Legal aid funding

Current challenges and the opportunities of cooperative federalism

Final report

December 2009
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Executive summary

Legal aid in Australia is in need of fundamental national reform

Australia’s legal aid system faces challenges and opportunities.

The challenges result from the ongoing impact of past budget cuts and the imposition of a funding distinction between State and Commonwealth legal matters. These decisions have, over time, made it increasingly difficult for the legal aid system to meet its core responsibilities of providing adequate representation for the most disadvantaged Australians facing serious legal problems. This situation has been compounded by a significant fall in legal aid funding from public purpose funds, which had previously provided a substantial component of overall legal aid funding. These funds have been significantly affected by the global financial crisis.

There are strong arguments in favour of reform. Meeting the identified challenges requires a genuinely cooperative approach between levels of government, with strong leadership from the Commonwealth. This will require the Commonwealth and States to take shared funding responsibility for the overall health of the system.

The opportunity for reform has arisen through the changed approach to Commonwealth-State financial relations introduced by the Rudd Government – creating a new system of ‘cooperative federalism’. These cooperative federalism reforms offer the prospect of a legal aid system based on shared goals concerning the well-being and legal representation of the most disadvantaged members of the community. Such shared goals would move beyond the distinctions based on Commonwealth matters, introduced in 1997, and Commonwealth persons, which operated since the 1970s.

In addition, the Rudd Government has elevated the goal of social inclusion to greater prominence in the context of cooperative federalism.

Commonwealth funding has fallen since 1997 and this is forecast to continue

Since 1997, the Commonwealth’s real per capita funding of legal aid has fallen. The 2009-10 Federal Budget indicates that real per capita Commonwealth funding will fall further over coming years. In addition, significant pressure will arise from a reduction in contributions from public purpose funds.

State and Territory Governments bear the majority of the public costs associated with supporting legal aid. Overall, in 2008-09 the Commonwealth funded approximately $12.40 per capita compared with an average of $15.61 per capita from State and Territory sources. However, the Commonwealth contribution to LACs was $8.26 per capita. This funding to LACs from different sources is presented over time in the following diagram.

It should be noted that the budgeted increase in State grants for 2009-10 (black line) is predominately driven by a ‘one off’ increase in funding from...
the Victorian Government to Victorian Legal Aid of around $24 million. This funding will effectively offset the decline in funding from other sources.

The forecasts from 2009-10 onwards are based on the estimated Commonwealth funding for legal aid as included in the 2009-10 Budget, while holding all other sources constant at 2009-10 levels.

**Real funding of legal aid commissions – per capita by source ($ 2009)**

As can be observed, holding all other things constant, real per capita legal aid funding is set to decline, due to falling Commonwealth contributions. The Commonwealth contribution to legal aid commissions (LACs) in 2008-09 was $178.5 million, but is forecast to drop to $154.7 million in real terms in 2012-13. In light of recent trends showing decreases in funding from other State sources, the overall decline could be expected to be even greater.
The current mix of Commonwealth and State and Territory funding to LACs per capita for legal aid is set out in the following table.

**Per capita funding from Commonwealth, State and Territory sources**

<table>
<thead>
<tr>
<th>State and Territory sourced funding</th>
<th>Per capita funding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grants to State and Territory LACs (primarily for criminal matters)</td>
<td>$8.90</td>
</tr>
<tr>
<td>PPF schemes and other income</td>
<td>$6.72</td>
</tr>
<tr>
<td><strong>Total State and Territory Government funding</strong></td>
<td><strong>$15.61</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Commonwealth sourced funding</th>
<th>Per capita funding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grants to State and Territory LACs (primarily for family law matters)*</td>
<td>$8.26</td>
</tr>
<tr>
<td><strong>Sub total: Total funding provided to LACs (see Chapter 4)</strong></td>
<td><strong>$23.87</strong></td>
</tr>
<tr>
<td>CLC funding</td>
<td>$1.40</td>
</tr>
<tr>
<td>Indigenous legal aid funding (ATSILS)</td>
<td>$2.75</td>
</tr>
<tr>
<td><strong>Total Australian Government funding</strong></td>
<td><strong>$12.40</strong></td>
</tr>
<tr>
<td><strong>Grand total: legal aid funding</strong></td>
<td><strong>$28.01</strong></td>
</tr>
</tbody>
</table>

Funding constraints and rising demand create inevitable resource pressures on Legal Aid Commissions (LACs)

Demand has grown for legal aid services as the Australian population has grown and policy induced factors have stimulated need. In addition, various changes to law over the past ten years have resulted in an increased complexity of cases which LACs are required to fund. This increased complexity has led to an increase in the cost of cases, across all courts by 78 per cent in real terms (ie inflation adjusted) from 1998 to 2008.\(^1\)

In facing these pressures, LACs have a limited ability to control costs. The policy levers available to LACs have their own negative consequences and have the potential to induce other distortions:

- LACs can alter the means and merits test. The means test is a relatively blunt instrument for LACs to limit the demand on their services. Five of the LACs’ incomes means tests are already set at or below the Henderson Poverty index, suggesting that if the LACs more stringently applied the means test they would be excluding some of society’s most needy from accessing justice. Further, a stricter application of the merits tests would result in a reduction in assistance for serious and worthy matters.

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LACs can change fees paid to legal practitioners. A reduction in fees potentially leads to a system of under-funded legal aid lawyers. At the same time it leads to a system which is primarily funded by charity, where the fees paid to lawyers do not allow them to make sufficient returns on their effort when representing legal aid clients. This charity or cross subsidisation-based system is only capable of funding legal aid for a limited period of time before it collapses. Low returns to lawyers for undertaking legal aid work results in fewer practitioners entering the system, or choosing to specialise in legal aid work.

LACs can alter the allocation of resources between court work and alternative dispute resolution (ADR)/educational/other programs. Legal aid should not be seen in the context of funding one program over another but rather as a complete multi-faceted system offering a mix of services and solutions to legal issues. Despite the economic advantages of ADRs, there are a number of limitations on the kinds of matters they can resolve. Likewise, duty lawyer services are an important aspect of the overall legal aid system but are unable to provide the level of legal assistance which some matters require.

The levers available to LACs to control expenditure in the face of declining funding, rising costs and demand growth are limited. Employing any of these levers has negative consequences for the quality and quantity of services provided.

There is evidence that the use of these policy levers has had implications for the delivery of legal aid services

The combination of relatively flat overall funding (including a reduction in Commonwealth and an increase in State contributions) and increased demand has led to the use of policy levers to constrain costs.

There is now evidence that the means test for legal aid services in most states falls below the level of the Henderson Poverty Index. In addition, fees paid to legal practitioners appear to have fallen in real terms, resulting in a reduction in the number of practitioners offering legal aid services.

This reduction in fees has led to the prospect of:

- fewer practitioners undertaking legal aid work overall
- fewer practitioners specialising in legal aid work, as opposed to performing occasional legal aid services

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2 Survey work by the Commonwealth Attorney General’s Department (TNS Social Research 2007, Legal Aid Remuneration Review: Final Report) suggests that one of the primary drivers of professionals providing legal aid is based on a social contract or moral obligation felt by the profession. However, the ability of governments to rely on this sense of obligation as the primary driver for providing services is limited and is likely to lead to a number of undesirable consequences including an increasing numbers of professionals exiting the field. When asked for the driver of this decision, the profession continues to state a lack of government support for legal aid, and fees which do not fully cover the cost of providing services.
- reduced quality of legal services being offered to legal aid clients, with implications for the efficiency and fairness of outcomes.

There is a case for more legal aid funding, but the quantum is indeterminate

The nature of the justice system makes it difficult to quantify the appropriate or optimal level of legal aid funding. This question will always be open to considerable debate as it is dependent on a value judgement that is based on:

- the willingness of the public to fund legal aid
- the obligations and responsibilities of the various international human rights instruments to which Australia is a signatory
- the degree to which a community values the presence of a safety net that provides access to justice for the disadvantaged
- the benefits (avoided costs) that legal aid provides in terms of the efficiency of the justice system and effective justice outcomes
- the degree to which agreement can be reached as to who is eligible to access legal aid.

The issue is made more complex by the fact that some alternative interventions (diversion, alternative dispute resolution, or other preventive measures) can result in measurable administrative savings to the justice system, whereas the need for adequate representation in prosecutions or litigation is very difficult to quantify. Nonetheless, these latter court-related services are indispensable in a context where some legal matters will inevitably require court-based solutions.

Given this indeterminacy, international comparisons provide one benchmark when considering the adequacy of current funding.

While international comparisons need to be treated with a degree of caution (due to differing legal systems), some insight can be gained from the comparison of relative legal aid funding, particularly for countries with legal systems most similar to Australia’s (ie the United Kingdom, Canada and New Zealand). At the upper end of the international range is the example of England and Wales where (on current exchange rates) the per capita expenditure on legal aid is $68.36, which is an increase of over 200 per cent on the current expenditure in Australia. For Australia to increase the legal aid budget to this level the increase in the legal aid budget would be approximately $1 billion per annum.

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3 Based on a current exchange rate of 1.79883 sourced from www.xe.com accessed on 22 October 2009.
On the basis that there is a need for additional funding for legal aid, five ‘signposts’ (ie guides) for additional funding have been considered. All of them are likely to require a reconsideration of the existing division of funding responsibilities between the Commonwealth and State governments.

- **Signpost 1** – Commonwealth replaces funding from the public purpose fund (PPF) and other self generating sources of income
- **Signpost 2** – Commonwealth matches spending from PPF and other self generating sources of income
- **Signpost 3** – A 12.5 per cent increase to the means test
- **Signpost 4** – A return to pre 1997 funding levels from the Australian Government
- **Signpost 5** – return to pre 1997 proportional share of funding of Commonwealth and State and Territory Governments.

The following table sets out the impact on the Commonwealth budget and the resulting increase in the legal aid budget if the signposts above were adopted.

