federal government perspective. The lessons revealed by the answers to Qs. 5 and 6 are applicable to funding and managing national legal aid programs in other federal states. Provided that the unique historicity of law and the experience of its institutions in even highly comparable societies such as Canada and Australia are borne in mind.

Many of the lessons evident in Qs. 5 and 6 above are applicable to program management in federal and unitary states. It is implicit in the PSM, for instance, that policy-making processes should become more efficient and effective, governments invest in research and managers in funding/policy agencies ensure that staff administering PS programs have appropriate inter-personal, negotiation and bargaining, accounting and financial, contract, risk and change management skills. To explore such particular implications at the program management level is beyond the scope of this paper, although a similar investigatory/research process should precede any sustainable and successful shift to a PS-approach. Drawing in particular on the wealth of experience of the PSM that exists, for instance, in England and Australia, and almost certainly, Canada. This reservation notwithstanding the paper includes as Appendix B a table comparing the features of the mutual interest and PS models of funding legal aid. The table in Appendix B should be read as a white-board approach, and does not purport to be an exhaustive comparison, nor does it contextualise the two funding models within a framework of organizational or public management theory.

There are implications peculiar to federations in which the central government is a major funder of legal aid. Invigorating policy-making functions, publicising policies and greater control over resource allocation is likely to increase the national profile of central governments in funding and providing legal aid. The exercise of such powers brings new or heightened responsibilities. There is a real risk that the onus of financing and managing national legal aid schemes will shift to central/Federal governments. The States/provinces, legal aid commissions/plans, legal professions, CLCs/clinics and the public may come to expect that expanded central/Federal power and functions carries greater responsibility and accountability, not necessarily restricted to funding and providing legal aid in central/Federal matters. Mutual interest approaches divide and diffuse responsibility for legal aid whereas PS-approaches tend to concentrate it.

Federal states are systems in which power is shared/divided in agreed proportions, and functions allocated to the centre/regions. Any centralizing effects of a PS-approach must be mediated within this socio-political legal framework. The need for effective system penetrating communication is no less than in the mutual interest model. In fact a PS-approach to managing

the interests of central/Federal governments in a national legal aid system requires more effective cross-interest communication. In part, through new institutions, such as the Legal Aid Council proposed in Australia in 1998 (Senate Legal and Constitutional References Committee 1998), or through effective policy and contract management, ever aware of the difficulties of achieving fair and equitable distribution of resources in regions and communities with distinctive and different needs, and sub-markets for legal services.

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Appendix A: The Purchaser-Supplier Approach in Legal Aid Terms of Reference

Background

A trend that is emerging in public policy related to legal aid in several countries is the increasing separation of purchasers of legal aid services and providers or suppliers of legal aid services. With respect to government as a funder of legal aid, increasing pressures from central agencies for clear objectives and performance measures, and value for public money is changing the balance of elements comprising the foundation of legal aid funding. The traditional funding model is a "mutual interest model" of funding that views the funder as a "partner" with the provider in the provision of legal services, having a basic interest in the provision of the service. The interest is diffuse and the risk with respect to cost is shared. The new model, taken to its logical extension is the "purchaser-provider model" in which the funder becomes a purchaser who determines what will be purchased at what unit cost. Shared risk with regard to cost in the mutual interest model is replaced in the purchaser-supplier model by certainly of costs and optimal cost-effectiveness. More typical of the purchaser-supplier model, the purchaser of services decides what services represent its greatest interest. Those areas of service become priorities.

The purchaser-supplier model in England and Wales has taken the form of a massive contracting initiative by the Legal Services Commission. This initiative is fundamentally changing the nature of the relationship between the Commission and the Bar. There is a growing body of literature about the consequences of the English initiative (Moorhead, 1998; Sommerlad, 1999).

In Australia the move to a purchaser-supplier model was made in the context of a federal system in which the Commonwealth or national government has priorities with respect to areas of law that are distinct from those of the states and territories. The move to a purchaser-supplier model by the commonwealth five years ago has brought about profound changes in many aspects of legal aid; changes in the relationship between levels of government, in the alignments of interest groups within legal aid, in the operations of the legal aid plans, and in the level of service provided.

The trend toward supplier-supplier approaches to legal aid funding reflects the increasing influence of the "new public management" in public policy. Further, this may reflect a long-term, fundamental change in the foundations of legal aid. In the earlier years, especially in common law countries, the legal professions became a controlling influence in the emerging institutions of access to justice – legal aid being the principal one among them. The dominance of the mutual interest model of finding may reflect the decisive presence of lawyers within government policy structures and within legal aid organizations in this early period in the history of legal aid. It is possible that the emergence of the purchaser-supplier models reflects a fundamental shift away from early foundations. The impact on the nature of legal aid as an institution in the overall justice system is uncertain.