### Per capita funding of the under funding signposts ($2009)

<table>
<thead>
<tr>
<th></th>
<th>Commonwealth</th>
<th>State and Territory</th>
<th>PPF</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Current funding</strong></td>
<td>$12.40</td>
<td>$8.90</td>
<td>$6.72</td>
<td>$28.01</td>
</tr>
<tr>
<td><strong>PPF as proportion of expenditure</strong></td>
<td>$19.26</td>
<td>$8.90</td>
<td>0.00</td>
<td>$28.15</td>
</tr>
<tr>
<td>Funding at 1997 levels</td>
<td>$13.79</td>
<td>$8.90</td>
<td>$6.86</td>
<td>$29.55</td>
</tr>
<tr>
<td>Henderson</td>
<td>$15.50</td>
<td>$8.90</td>
<td>$6.86</td>
<td>$31.25</td>
</tr>
<tr>
<td>Add back PPF</td>
<td>$19.26</td>
<td>$8.90</td>
<td>$6.86</td>
<td>$35.01</td>
</tr>
<tr>
<td>55% 45% share</td>
<td>$23.23</td>
<td>$8.90</td>
<td>$6.86</td>
<td>$38.98</td>
</tr>
</tbody>
</table>

There is no unique signpost which can be defined as the correct level of funding. For example, while Australia compares favourably to the New Zealand and Canadian examples there is evidence to suggest that legal aid funding in those two countries is currently considered inadequate. Importantly, the various funding signposts considered do not result in an increase funding equivalent to the Netherlands, the first country that funds legal aid above Australia.

While these signposts have been provided as a tool to consider the impact on the budget from increasing funding, any increase in legal aid funding must be seen in the context of the funding arrangements between the Australian Government and the States and Territories.

**Additional funding for legal aid needs to be provided in a contemporary best practice funding model**

Legal aid constitutes a national policy challenge – in order to adequately address it, a cooperative approach, based on shared national goals, is required.
The recent reforms to Commonwealth-State relations provide an opportunity for legal aid funding to be improved in keeping with the principles of ‘cooperative federalism’. These reforms have been introduced following the election of the Rudd Government, and agreed by the Council of Australian Governments (COAG) in December 2008.

In essence, cooperative federalism involves a move away from the combative and defensive approach taken to Commonwealth-State negotiations in the past, in favour of a genuine partnership.

Overall, the objectives of the cooperative federalism reforms can be summarised as:

- identification of national goals, as distinct from Commonwealth or State ones
- a move to a shared, cooperative approach to addressing these national policy issues
- a focus on outputs, outcomes and objectives rather than inputs and prescriptive funding conditions
- a high degree of budget flexibility for States and Territories in allocating funds to achieve the agreed outcomes
- an emphasis on measurable performance indicators, transparent reporting and shared accountability
- a clarification of the responsibilities and roles of each level of government
- the subsidiarity principle, reflecting the view that ideally, decisions are taken by a level of government closest to those affected, subject to the need for broader coordination and harmonisation in some instances
- less incentive for cost-shifting between levels of government
- a particular focus on social inclusion
- reduced administrative and compliance overheads.

In achieving these principles, some trade-offs are inevitable. For example, a greater emphasis on cooperative effort can result in some blurring of the accountability of individual governments for the outcomes produced. Conversely, too much focus on clarity of roles can undermine the desire for partnerships and shared goals.

Nonetheless, the cooperative federalism approach has already achieved significant positive change in a range of service delivery areas including health, homelessness and disability services.

Judged against the principles of cooperative federalism, the current arrangements governing the provision of Commonwealth legal aid funding have significant weaknesses. Existing arrangements place a narrow focus on clearly defined roles and the prevention of cost-shifting from one level of government to another. This arguably reflects the defensive, combative approach which has characterised Commonwealth-State financial relations in the past.
A new approach, based on the principles of cooperative federalism, is required.

We have considered five main funding models as alternatives to the current legal aid funding structure to be adopted under a cooperative federalism-inspired approach. The funding models are intended to provide an indication as to broad directions in which funding arrangements could be reformed. In practice, some combinations of the different types might be possible. The funding models identified are:

- block funding under a National Partnership Agreement approach, funding LACs based on shared national goals
- a national fee for service program for court-related work, funded either by the Commonwealth Government or a single purchaser using pooled resources
- existing arrangements supplemented by lump sum incentives to private practitioners to encourage a specified level of legal aid caseload
- casemix funding arrangements, with client-based funding for specific legal issues
- other structures, including the increased use of salaried lawyers.

Our analysis of the current arrangements and these alternatives suggests that:

- the current arrangements perform poorly
- a continuation of block funding within a genuine national partnership approach – including the removal of the existing distinction between Commonwealth and State legal matters – is preferred
- lump sum incentives could be a useful complement to block funding.

Increased funding within a reformed funding framework provides the best opportunity for meaningful reform of Australia’s legal aid system, helping to ensure that the system is well equipped to assist disadvantaged Australians through adequate legal representation.
1 Introduction

Scope of this report

PricewaterhouseCoopers (PwC) has been engaged by the Victorian Bar Council in a jointly-funded project with the Australian Bar Association, the Law Council of Australia and the Law Institute of Victoria to provide analysis of current and potential future funding arrangements for legal aid in Australia.

While legal assistance services are funded and provided in various forms by the Australian, State and Territory Governments, this review focuses on the funding provided to, and services provided by, legal aid commissions (LACs). 4

The legal aid services included in this analysis that are funded by Commonwealth grants and administered through the LACs include:

- legal representation, duty lawyer, advice and information and educations services in relation to Commonwealth law matters
- direct grants to Community Legal Centres (CLC)
- additional special funding provided for expensive cases in relation Commonwealth law.

The legal aid services that are funded by the States and Territories and are considered in the report are all the other services provided or funded by the LACs.

Structure of the report

The remainder of this report is structured in the following way:

- Chapter 2 provides a brief overview of the justification for the funding of legal aid.
- Chapter 3 sets out the background and history of legal aid in Australia.
- Chapter 4 provides a description of the current funding model for legal aid in Australia, including the current funding level, the mix of Commonwealth and State and Territory funding, and compares legal aid funding to the funding of other services provided by a mixture of jurisdictional responsibilities.

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4 It is noted that while the Australian Government also separately funds the Indigenous Legal Aid Service (ILAS), the focus of this report is specifically on the funding provided to, and services delivered through, LACs. The ILAS is an important element of legal service delivery and worthy of detailed study in its own right. However, this has not been the focus of this report.
• Chapter 5 considers a number of possible approaches (ie levers) to address funding constraints and the potential consequences of employing these levers.

• Chapter 6 sets out a number of sign posts which can be used to establish the appropriate funding level for legal aid.

• Chapter 7 outlines the recent changes in the funding of services — 'cooperative federalism' — and the implications that this has in thinking through how funding should be provided to support legal aid.

• Chapter 8 draws on the cooperative federalism framework, and considers possible approaches to funding legal aid. These funding models are assessed against various criteria to consider how they best meet the needs of legal aid and avoid the problems associated with current Commonwealth-State allocations of responsibility.
2 Why legal aid is funded

Key points

- Governments have a responsibility to fund legal aid to ensure access to justice in accordance with international obligations and commitments to ensure social inclusion.
- Funding for legal aid is also justified by the benefits it brings to society and individuals including:
  - upholding rule of law
  - more just and effective outcomes
  - increased efficiencies in the courts and the justice system.

The Australian Government is bound under multiple international covenants, conventions and declarations to meet specified standards of justice and human rights.

Access to justice and provision of legal representation feature prominently in a number of international treaties and declarations to which Australia is a signatory, including:

- the International Covenant on Civil and Political Rights (ICCPR)
- the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- the Convention on the Rights of the Child (CRC)
- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- the Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- the Universal Declaration of Human Rights (UDHR).

These commitments have been made on the understanding that legally enforceable rights and duties underpin a democratic society. Access to justice is essential to make these rights and duties real. Access to justice can be understood as access to legal assistance for all people, regardless of their means, background or capabilities. A key delivery mechanism of access to justice in the Australian community is the provision of legal aid services. Therefore it can be considered the responsibility of governments to

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5 Tony Blair, as quoted in Hilary Sommerlad 2004, ‘Some reflections of the relationship between citizenship access to justice and the reform of legal aid,’ 31(3) Journal of Law and Society
provide legal aid services on the basis of numerous moral, political, social justice and legal terms.\(^6\)

The Commonwealth Attorney-General Robert McClelland recently reaffirmed the importance of providing access to justice, noting that ‘an effective justice system must be accessible in all its parts. Without this, the system risks losing its relevance to, and the respect of, the community it serves’.\(^7\)

Consistent with this view, the Attorney-General’s ongoing Access to Justice Taskforce noted the importance that the Australian Government places on the provision of access to justice regardless of whether matters fall under state or Commonwealth law.\(^8\) In this context, it also identified four waves of access to justice reform, of which the first is ‘equal access to legal services (lawyers and legal aid) and courts’.\(^9\)

The Taskforce sets out the following reasons why access to justice is important:

- maintenance of the rule of law is fundamental to Australia’s economy and prosperity as it allows planning and underpins social and economic development
- access to justice is an essential element of the rule of law that frames the relationship between state and society, founded upon an accepted set of social, political and economic norms
- access to institutions enables people to protect their rights against infringement by other people, bodies and the government and ensures accountability
- barriers to justice enforce poverty and social exclusion
- there is a legal dimension to many of the issues commonly faced by people (eg family breakdown, credit and housing issues, discrimination, and exclusion from services)
- legal aid can assist in ensuring that the law is applied correctly and thus the justice system returns an effective outcome. This is particularly important in cases where people’s liberty or safety is at risk.

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\(^6\) Skinnider, E, *The Responsibility of States to Provide Legal Aid*, The International Centre for Criminal Law Reform and Criminal Justice Policy, Canada, 1999


\(^8\) Ibid

\(^9\) Ibid
In addition legal aid promotes significant efficiency benefits for the justice system due to:

- increased efficiency of the justice system and the courts in terms of avoiding or assisting self-representing litigants and diverting matters from the court to dispute resolution services
- lower cost alternatives to court for resolution of matters. An evaluation of family dispute resolution (FDR) services provided by legal aid found them to have a benefit-cost ratio of 1.48 in terms of costs avoided by diverting matters from litigation to FDR\(^\text{10}\)
- information and direction provided by legal aid services that ensure the most (or more) appropriate pathways are taken through or away from the justice system.

Although these combined benefits make a compelling case for the funding and provision of legal aid, the challenge remains to determine:

- an adequate and efficient level of funding
- where responsibilities for this funding lie
- the most efficient and effective structure for its allocation.

These are the challenges that this report seeks to investigate and address in later chapters.

\(^{10}\) KPMG 2008, *Family dispute resolution services in legal aid commission, Evaluation report*, Attorney General’s Department
3 Background to the Australia’s legal aid system

Key points

- The Commonwealth Government began to take a significant role in legal aid in the 1970s, providing assistance for Commonwealth matters and Commonwealth persons. In 1977 the state based Legal and Commissions (LACs) were established and the provision of legal aid was considered the joint responsibility of the Commonwealth and State and Territory Governments.

- Significant changes to the funding and structure of legal aid provision occurred in 1996-97 when the then Australian Government limited its funding contribution to matters under Commonwealth law, effectively reducing its funding support.

- Recent trends in the provision of legal aid have included:
  - difficulty in attracting legal practitioners
  - provision of mixed multi faceted services
  - declining funding in the face of increased costs.

Establishment of legal aid and the mutual interest approach

The Australian Legal Aid Office was established by the Commonwealth in 1973 to provide legal assistance to people for whom the Commonwealth had a special responsibility, including social security recipients, returned servicemen and women, indigenous Australians and migrants. It also provided legal aid for matters that arose under Commonwealth law (eg family law, social security matters, divorce, tax offences, etc).

In 1977 the Commonwealth Legal Aid Commission Act 1977 was enacted, establishing the state based LACs. Responsibility for the provision of legal aid was handed to the States and Territories’ LACs, and funding was allocated in line with an agreement which apportioned 55 per cent of the funding responsibility to the Commonwealth and 45 per cent to the States and Territories. At this point the LACs determined their own priorities for the use of this revenue.

Susan Armstrong 2001, 'What has happened to legal aid?' 8 University of New South Wales Law Review
What followed was a period where the ‘mutual interest approach’ was the overarching legal aid paradigm. This was an approach to managing and supplying legal aid that emphasised:

- high levels of reciprocity, agreement and co-operation between the Commonwealth and State and Territory Governments, LACs and the legal profession
- a sense of shared purpose and responsibility
- acknowledgement of legal aid (and its solutions of providing lawyers) as the dominant access to law policy template.

Commonwealth-state distinction and the purchaser-provider model

In 1996-97 the Australian Government withdrew from the previously existing funding arrangements in favour of a purchaser-provider model that is still in place today. The key feature of this model is the clear distinction between the responsibilities of the Commonwealth, as opposed to the States and Territories, with Commonwealth funding only provided to assist people with matters arising under Commonwealth law. State and Territory Governments are responsible for funding matters arising under State and Territory law. Parallel to this, the then Australian Government also cut funding for legal aid.

Agreements for a purchaser-provider style funding arrangement for the provision of Commonwealth legal aid in each State and Territory were entered into. Under the legal aid agreements the Commonwealth determines the priorities, guidelines and accountability mechanisms that apply to the use of its funds, provides funding for community legal centres (CLCs), and encourages the States and Territories to increase their legal aid funding.

From 1997 onwards the Australian Government took a greater role in guiding the provision of legal aid services in relation to Commonwealth law. It also placed greater emphasis on developing and funding services aimed at preventing and deferring matters from the justice system, including Family Relationship Centres and specific Indigenous legal assistance initiatives.

From 1997 on both the share of funding and for some years the total amount of legal funding provided by the Commonwealth has declined while the share provided by the States and Territories increased.

Recent trends in legal aid service delivery

The past ten years have seen a more complex and diversified system for providing access to justice. LACs also provide a wide range of services including legal representation and advice, duty lawyers, dispute resolution services, community legal centres (CLCs) and information and education services.
An immediate and long-term problem continues to be ensuring participation by private practitioners in legal aid work. This is also a problem that faces mixed model and Judicare schemes in England, Scotland, the Netherlands, Canada and the United States.\(^\text{12}\) Firms and individuals undertaking legal aid work incur real opportunity costs, measurable not only against fees paid by self-funding clients for comparable work, but also against opportunities for more highly remunerated legal work than family law or crime in a buoyant market for legal services.\(^\text{13}\)

In his summary of the current status of the Australian legal aid system Dr Don Fleming notes the following key points:

- a new approach to the delivery of legal aid services is needed to mobilise planning and co-ordination at a national level to deliver legal services to citizens
- legal aid is becoming increasingly limited in the individual legal assistance and representation it offers people due to declining levels of funding and increasing costs
- individual casework is confined predominantly to limited areas of family and criminal law
- although the overall rationale for legal aid is generally implicit in policy and work practices, it has not been clearly articulated.\(^\text{14}\)

In the early 1970s, the Law and Poverty Report found deficiencies in the existing legal aid system that included lack of co-ordination between the various legal aid schemes.\(^\text{15}\) A person in need of legal help who now faces a choice between LACs, legal centres and pro bono schemes, with their different eligibility criteria and areas of work covered, might draw the same conclusion.\(^\text{16}\)

As noted by Chief Justice Paul de Jersey, governments have created a complicated legal system and expect people to work effectively within it. They must therefore provide parties with the opportunity and capability to be represented when they are forced to interact with the system.\(^\text{17}\)

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\(^\text{13}\) Ibid.


\(^\text{17}\) Chief Justice Paul de Jersey AC (Chief Justice of Queensland) 200, Launch of “The History of Legal Aid Queensland 1979-2004”.

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Legal aid funding
PricewaterhouseCoopers
In 2008 the Council of Australian Governments (COAG) announced major reforms to Commonwealth-State financial relations, including those in relation to legal aid, to simplify and streamline payments to the states and to work towards shared goals. Many of these reforms are to take effect in 2009, however significant reform of the structure and quantum of funding for legal aid is yet to take place.
4 Current legal aid funding arrangements

Key points
- Australian Commonwealth/State funding arrangements are characterised by a high degree of vertical fiscal imbalance. Since 1997 Commonwealth funding for legal aid has been provided through a Specific Purpose Payment, which has been used by the Commonwealth to specify the priorities to which legal aid funding should be made available.
- The current purchaser-provider funding model for legal aid provides that the Commonwealth grants funding to the LACs to be used for Commonwealth law matters and the LACs provide these services according to the Commonwealth guidelines.
- Allocation of funding to individual LACs is made according to a model that includes factors for the driver of needs for legal aid in each State or Territory.
- The Federal/State divide for funding of legal aid creates inefficiencies and complexities in the system, due to its arbitrary nature. It is also considered to be a vehicle for the Australian Government to reduce their relative funding contribution for legal aid.
- Funding for LACs from Commonwealth sources has declined from 49 per cent of total funding in 1997, to 32 per cent in 2010 (budgeted). This shortfall has been picked up by the States and Territories. The state income is reliant in part on interest on solicitors' trust accounts that are exposed to interest rates movements and are currently in decline due to the economic climate. Current and expected income for legal aid has fallen below expenditure.

4.1 Current legal aid funding arrangements

4.1.1 Commonwealth-State revenue and funding arrangements

Australia’s federation has three features which have shaped historic approaches to Commonwealth-state relations:
- a high degree of vertical fiscal imbalance (VFI) whereby the Commonwealth raises substantially more revenue than it requires for its own purposes, while the States and Territories have significant spending responsibilities relative to their revenue raising capacity
- differing revenue raising capacities and service delivery challenges between the States and Territories, requiring a degree of redistribution of resources across the federation
Current legal aid funding arrangements

- a high degree of overlapping responsibilities between the two tiers of government in relation to a significant range of service delivery areas.

None of these features is unique to Australia. Nor does any of them necessarily result in a dysfunctional or broken system. A federal system has substantial advantages, including the ability to ensure that decisions are made close to the communities which they affect. Nonetheless, the presence of a high degree of VFI and overlapping responsibilities can create obstacles to achieving optimal outcomes for the community in terms of service delivery and accountability. The delivery of legal aid has been affected by these considerations.

At present, States and Territories rely on Commonwealth grants for 40 per cent of their budgetary requirements. Commonwealth grants have traditionally taken two main forms:

- general revenue grants
- Specific Purpose Payments (SPPs) under section 90 of the Constitution.

In 2000 general revenue grants were almost wholly replaced by revenue from the Goods and Services Tax (GST), which is raised under Commonwealth law and collected by the Australian Taxation Office (ATO), but with all of the revenue being given to the States and Territories according to a redistributive formula determined by the Commonwealth Grants Commission (CGC).

Specific Purpose Payments (SPPs) are payments made by the Commonwealth to the States and Territories on the basis of clearly identified conditions. They have been a vehicle for the Australian Government to play a role in areas of service delivery and policy priorities which do not necessarily fall within the enumerated Commonwealth heads of power in the Constitution.

Legal aid funding from the Commonwealth has traditionally been provided under a SPP. The conditions placed on this funding have been one of the key policy levers used by the Commonwealth in specifying the priorities for legal aid funding, including the content of the merits test and the introduction of the restriction on using Commonwealth funds for state matters introduced in 1997.