Research Questions

1. What are the features of a mutual interest approach to legal aid?
2. What are the features of a purchaser-provider approach to funding legal aid?
3. Based on the experience in Australia, what are the advantages of a mutual interest model?
4. Based on the experience in Australia, what are the disadvantages of a mutual interest model?
5. Based on the experience in Australia, what are the advantages of a purchaser-supplier model?
6. Based on the experience in Australia, what are the disadvantages and potential negative impacts of a purchaser-supplier model?
7. What are the implications of a shift toward a purchaser-supplier approach to funding for legal aid as a socio-legal institution?
8. What are the implications of a shift toward a purchaser-supplier model in a federal state in which the national government is a major funder of legal aid?

Statement Of Work

The contractor will prepare a preliminary paper based on his own views and experience addressing the research questions outlined above. The documentation for the paper will be limited to material already in the possession of the contractor.

Appendix B: Comparing the MI and PS legal aid funding models

Features	Mutual interest model	Purchaser-supplier model
Predominant ideals	Liberal legalism	Administration
	Professionalism	Bureaucracy
	Social service legal professionalism	Efficiency and effectiveness
	Legal services for the poor	Integrated, access-to-justice approach
	Co-operative federalism	Compartmentalised federalism
	Equal access to courts and lawyers	Affordable and appropriate access to legal services
Program culture	Centrifugal	Centripetal
	Collective	Atomistic
		Contractual
	Emphasises long-term government, legal aid agency and legal profession relationships	Emphasises price and outcomes in funder/supplier transactions
	Provincial/State centric	Funder/purchaser centric
	Multi-focus policies (funding, expenditure, service delivery)	Bifurcated policies (defining expenditure goals and targets/delivery legal aid services)
	Legal profession/lawyers at gatekeepers	Economists/civil service professionals/managers as gatekeepers

Features	Mutual interest model	Purchaser-supplier model
Advantages	Demonstrated track record historically	Demonstrated record in current comparable national public policy projects
	Expression of international post-war courts-legal profession-lawyers' services approach (i.e. the "first wave" of the access-to-justice approach)	Expression of international post-modern/new modern phase public management approach
		Brings legal aid management into line with current trends in the welfare state
	Mobilises socio-legal institution of legal aid	Mobilises legal institution of contract
	Compatible with goals of social welfare capitalism	Compatible with goals of market capitalism
	Inter-active, national, macro-consultative system oriented, centrifugal public policy project	Inter-active, national, micro-consultative outcome oriented centripetal public policy project
	Shared responsibility for policy-making, resource allocation, outcome agendas and service delivery	Responsibility divided between funders (policy making, resource allocation & outcome agendas) and providers (service delivery)
	De-centralises and shifts costs of administering federal legal expenditure	Tendency to centralise and focus costs of administering federal legal aid expenditure
		Minimises tension between multiple and conflicting agency roles

Features	Mutual interest model	Purchaser-supplier model
		Assists in clarifying agency needs (via contract specification and negotiation processes) and increasing competition
		Increased leverage of funding/policy agency (purchaser) over outputs
		Enables funders to satisfy increasing requirements of Departments of Finance to demonstrate effectiveness and efficiency in legal aid expenditure
		Likely to improve financial accountability and management
	Risk spreading	Risk nodulation
	Encourages policy, eligibility and service menu diversity	Maximises opportunities for policy, eligibility and service menu diversity/flexibility
		Target policy outcomes to meet identified needs for service delivery
	Tends to integrate national schemes with local provincial/State lawyer elites	Creates fresh opportunities to diversify interest group base in legal aid projects
	Promotes self-reliant, autonomous, locally street-smart provincial/State legal aid providers	Increases management autonomy of service providers

Features	Mutual interest model	Purchaser-supplier model
		Creates new opportunities to bridge build between legal aid programs with other social welfare and justice system projects
	Emphasises quality/equity in participant partner relationships	Emphasises efficient, effective, outcome oriented resource allocation
	Provides macro-institutional framework to mediate partner/interest group differences	Provides micro-institutional frameworks (i.e., bargaining, negotiation, contract, and contract management) to mediate funder/purchaser and provider/supplier differences
	Mobilises legal professional social service/social justice ideals	Creates opportunities to rejuvenate support base amongst practising lawyers (as governments/consumer re-re-negotiate 20th century legal professionalism)
	Mobilises/engages skills, know-how and social capital of the legal profession	Mobilises/engages skills and know-how of practising lawyers
		Reduces opportunities for supplier capture
	Significant degree of compatibility with traditional work models in professional occupations	Potential to mobilise skills and know-how of non-lawyer legal services providers
		Potential to mobilise purchaser/ supplier experiences in other public sector agencies