On 29 November 2008, COAG agreed to significant reforms of Australia's federal relations. The new framework for federal financial relations commenced on 1 January 2009 and involves considerable rationalisation of the number of payments made to the States. The framework provides specification of the roles and responsibilities of each level of government, with the objective that the appropriate government is accountable to the community. It also aimed to provide incentives for reform through National
4.1.2 The current purchaser-provider funding model for legal aid

As noted in the previous chapter, since 1997 the Australian Government has provided legal aid funding for matters arising under the Commonwealth law and that are considered a Commonwealth priority.\(^{19}\) Predominantly these are family law matters involving children.

The Commonwealth provides funding and sets out priorities and guidelines that the LACs must comply with when funding Commonwealth law matters. The LACs report their use of the Commonwealth funds, including unit outputs and costs.

The priorities and guidelines that the Commonwealth sets out relate to matters for which legal representation and ADRs may be provided, and inform the merits test used to assess applicants for eligibility to receive legal aid, in relation to Commonwealth matters. They give priority and emphasis to:

- urgent family law matters, for example when the LAC determines the child or applicant’s safety is a risk
- matters that involve children, including assistance for separate representation of a child
- consideration of resolution processes other than litigation, where appropriate.

Despite the priorities, guidelines and reporting requirements, the State LACs have some degree of autonomy in their provision of services in relation to Commonwealth matters. They set the means test, and are responsible for the management and delivery of services to the clients.

Employment conditions, staffing numbers and classifications and use of private sector providers and their fees are matters determined by individual LACs delivering Commonwealth law services in accordance with legal aid agreements and within the funding provided by the Australian Government each year.\(^{20}\)

Where payments for legal aid were previously the responsibility of the Attorney General’s Department, they are now made by the Treasury under the new administration of federal financial relations arrangements.

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\(^{18}\) Budget 2009-10. Budget Paper No. 3, Australia’s Federal Relations


\(^{20}\) Senate Standing Committee on Legal and Constitutional Affairs, Attorney General’s Department Output 1.7, Attorney General’s Department’s response to Question No. 33, from Senator Ludwig at the hearing on 24 May 2007:
While legal aid funding came under the new federal financial relations arrangements between the Australian and State and Territory Governments have effectively remained unchanged. Shortly, the Australian Government is due to negotiate a new National Partnership Agreement for legal aid with some States to settle arrangements for legal aid service delivery for the next four years.\textsuperscript{21} It is expected that many of these agreements will effectively continue as they are currently.

### 4.1.3 Allocation of funding to LACs

The total legal aid funding provided by the Commonwealth is indexed to a Wage Cost Index.\textsuperscript{22,23}

Commonwealth funding is then allocated to the LACs by the Australian Government using the Rush/Walker model developed in 1997. The model is used to assist in the allocation of Commonwealth legal aid funding to the States and Territories on the basis of need. The model allocates funding based on the following variables:

- demographics including population, age, and gender
- proportion of non-English speaking background (NESB)
- numbers of divorces
- number of single parents
- unemployment
- income levels
- socio-economic composition

\textsuperscript{21} The Attorney General – Address made at the Opening of Legal Aid Queensland and Western Queensland Justice Network, Mt Isa, Queensland Tuesday, 29 September 2009

\textsuperscript{22} Attorney General’s Department’s response to Question No. 33, from Senator Ludwig at the hearing on 24 May 2007, Senate Standing Committee on Legal and Constitutional Affairs, Attorney General’s Department Output 1.7

\textsuperscript{23} www.ag.gov.au/www/.../00Attorney-Generals+Department.doc
Current legal aid funding arrangements

- Aboriginal and Torres Strait Islander populations
- difference in cost between jurisdictions (e.g., higher costs in less populous jurisdictions, or highly urbanised environments)
- expressed demand from applications for legal aid.

The funding model was developed to include factors which were considered best fit for the service requirements of the respective client groups. This is reflected in the service provision focus of each program and its respective client group.  

The Senate Legal and Constitutional Affairs Committee 2004 inquiry into Legal Aid and Access to Justice in 2004 heard significant criticism of the current Rush/Walker funding model, particularly in relation to components such as the 'suppressed demand factor' which result in more funding for some jurisdictions. Accordingly the Committee recommended the model be reformed. 

### 4.1.4 Impact of the federal-state divide

Funding responsibility for legal aid is currently split between the Australian Government and the State and Territory Governments. This split is primarily based on the distinction between legal matters that fall under Commonwealth and State laws, and was established in 1997 when the legal aid funding model was changed.

The 2004 the Senate Legal and Constitutional Affairs Committee noted that:

> The distinctions between Federal and State powers and institutions can seem artificial to a person’s day to day life and business, but have a significant effect on the quality of justice a person receives, and the navigability of the justice system. The division of responsibility between the levels of government also leads to duplication and inefficiency.

An illustrative example of the anomalies presented by the federal-state divide is the representation of children in cases where there are accusations of physical or sexual abuse by a family member. The procedural and funding arrangement differs depending on the jurisdiction in which the matter is raised. Where the accusations arise in a divorce case, the matter is brought before the Family Court (a Commonwealth jurisdiction). In such circumstances, there is discretion to appoint an Independent Children's Lawyer to represent the child. However, if the same accusations arise

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24 Senate Standing Committee on Legal and Constitutional Affairs, Attorney General's Department Output 1.7, Attorney General’s Department's response to Question No. 33, from Senator Ludwig at the hearing on 24 May 2007

25 Senate Legal and Constitutional Affairs Committee ‘Inquiry into Legal Aid and Access to Justice’ 2004

outside the context of a divorce case, a child protection application will be taken to the Children's Court (a State jurisdiction). In both circumstances, the issues at stake are similar but matters are dealt with differently and the fees paid to practitioners vary.\(^{27}\)

In addition to this artificial split, it is important to recognise that the parties being exposed to the justice system do so in relation to clusters of issues. Those parties that legal aid assists often have multiple and complex legal problems that span across the federal-state divide. For example, child protection and family violence intervention orders are governed by state law, while divorce and custody fall under Commonwealth law.\(^{28}\) The federal-state divide limits legal aid’s agility as assistance must be provided to a recipient based on jurisdictional issues, rather than on the recipient’s needs.

It was noted in the Strategic Framework for Access to Justice in the Federal Civil Justice System that the removal of the federal-state divide would result in a reduction in duplication and an increase in the efficiency of legal aid provision and a review of the interrelationship between the Commonwealth and State and Territory justice systems was recommended in this report.\(^{29}\) This finding is supported by various LACs and the Law Council of Australia.\(^{30}\)

Furthermore, when seeking to address the needs of a community, it is most appropriate that the allocation of resources is made at the lower levels of responsibility, where there is a more comprehensive and nuanced understanding of these needs. In the context of legal aid it can be argued that the LACs are in the best position to determine the most efficient allocation of scarce resources, rather than resources being allocated according to the arbitrary funding allocations which govern the current system.

The federal-state divide limits the Australian Government’s ability to meet its key objectives and priorities, as articulated by Attorney General’s department, of both improving access to justice for all Australians and demonstrating agility in response to whole-of-government concerns.\(^{31}\)

\(^{27}\) For example in Victoria the Commonwealth matter scenario the VLA daily appearance fee for the final hearing regarding these matters is $1,235 while the daily appearance fee for a lawyer representing a child in the Children’s court in these cases $717.

\(^{28}\) Law and Justice Foundation of New South Wales, Justice Made to Measure: NSW Legal Needs Survey in disadvantaged Areas, 2006, pp 77 – this report discussed sub clusters as well.

\(^{29}\) Access to Justice Taskforce 2009, A Strategic Framework for Access to Justice in the Federal Civil Justice System, Canberra, September

\(^{30}\) Discussion held with these bodies as part of the preparation of this report.

\(^{31}\) The Australian Government Attorney Generals Department, Strategic Plan, July 2009
4.2 Current funding for legal aid

As noted earlier, the funding model for legal aid was reviewed and significantly altered in 1997. Table 1 sets out the change in legal aid funding from 1997 to the budgeting levels for 2010.

**Table 1 Real funding of legal aid commissions 1997 to 2010***

<table>
<thead>
<tr>
<th></th>
<th>1996-97</th>
<th>2009-10*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total funding (millions $ 2009)</td>
<td>$367</td>
<td>$510</td>
</tr>
<tr>
<td>Total funding per capita ($ 2009)</td>
<td>$20</td>
<td>$23</td>
</tr>
<tr>
<td>Funding as a percentage of Gross Domestic Product</td>
<td>0.048%</td>
<td>0.046%</td>
</tr>
<tr>
<td>Commonwealth funding share</td>
<td>49%</td>
<td>32%</td>
</tr>
<tr>
<td>State and Territory funding share</td>
<td>28%</td>
<td>44%</td>
</tr>
<tr>
<td>Funding other sources share**</td>
<td>24%</td>
<td>24%</td>
</tr>
</tbody>
</table>

Sources: NLA, ABS – 3222.0 Population Projections Australia, 5204.0 Australian Systems of National Accounts

Notes:
* Budgeted
** This is considered state sourced funding
Shares may not add to 100% due to rounding
Excludes Commonwealth funding for Community Legal Centres

As can be observed in Table 1 the Australian Government’s share (Commonwealth grants) of funding for LACs has declined considerably between 1996-97 and 2009-10, while State and territory grants have increased significantly. Total funding for legal aid has declined as a proportion of Gross Domestic Product (GDP) during this period. Current Australian Government funding of LACs in the 2008-09 year was $178.5 million.

Figure 1 below presents the funding make up of legal aid from the various sources, in real (ie adjusted for inflation) terms.
Current legal aid funding arrangements

**Figure 1 Real total funding of legal aid commissions – by source ($ 2009)**

![Figure 1 Real total funding of legal aid commissions – by source ($ 2009)](image)

Sources: NLA, ABS –6401.0 – Consumer Price Index, Australia, Sep 2009

Notes:

* Budgeted

** This is considered state sourced funding

Excludes Commonwealth funding for Community Legal Centres

Total federal funding in 1996/97 financial year (1997) in nominal dollars was $126.6 million per annum. Figure 2 sets out the change over time in real legal aid funding per capita, from the various funding sources.
In 1996-97, the Commonwealth per capita expenditure in real (2008-09 dollar) terms was $9.65. In 2008-09, it was $8.26. It should be noted that the budgeted increase in State grants for 2009-10 (black line) is predominately driven by a ‘one off’ increase in funding from the Victorian Government to Victorian Legal Aid of around $24 million. This funding will effectively offset the decline in funding from other sources.

As can be observed in Figure 1 and Figure 2 since 1997 there has been a real reduction in the amount of funding allocated by the Commonwealth for legal aid, both in total and per capita terms. This is in large part due to the changes in Commonwealth, State and Territory responsibilities mandated by the Australian Government.

At the same time there has been a significant increase in the State and Territory sourced funding for legal aid. Since 1997 the State and Territory Governments’ sourced funding of legal aid per capita (including money from interest on solicitors trust accounts and other sources) has increased by
54 per cent in real terms (inflation adjusted to 2009). Meanwhile, Commonwealth funding per capita has fallen by 22 per cent in real terms.

As the share of Commonwealth funding has declined, some LACs have relied increasingly on funding from revenue sources other than government, primarily interest on monies held in solicitors’ trust accounts and income from other sources. Notably, as can be observed in Figure 1 and Figure 2, funding for legal aid from these other sources is currently in significant decline, and is expected to drop further. This is due to changing economic conditions which has led to a reduction in both the value of money held in trusts and interest rates.

Therefore the funds in these accounts are considered to be an unstable funding source due to their volatility, as they are exposed to interest rates, other economic factors and legal procedures. Furthermore the LACs have limited ability to address the reduction in this funding, other than by seeking funding from government.

Figure 3 presents the total income and expenditure of the legal aid commissions from 1997.

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32 While there has been an increase in funding, this increase has not been uniform across the states and territories.
As can be observed in Figure 3 in recent years legal aid expenditure has been greater than income, and this shortfall is expected to continue, even while expenditure is curbed.

Sources: NLA, ABS- 6401.0 – Consumer Price Index, Australia, Sep 2009
Note:
* Budgeted
Excludes Commonwealth funding for Community Legal Centres

Figure 3 Legal aid commissions’ income and expenditure (real $ 2009)
Figure 4 presents the estimated payments made by the Commonwealth to the State LACs for the provision of legal aid services, as set out in the Australian Government’s Budget 2009-10. These show that payments will continue to decline, dropping to $154.7 million in 2012-13 in real terms.\(^{33}\) This results in an expected decrease of 29 per cent\(^ {34}\) as represented on the left hand axis in the figure. The decrease in total Commonwealth funding, as represented on the right hand side axis, is expected to be 18 per cent in real terms. The projected decrease in funding from Commonwealth sources will further exacerbate the funding shortfall currently experienced by the LACs, as presented in Figure 3.

---

34 16 per cent in nominal terms
Current legal aid funding arrangements

Figure 5 Projected real funding of legal aid commissions – per capita by source ($ 2009)

* Budgeted
** These are considered state sources of funding
# Budget and forecasts
Note: Excludes Commonwealth funding for Community Legal Centres; State funding in 2009-10 is boosted by a one-off $24 million funding injection from the Victorian Government, which is not expected to be sustained.

Figure 5 above sets out the estimated future funding for legal aid. The forecasts are based on holding State sources constant from 2009-10, allowing for inflation and population growth, and including the estimates for Commonwealth funding of legal aid per the Budget 2009-10. This shows that, holding all other things constant, real per capita legal aid funding is set to decline going forward, due to falling Commonwealth contributions. In light of recent trends showing decreases in funding from other State sources, this decline could be expected to be even greater. It should also be noted that State contributions are in fact unlikely to remain constant because the budgeted increase in State grants for 2009-10 (black line) is predominately driven by a ‘one off’ increase in funding from the Victorian Government to Victorian Legal Aid of around $24 million.

The challenge for LACs is to continue providing legal assistance services as funding levels decline. The following chapter investigates the various levers available to legal aid to address such a shortfall, and the consequences of employing these courses of action.
5 Levers available to address legal aid’s funding shortfall

Key points

LACs have a limited ability to control costs in response to demand growth, increasing costs and funding constraints. The mechanisms they are able to employ include:

- Altering the means and merits test – which are already applied relatively stringently, particularly with reference to income, with five of the LACs means test thresholds below the Henderson Poverty Index line.
- Changing fees paid to legal practitioners – fees have been declining in most jurisdictions leading to a number of practitioners moving away from legal aid work in response to inadequate returns. This in turn threatens the quality of legal aid representation.
- Altering the allocation between court work and ADR/educational/other programs – LACs undertake a broad spectrum of activities and offer a mix of services that should be seen as complements to each other rather than as competing for the same scarce resources. Legal aid should not be seen in the context of funding one program over another, but as a complete system. Altering the mix of services can result in trade-offs with negative returns thus limiting the ability of the LACs to reallocate funding.
- These limitations suggest that increased demand will need to be met by additional government support.

5.1 Demand for legal aid

This section of the funding review considers the consequences of underfunding the legal aid system. As noted in the previous chapter, the share of legal aid funding provided by the Commonwealth has fallen considerably over the past 13 years. This continued reduction is not considered sustainable given the current pressure on other funding sources, the growing demand for legal services and increasing costs.

Many exogenous factors contribute to overall demand for legal aid. For example demand for services is likely to increase in times of economic downturn as noted in the Strategic Framework which stated ‘The economic
Levers available to address legal aid's funding shortfall

Downturn is likely to mean that more people will be making some contact with the justice system.\(^{35}\)

Demand growth for legal aid services is also directly linked to variables such as population growth and policy induced factors, for example the number of police and the number of child protection officers. In addition, changes to the law, its application and justice processes result in cases which LACs are required to fund becoming increasingly complex.

Furthermore, this increased case complexity leads to an increase in the cost of cases. This is evidenced by the fact that the costs of matters finalised across all Australian courts have increased by 78 per cent in real terms (inflation adjusted) from 1998 to 2008.\(^ {36}\)

As demand and costs increase LACs have the following levers available to ensure their expenditure is equal to their allocated funding:

- alter the means and merits tests
- change fees paid to legal practitioners
- alter allocation between court work and ADR/educational/other programs
- review available funding options.

These levers are discussed in turn.

5.2 The means and merits test

The means test is a test of the ability of an applicant to fund their own representation. The merits test seeks to test the severity and worthiness of the applicant’s matter. Against the background of demand growth, rising costs and falling revenues LACs may alter the level of the means test and the stringency of the merits tests, to limit demand and control expenditure. The degree to which these tests can be altered and thus used as an appropriate measure for allocating the scarce resources of the legal aid budget is now considered.

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5.2.1 The means test

Different means tests are applied across the various State jurisdictions. However, there are some factors which are common across jurisdictions albeit with different applications and thresholds levels set. These include the following:

- a net income test set by reference to allowances for various living expenses and the number of dependents
- an assets test against an applicant’s house
- an assets test against an applicant’s remaining assets.

Analysis was undertaken in relation to the means test thresholds. In order to standardise the various means tests across each jurisdiction consideration was given to the thresholds for each LAC before co-contributions are required from litigants. Table 2 sets out the gross income thresholds for an average family with two children to qualify for 100 per cent legal aid funding. These are calculated by including allowances for dependent children and living expenses.

### Table 2 Income test across jurisdictions

<table>
<thead>
<tr>
<th></th>
<th>ACT</th>
<th>TAS</th>
<th>VIC</th>
<th>WA</th>
<th>SA</th>
<th>NSW</th>
<th>NT</th>
<th>QLD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single income</td>
<td>$487</td>
<td>$380</td>
<td>$255</td>
<td>$264</td>
<td>$406</td>
<td>$318</td>
<td>$446</td>
<td>$485</td>
</tr>
<tr>
<td>Add. income</td>
<td>$164</td>
<td>$100</td>
<td>N/A</td>
<td>N/A</td>
<td>$137</td>
<td>N/A</td>
<td>$151</td>
<td>N/A</td>
</tr>
<tr>
<td>Housing*</td>
<td>$91</td>
<td>$125</td>
<td>$240</td>
<td>$260</td>
<td>RH</td>
<td>$320</td>
<td>RM</td>
<td>N/A</td>
</tr>
<tr>
<td>2 children</td>
<td>$263</td>
<td>$131</td>
<td>$255</td>
<td>$192</td>
<td>$219</td>
<td>$200</td>
<td>$241</td>
<td>$315</td>
</tr>
<tr>
<td>Weekly taxable income for average family with 2 school age dependents</td>
<td>$1005</td>
<td>$736</td>
<td>$750</td>
<td>$716</td>
<td>$762</td>
<td>$838</td>
<td>$838</td>
<td>$800</td>
</tr>
</tbody>
</table>

Source: LACs’ Websites accessed on 12 October 2009, Melbourne Institute Henderson Poverty Lines: Australian ISSN 1448-0530–June Quarter 2009. Full table with up to six dependents is set out in Appendix B. RH – set in reference to the Henderson Poverty index, RM – set with reference to the housing market. ^ from second income, * Tasmania has an allowance for three zones across the state between $100 and $125 Western Australia has three rent allowances to include the housing stress in Mining towns of $360, all other rural environments it is $230. NSW has a rural allowance of $220. # The allowance for children is applied equally across those with custody and those paying maintenance and or child support.

Table 3 below sets out the upper and lower bands of annual income for litigants seeking legal aid. Given the allowances made in Table 2 for children and living expenses, Table 3 sets out the annual income for a family with two dependent children needed to qualify for 100 per cent legal aid funding.

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37 Without the need for a co-contribution.