Features	Mutual interest model	Purchaser-supplier model
	Compatible with traditional work practices of legal profession (i.e. lawyer defined competence, quality, cost and scope of service delivery)	Creates opportunities to reconstruct lawyer work practices in legal aid work Enables funding/policy agencies to create or intervene in occupational markets
Disadvantages	Efficiency and effectiveness contestable	Conversion to a purchaser-supplier model inevitably disrupts relationships of long standing (short or long-term)
	Mismatch between reporting/outcome criteria and Departments of Finance program management criteria	Possibly associated with trend towards reduced central expenditure on legal aid programs
	Cost-benefit of federal expenditure on legal aid may be problematic	Risks federal funders losing national perspective (and concentrating on efficiently targeting legal aid in federal matters)
	Effective monitoring of federal expenditure can be problematic	Risks federal governments/ legal aid funders/policy makers retaining insufficient incentives to collect comprehensive national data
	Lack of central awareness/ sufficient knowledge of local markets for legal aid services, peculiarities of regional/local legal cultures etc.	Risks providers' pursuing short-term savings/benefits at the cost of sustainable, win/win relationships with suppliers (e.g., provincial/State agencies, practising lawyers, NFPs etc.)

Features	Mutual interest model	Purchaser-supplier model
	Diminished resonance of socio-legal institution of legal aid in market welfare state	Demands new investment in monitoring technologies, research, needs management and contract management
	Less compatible with goals of market capitalist states (e.g., de-regulation, reforms to markets for legal services)	Risks contract/separating funding/policy and service delivery functions being seen as one-stop solution to problems of funding/managing complex, multi-relationship and dynamic legal aid projects
	Not necessarily attuned to current visions of state/legal profession relationship of practising lawyer opinion leaders	Risks uncompensated cost-shifting to provincial/State/ legal profession suppliers of costs of administering/ accounting for expenditure on federal legal aid priorities
	Risks collective/partnership culture producing lowest common denominator or majority interest (i.e. favouring provincial/State legal aid provider) solutions	Introduction of divide between federal and provincial/State legal aid matters introduces artificial divide, out-of-step with emergence of national economies and globally-sensitive local/regional communities
	Political voice of provincial/State legal aid agencies possibly disproportionate to funding quid pro quo	Introduction of divide between federal and provincial/State legal aid matters risks prejudicing clients with mixed/overlapping/fused legal problems and cases

Features	Mutual interest model	Purchaser-supplier model
	Shared responsibility for policy, resource allocation and service delivery can lead to gaps in accountability Partnership approach not necessarily attuned to linked-up, seamless, integrated approach of access-to-justice policies Savings in cost of federal administration may be at the price of non-optimum match between policy and service delivery outcomes and responding to needs Problems in collecting comprehensive, reliable cost, services delivery and outcome data Semi-autonomy of provincial/State legal aid agencies may produce over emphasis on regional/local interests at cost of national and federal interests and meeting client needs Institutional design/cultures creates potential for capture by non-federal interests	Potential to damage desirable/productive aspects of legal professional work practices Over-regulation/reporting and excessive controls/restrictions on legal professional work risks alienating otherwise empathetic and effective practising lawyers willing and in practice cohorts for which legal aid work is otherwise financially viable

Features	Mutual interest model	Purchaser-supplier model
	Imbrication of socio-legal institution of legal aid as institutional/cultural/ideological template protects/projects interests of the legal profession and practising lawyers Reinforces professionalism (at costs of efficiency/effectiveness, competition and consumer interests) Tends to protect potentially negative features of work practices of the legal profession (e.g., how legal work is performed, at what cost, and in what bundles) Reliance on mobilising the legal profession promotes opportunities for capture of centrally-funded legal aid projects Exclusive aspects of the socio-legal institution of legal aid (eg, inadequate voice for social welfare and consumer groups) Institutionally/culturally less willing/able to respond to new market needs in a timely fashion Decentralised policymaking/ expenditure may lead to lack of uniformity in eligibility for federally-funded legal aid	