38 Lower earning (typically single income living in a rural settings), Upper earning – typically dual income living in the capital city – WA is the exception with an allowance made for the high cost of living in North Western mining towns.
Table 3 Average annual income thresholds for family with two dependent children

<table>
<thead>
<tr>
<th></th>
<th>ACT</th>
<th>TAS</th>
<th>VIC</th>
<th>WA</th>
<th>SA</th>
<th>NSW</th>
<th>NT</th>
<th>QLD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lower</td>
<td>$43,724</td>
<td>$31,772</td>
<td>$39,000</td>
<td>$35,672</td>
<td>$32,486</td>
<td>$38,376</td>
<td>$35,735</td>
<td>$41,600</td>
</tr>
<tr>
<td>Upper</td>
<td>$52,269</td>
<td>$38,272</td>
<td>$39,000</td>
<td>$42,432</td>
<td>$39,624</td>
<td>$43,576</td>
<td>$43,576</td>
<td>$41,600</td>
</tr>
</tbody>
</table>

Source: PwC Calculations see Appendix B, ABS. Full table with up to six dependents is set out in Appendix B

The upper income threshold is then compared to the average wage across each jurisdiction, and set out in Figure 6, showing means tests for various numbers of dependants. The Y axis measures the percentage above or below the average wage.

**Figure 6 Average weekly earnings versus the means test**

As can be observed in Figure 6 the vast majority of means test thresholds are below the average wage. In Western Australia, Tasmania and Queensland the means test is less than 10 per cent of average wage, irrespective of the number of children. Meanwhile, generally the means test is set above the average wage once an applicant in the ACT, Victoria, New South Wales and the Northern Territory has five or more dependent children. This suggests that the current means test is stringently applied as the income level required to qualify for 100 per cent legal aid funding with two dependent children is on average 27 per cent below the average wage.

The Australian Government’s report *A Strategic Framework for Access to Justice in the Federal Civil Justice System* notes that the increase in court fees being waived demonstrated that the vast majority of litigants who might be expected to meet the socio-economic criteria for legal aid were not, in fact, legally aided. This is demonstrated in Figure 6 which shows that...
litigants earning well below the average income are unable to qualify for 100 per cent legal aid funding.\textsuperscript{39}

The means test can also be considered in relation to the poverty line as defined by the Henderson Poverty Index, to establish who qualifies for legal aid relative to this measure of poverty. Figure 7 compares the Henderson poverty line to the upper limits of the means test thresholds as set by the various LACs.

\textbf{Figure 7 The Henderson poverty index versus the means test}

![Figure 7 The Henderson poverty index versus the means test](image)

Source: Upper limits outlined in Appendix B, the Henderson Poverty Index\textsuperscript{40} at number of children

Figure 7 illustrates that in five jurisdictions, the means test excludes some people who are at or below the Henderson Poverty Line. Meanwhile in the ACT, NSW and NT the means test is above the Henderson Poverty index.\textsuperscript{41} This is consistent with the fact that the means test in the ACT and the NT are set with reference to the Henderson index. The NSW result is higher than other states largely due to extra $100 per week provided for the relatively high living costs associated with rents in Sydney. The variation of both the NSW and the ACT means tests should be considered in context of the high cost of living in both locations.

\textsuperscript{39} Access to Justice Taskforce Attorney-General’s Department A Strategic Framework for Access to Justice in the Federal Civil Justice System. September 2009

\textsuperscript{40} Index updated by Melbourne Institute of Applied Economic and Social Research, June 1997

\textsuperscript{41} As is the case in South Australia, albeit where the means test is set at the Henderson Poverty line.
In many States if the LACs were to more stringently apply the means test to limit demand, and allocate their scarce resources, they would be excluding a cohort who are already considered to be a severely disadvantage group of Australians. Indeed it could be argued that, assuming that those at or below the poverty line should be eligible for representation, the current means test thresholds should be increased to include all those living at or below the poverty line. This suggests a need to increase the funding available to LACs throughout Australia.

5.2.2 The home equity test

The remaining aspects of the means test relate to an assets test based primarily on an individual’s primary asset, their home, along with all other assets. The asset means test has been considered against average price of a house in the major city in Table 4.

Table 4 Home equity versus average house prices (‘000)

<table>
<thead>
<tr>
<th></th>
<th>ACT</th>
<th>TAS</th>
<th>VIC</th>
<th>WA</th>
<th>SA</th>
<th>NSW</th>
<th>NT</th>
<th>QLD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equity excluded</td>
<td>$400#</td>
<td>$215^</td>
<td>$400#</td>
<td>$362</td>
<td>n/a</td>
<td>$521^</td>
<td>$200^</td>
<td>$146</td>
</tr>
<tr>
<td>Average price</td>
<td>$455</td>
<td>$300</td>
<td>$385</td>
<td>$420</td>
<td>$355</td>
<td>$465</td>
<td>$445</td>
<td>$398</td>
</tr>
<tr>
<td>Equity test*</td>
<td>88%</td>
<td>72%</td>
<td>104%</td>
<td>86%</td>
<td>N/A</td>
<td>112%</td>
<td>45%</td>
<td>37%</td>
</tr>
</tbody>
</table>

Source – LACs Means test, ABS, all dollar amounts presented in thousands. *Against average price. ^Outside Hobart – $167,500. Household equity for people over 60 years old $292,000. NT average price is actually of a 2 bedroom flat in Darwin (not available). #In the ACT and Victoria the assessment is made on one half share of the house not exceeding $200,000.

The asset test relating to equity in an applicant’s home is in most circumstances above 70 per cent of the average house price within a capital city. Given that most parties are required to start a loan with at least 20 per cent equity, the means test, in most cases, allows a considerable equity growth in one’s primary asset before an individual is deemed to be ineligible for legal aid.

The exception are the Northern Territory and Queensland means tests:

- In the Northern Territory the means test is determined on a 2 bedroom flat in Darwin rather than an established house.
- In Queensland the average price is taken from Brisbane. However, unlike other States, less than 50 per cent of the population lives in the greater Brisbane area suggesting that again a more appropriate average house price measure would result in a considerably higher equity test result.
5.2.3 Other assets

There are considerable exemptions in all jurisdictions regarding which assets should be included in the secondary asset test outlined in Table 5. These exemptions typically cover household furniture, tools of particular trades, and equity shares of cars to a certain level.42

<table>
<thead>
<tr>
<th></th>
<th>ACT</th>
<th>TAS</th>
<th>VIC</th>
<th>WA</th>
<th>SA</th>
<th>NSW</th>
<th>NT</th>
<th>QLD</th>
</tr>
</thead>
<tbody>
<tr>
<td>No dependents</td>
<td>$1,000</td>
<td>$740</td>
<td>$100</td>
<td>$950</td>
<td>$3,000</td>
<td>$1,310</td>
<td>$879</td>
<td>$100</td>
</tr>
<tr>
<td>Dependents</td>
<td>$2,000</td>
<td>$1,490</td>
<td>$100</td>
<td>$1,900</td>
<td>$3,000</td>
<td>$2,635</td>
<td>$1,758</td>
<td>$100</td>
</tr>
</tbody>
</table>

Source: LACs means test

Given these exemptions it is difficult to consider the application of the means test related to assets other than the family home as being anything other than appropriate. Further, these assets tests are relatively low suggesting that LACs have limited ability to more strictly apply these tests.

5.2.4 Summary

In addition to controlling service provision through the means and merits test some LACs have imposed a quota on the number of services. In 2008-09 for example, VLA imposed a quota on provision of Independent Children’s Lawyers. The VLA Independent Children’s Lawyers program assisted 736 fewer children exposed to high-risk situations compared to 2007-08 because of this quota, limiting access to justice to children at risk.43

LACs are relatively constrained regarding the application of the means test as an option for controlling costs. The primary constraint, the income test, is extremely stringent as the majority of means tests thresholds are below the Henderson Poverty index.

Therefore it is considered that the means test is a relatively blunt instrument for the LACs to control costs. Although the mean tests appear to be consistent with the concept of only allocating legal aid to those most deserving, it could be argued that they currently excluded some parties who would otherwise be considered as deserving.44

Furthermore if applied more stringently as a lever to control costs, the means test, particularly in some states, would further exclude some of society’s neediest, those living at or below the Henderson Poverty line.

42 Typically no greater than $15,000.
43 Victorian Legal Aid – Annual Report 2008-09
44 This is particularly true where the Henderson Poverty index is used as the measure of who is and is not eligible for legal aid.
5.2.5 The merits test

Separate merit tests are applied by LACs for Commonwealth matters and State matters, and vary across the LACs. Nevertheless they are similarly defined and can be represented by the LAC of Tasmania’s merits test summary.\textsuperscript{45} The merits test is based on:

- the nature and extent of any benefit that an applicant may gain if aid is approved, or any detriment an applicant may suffer if aid is refused (not imposed as part of the Commonwealth merits test)
- whether the applicant has reasonable prospects of success in the proceedings
- that an ‘ordinarily prudent self funding litigant’ would also risk funds in the proposed proceedings
- that it is appropriate to spend limited public funds on the matter in terms of the likely benefit to the applicant, or in some circumstances to the community.\textsuperscript{46}

Essentially, the LACs have flexibility in the application of the merits test, and it can be considered a relatively subjective measure. In practice, by necessity, this flexibility results in the merits test being used as a lever to control the allocation of legal aid given the LACs’ limited budget.

In an environment where funding becomes more constrained the LACs can make the application of the merits tests more stringent. This would serve to exclude cases from funding that would have previously, and would generally, be considered worthy of assistance, thus further restricting access to justice.

5.3 Change fees paid to legal practitioners

As discussed throughout this report, demand for legal aid services is driven by a range of complex converging factors that are outside the LACs’ control. To continue to offer services in a constrained funding environment one of the remaining policy levers available to the LACs is the fees paid to legal practitioners.

This section highlights some of the trends observed in the legal profession, in relation to legal aid, in order to explore the feasibility of using this lever, and to understand the potential consequences.

\textsuperscript{45} The full merits test for both Commonwealth and Tasmanian issues are set out in appendix D.
5.3.1 Criminal lawyers undertaking legal aid: fees and costs

Recent work conducted in Victoria considered the fees paid for criminal legal aid to barristers representing legal aid funded litigants in each court.\(^47\) The study found that by comparison to other professionals, legal practitioners had seen their incomes fall over the past 15 years and VLA fee increases had failed to keep pace with both:

- the primary measure of inflation, the Consumer Price Index (CPI)
- the more specific cost index established by tracking the increases in expenses that barristers face in running their practices.

<table>
<thead>
<tr>
<th>Court Jurisdiction</th>
<th>Period</th>
<th>Change in VLA fees</th>
<th>Change in CPI</th>
<th>Change in Barristers’ Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Magistrates</td>
<td>1993-2007</td>
<td>16%</td>
<td>44%</td>
<td>56%</td>
</tr>
<tr>
<td>County</td>
<td>1993-2007</td>
<td>22%</td>
<td>44%</td>
<td>56%</td>
</tr>
<tr>
<td>Supreme</td>
<td>1993-2007</td>
<td>31%</td>
<td>44%</td>
<td>56%</td>
</tr>
</tbody>
</table>

These measures indicate that the income received by barristers working for legal aid has declined in real terms over this period. As the majority of criminal cases are funded by VLA, legal aid is the main source of work for criminal barristers. This has led to a real decrease in the remuneration of VLA funded barristers over this time.

Solicitors also face similar issues with the pay rates for solicitors undertaking criminal legal aid work lower than those set for family matters resulting in similar issues. In a recent submission, the Law Institute of Victoria\(^48\) stated that the cost of providing legal aid services in Victoria was insufficient to compensate private practitioners for the amount of the work that is required on each legally aided matter. Having reviewed a number of legally aided files, LIV found that VLA fees recovered the following proportions:

- Magistrate Court Plea – 17 per cent cost recovery
- Magistrate Court Bail application – 17 per cent cost recovery
- Magistrate Court Consolidated plea – 45 per cent cost recovery
- County Court trials (10 and 15 days) – 55 per cent cost recovery

\(^47\) PricewaterhouseCoopers, Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases April 2008

\(^48\) Law Institute of Victoria, Submission Victoria Legal Aid Funding To: Attorney General and Treasurer, September 2008
5.3.2 *Comparison of legal professionals’ income*

The same work referenced in Section 5.3.1 found that when the effective annual income of a barrister solely doing legal aid work is calculated and compared to the remuneration of other legal professionals of like experience, there is a significant disparity. At all levels of experience VLA funded barristers are being compensated well below the market value, for completing work of similar economic value. Examples of some legal professionals’ average annual income compared to those of VLA funded barristers are set out in Table 7.

<table>
<thead>
<tr>
<th>Career level</th>
<th>VLA criminal barrister</th>
<th>Public prosecutor</th>
<th>Solicitors working at law firms *</th>
<th>In house counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td>Junior</td>
<td>$36,383</td>
<td>$87,200</td>
<td>$85,000</td>
<td>$97,500</td>
</tr>
<tr>
<td>Mid- career</td>
<td>$91,478</td>
<td>$196,200</td>
<td>$177,500</td>
<td>$197,500</td>
</tr>
<tr>
<td>Senior</td>
<td>$110,241</td>
<td>$287,021</td>
<td>$210,000</td>
<td>$325,000</td>
</tr>
</tbody>
</table>

* Firms not undertaking legal aid criminal work

In addition, there is a lack of incentives for new barristers to choose to practise in criminal law. While those already in the profession have generally specialised, new entrants have significantly more options available to them. Currently there are significant economic disincentives to remaining a criminal barrister. In addition, without adequate incentives to compete with more highly remunerated alternatives (as set out above), the number of new entrants will decrease. This has already been observed as the number of junior barristers that focus 90 per cent or more of their practice on criminal work has declined by 59 per cent over the last three years.

5.3.3 *Cross subsidisation of legal aid work*

The underfunding of legal aid potentially leads to a system in which defence solicitors and barristers effectively cross subsidise the system. Many lawyers undertaking legal aid work are unable to make sufficient returns on their efforts and therefore must subsidise their income with private work. This effectively results in a system where the legal practitioners are bearing the cost of providing a public good. This is unsustainable. Lawyers, as rational economic actors cannot be expected to continue this practice and will eventually preference away from the lower paid work, while new participants will be deterred from entering the profession.

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49 PricewaterhouseCoopers & Victorian Bar, Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases April 2008
50 ibid
5.3.4 Lawyers moving away from legal aid

The attitudes of legal professionals were surveyed by the Commonwealth Attorney General’s department in 2006. The Commonwealth and States rely on the private sector to deliver services for approximately half of all grants of legal aid. This research showed that a third of private providers had ceased to do legal aid work, and that providers would continue to withdraw because legal aid remuneration (less than 50 per cent of private sector fees) does not cover costs.\footnote{TNS Social Research, ‘Legal Aid Remuneration Review: Final Report’, 2007.}

As part of this survey, legal professionals provided the following reasons for providing legal aid:

- moral obligation and the ‘social contract’ were seen as the key motivator to providing legal aid
- the reliability and timeliness of payments from the legal aid commission was also a key area of satisfaction for legal aid providers and a valuable source of cash flow.

At the same time, and evidenced by the dramatic reduction in the numbers providing legal aid services, a number of reasons were provided for not servicing the legal aid market, with the study finding the following:

- Remuneration matters including the low hourly rate, and issues with the number of hours allocated under the stage of matter payment structure were the key reasons for disengagement from legal aid among all firms.
- Red tape associated with processing a grant of legal aid was also seen as a key reason for disengagement. This was particularly evident among firms that used to provide legal aid but now do not.

This study also revealed the following

- Approximately one in three firms that are currently practising family or criminal law have moved away from the provision of legal aid services (33 per cent).
- Revenue generated from legal aid as a proportion of the firms’ total earnings had decreased overall over the past five years.
- Revenue was approximately 14 per cent for firms currently providing legal aid for family law matters and a similar decrease (13 per cent) for firms currently providing legal aid for criminal law matters.
- Seventy-six per cent of firms saying the firm would either maintain (59 per cent) or increase (17 per cent) their supply of legal aid for criminal law matters.
Overall 24 per cent said that their firm was likely to decrease the supply of legal aid for criminal law matters, suggesting that there will be a net shortfall in provision of current services of 7 per cent. This needs to be considered in light of an increase in the overall demand for these services. Assuming that there is an alignment of demand with population growth of 2 per cent the decrease is almost 10 per cent.

The shortfall in professionals providing legal aid services is occurring right now. Over the past years there has been an increasing wedge between the returns available to lawyers providing legal aid compared to lawyers in other fields. Thomsen noted that private professionals do not consider legal aid as a particular threat for attracting lawyers away from their practices. At the same time work by Lamb and Litrich found increased legal activity across company, administrative, regulatory, finance, trade practices, intellectual property, environmental and media law fields. This has resulted in a far more instrumental and less ideological professional response to public legal aid.

Analysis by Fleming and Daly confirms the core claim of the evidence reporting a retreat of legal practitioners from legal aid work, with the numbers of private legal professionals participating in the mixed model falling over the period 1991 to 2003. The available evidence indicates market changes were the major contributing factors, including inside legal aid markets, which included:

- demand fell in response to a downward trend in Commonwealth expenditure
- approvals trended downward, reducing opportunities for referred legal work
- LACs rationed spending, restricting eligibility, and imposing cost and service caps on cases approved for legal aid, which further suppressed demand, and discouraged private practitioners from undertaking legal aid work
- there was an increase in opportunity costs of legal aid work because:
  - payments for legal aid work did not keep pace with market rates
  - by the end of the period a significant negative disparity apparently existed between amounts paid by LACs and fees received by private practitioners for comparable self-funded legal work
  - transaction costs associated with legal aid approvals were also an important contributory factor.

54 Fleming, D. and Daly, A. ‘The retreat of the legal profession from legal aid: labour market change in the Australian mixed model,’ International Journal of the Legal Profession, 2007
Survey work by the Commonwealth Attorney General’s Department suggests that one of the primary drivers of professionals providing legal aid is based on a social contract or moral obligation felt by the profession. However, the ability of Governments to rely on this sense of obligation as the primary driver for providing services is limited and is likely to lead to a number of undesirable consequences. This survey and other reviews of the profession have already highlighted the increasing numbers of professionals exiting the field. When asked the driver for this decision the profession continues to state a lack of government support for legal aid, fees which do not allow for recovery of the cost of providing services, and increased opportunities outside legal aid.

5.3.5 Efficiency and social costs of current constraints

Legal aid cases are typically time consuming owing to the complexity of the situations and the parties involved in the cases. These complexities can involve the need for translators, mental health issues, low socio economic factors including limited education levels and the fact that clients can already be in prison, making contact with them more difficult and time consuming. Legal aid is about hard, complicated cases often involving parties experiencing considerable disadvantage. Furthermore, these parties are typically facing a variety of issues at the same time across a multitude of legal and social welfare issues. For example one matter may include the breakdown of a marriage, residential tenancy issues, allegations of abuse and child protection.

Therefore legal aid cases require a high level of specialisation, experience, and resources and thus a legal aid system needs to be able to attract and retain the appropriately skilled practitioners to perform this work.

As legal aid becomes less attractive to practitioners due to the devaluation of this work, many will take on less legal aid work, mix it with other kinds of work, or cease legal aid work completely. This can be expected to decrease the number of specialised, experienced practitioners undertaking legal aid work, along with those still undertaking the work devoting less time and resources to these matters, to ensure their costs are recoverable.

A functional justice system is dependent on high quality advocates on both sides of a matter. Experience and well resourced representation provided to legal aid clients can lead to efficiency benefits to the justice system including:

- the early intervention or resolution of disputes through:
  - plea bargains – in the case of criminal disputes
  - consent agreements – in the case of family matters
  - settlements of commercial disputes – in the case of civil matters
- justice procedures being followed correctly and thus avoiding:
  - delays in proceedings
  - appeals, aborted trials and retrials

In addition significant benefit can be realised in terms of the effectiveness of the justice outcomes realised including:

- avoiding incorrect or inappropriate incarceration or other deprivation of liberty
- reaching just, workable and binding resolutions to disputes
- maintaining society’s faith in the justice system
- the testing of the facts of the case and the adequacy of any deal being offered including:
  - reviewing the case to determine the appropriateness of the charges levied against an individual
  - preventing civil settlements becoming intractable to the point of needing a final judgement

### 5.3.6 Conclusion

Specialising in legal aid work is less attractively remunerated than other areas of the legal profession. The Victorian example illustrates that fees paid to legal practitioners in criminal cases have fallen considerably over the past 15 years in real terms and in relation to the costs practitioners face. Low fees result in cross subsidisation of legal aid with other better paying legal work, which is unsustainable and leads to a decline in experienced and specialised lawyers undertaking this work.

A retreat of legal practitioners from legal aid work results in significant efficiency costs to the justice system, and ‘effectiveness’ costs to individuals and society as a whole, in terms of the outcome the justice system provide.

The trends and their impacts set out in this section suggest that LACs have a limited ability to reduce fees in response to lower funding without jeopardising the quality of legal aid services provided.
5.4 Alter the funding allocated between various legal aid services

There are a number of services provided by LACs in the provision of legal aid, including:

- education services
- legal information services
- duty lawyer services
- alternative dispute resolution (ADR) mechanisms
- legal advice
- legal representation.

These various services represent some of the many ‘rooms’ outlined by Galanter, who noted:

‘Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.’

The appropriateness of the room in which people experience justice is paramount. The provision of information may allow someone to understand their rights or allow individuals to reach an agreement in a legal matter. Equally, legal advice may allow a person to understand the legal consequences of a given action.

In cases such as disputes between neighbours regarding civil matters, or between a couple who are willing to reach an agreement but need assistance to negotiate their positions after the breakdown of a marriage, ADRs can be an appropriate.

Meanwhile, criminal cases, or complex family law matters which include elements of power imbalance and limited ability for one party to negotiate are more suited to formal court processes.

For example, a senior family law solicitor described the difficulties typically confronted in family law legal aid cases. This can include battered or abused wives of many years whose ability to stand up for themselves and their children is radically impaired due to the very history of abuse which is at the centre of the case, or husbands who face false or even imagined allegations of abuse of their children. In both types of cases, the parties themselves must have legal representation if they and their children are to be protected.

Cases at this end of the legal spectrum are not amenable to FDR and need to be resolved by the court.

It is for these reasons that legal aid provides a mix of services. LACs are able to allocate funding between these various programs to ensure that the best allocation of resources is achieved, to ensure the most cost effective and appropriate mix of services are provided.

Within limited resources the underlying economics of service provision would suggest that those programs which achieve the maximum benefits should attract additional resources through increased funding. As an example, the provision of legal representation is costly and is typically an exclusive good in that it cannot be easily replicated across a number of users. On the other hand education services, are not exclusive, and can be consumed across a wide variety of consumers at similar costs. Nonetheless, LACs’ primary purpose is to provide legal representation to those who are able to meet the means and merits test.

The ability to draw this same distinction between the various types of legal representation is compromised due to impact of the different types of services provided by the LAC. For example, one approach to providing legal aid could be an increase in the provision of duty lawyer services. Under this approach there could be an increased number of services provided. The result could be that notionally legal aid becomes more available, but at the same time the level of service could diminish. Another alternative would be allocating all funds to ADR programs which generate considerable savings to the court. However, neither ADRs nor duty lawyer services are appropriate for all disputes when considering the complexity of some disputes and the gravity of outcome of some encounters with the legal system.

Further, ADR is extensively used already in family law. The scope for LACs to make further savings by re-allocating to ADR is limited.

ADRs are only effective mechanisms when seen in the context of working in the shadow of the formalised court system. In relation to justice and ensuring social inclusion the disadvantaged are entitled to expect that their rights are protected. As noted by Kirby, disputes settled behind closed doors may not serve the purpose of preventing breach of the law, redressing legitimate grievances and educating the offender and the community.

Legal aid should not be seen in the context of funding one program over another, rather it is a complete system which is self supporting, providing a mix of services in appropriate circumstances.

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57 KPMG, Family dispute resolution services in legal aid commissions: Evaluation report, 2008
Considerable work has been undertaken regarding the economic benefits of various programs associated with legal aid. While allocations could be altered to extend the reach of legal aid services, this may trigger negative outcomes in terms of the appropriateness and quality of these services. Therefore reallocation of resources between the services that legal aid provides is not considered an effective instrument to address funding constraints.

5.5 Conclusion

In a constrained and declining funding environment LACs have limited ability to respond by controlling costs. Effectively their ability to meet demand for their services, within a given funding level is relatively fixed and, depending on the definition of need, it could be argued that LACs are currently unable to meet this need at present. Further, the Victorian example would suggest that the degree to which fees paid to legal aid practitioners could be reduced further is limited and it can be argued that these fees currently under value, and therefore jeopardise, the quality of the work performed by these practitioners.

Against these supply side concerns, demand is increasing due to population growth and policy changes, further increasing the pressure on LACs. Taking these factors into account the equation of legal aid funding and expenditure cannot be balanced unless services are limited further and access to justice for disadvantaged parties is decreased. This step reduces the ability of the Australian, State and Territory Governments, to meet their objectives of achieving social inclusion, a fair society and meeting their international obligations to provide access to justice.

The levers explored in this section do not provide feasible options for addressing the LACs funding constraints and therefore alternative funding arrangements for legal aid are now considered.
6 Signposts to guide future funding decisions

Key points

- The amount of expenditure on legal aid is essentially a values based decision. Policy makers need to consider the various issues associated with community expectations, international obligations, the full suite of associated policies, and the objectives of any broader social policies, for example social inclusion.

- Australia currently spends $28.01 per capita on legal aid funding, behind England and Wales ($83.68), Scotland and Northern Ireland ($68.26) and the Netherlands ($52).

- There are a number of funding signposts which could be considered, but there is no single correct funding level.

- One principle which could be pursued would be to ensure that Commonwealth contributions to LACs are equal to State contributions.

Throughout the previous Chapters the current and future shortfall in legal aid funding has been outlined, and the consequences of this explored. This Chapter considers the issue of how much funding would provide a sustainable increase in provision of services associated with legal aid.

6.1 Current legal aid expenditure

The application of the rule of law requires that the law be applied equally across all members of society. Where some are unable to afford legal representation, legal aid has the potential to provide that equality. The issue of who does and does not qualify for legal aid is therefore critical.

The question of how much funding is sufficient for legal aid is dependent to some extent on value judgements. As such the question of determining the appropriate level of funding is one which is open to considerable debate. It is not a question of assessing the net present value of the costs associated with a particular service level of the benefits associated with that service level. Rather it is a value judgement which seeks to understand a number of factors including:

- the willingness of the public to fund legal aid
- the obligations and responsibilities of the various international human rights instruments to which Australia is a signatory
- the degree to which a community values the presence of a safety net that provides access to justice for the disadvantaged
- the benefits (avoided costs) that legal aid provides in terms of the efficiency of the justice system and effective justice outcomes
the degree to which agreement can be reached as to who is eligible to access legal aid.

6.1.1 Legal aid expenditure

Both at the Commonwealth and state level, numerous departments spend a significant amount of money on a variety of programs in relation to legal issues and dispute resolution. As such it is important to consider what expenditure relates to the provision of legal aid versus other kinds of expenditure. The Strategic Framework specifies that the Australian Government spent approximately $1.040 billion in 2008-09 on the Commonwealth justice system, made up of the costs of institutions (courts, tribunal, ombudsman schemes, commissions etc) and key programs, including legal aid. Of this expenditure the report states that $446 million, 42.9 per cent, was spent on key programs. This is made up of:

- Legal Aid funding grants to the State and Territory LACs – 38.4 per cent or $178 million
- Family relationships centres – 37.3 per cent or $166 million
- Commonwealth Indigenous programs including Aboriginal and Torres State Island Legal Services (ATSILS) and family violence programs – 17.5 per cent or $78 million (of which $18.8 million is for family violence programs)
- Grants to CLCs – 6.8 per cent or $30 million.

Of the total of key program expenditure, legal aid funding provided by the Commonwealth to LACs amounts to $178 million. Adding ATSILS and CLCs to this figure results in approximately $268 million per annum of Commonwealth funding. Combined with direct State and Territory funding of $337.6 million per annum the total legal aid expenditure for the 2008-09 year was $605.5 million per annum. The per capita mix of Commonwealth and State funding for legal aid is set out in Table 8 for the 2008-09 year, with approximately $12.40 from the Commonwealth versus $15.61 from the various State and Territory funding sources.

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59 Commonwealth Attorney General’s Annual Report 2008-09
Table 8 Per capita funding from Commonwealth, State and Territory sources
2008-09

<table>
<thead>
<tr>
<th>State and Territory sourced funding</th>
<th>Per capita funding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grants to State and Territory LACs (primarily for criminal matters)</td>
<td>$8.90</td>
</tr>
<tr>
<td>PPF schemes and other income</td>
<td>$6.72</td>
</tr>
<tr>
<td><strong>Total State and Territory Government funding</strong></td>
<td><strong>$15.61</strong></td>
</tr>
<tr>
<td>Commonwealth sourced funding</td>
<td></td>
</tr>
<tr>
<td>Grants to State and Territory LACs (primarily for family law matters)*</td>
<td>$8.26</td>
</tr>
<tr>
<td><strong>Sub total: Total funding provided to LACs (see Chapter 4)</strong></td>
<td><strong>$23.87</strong></td>
</tr>
<tr>
<td>CLC funding</td>
<td>$1.40</td>
</tr>
<tr>
<td>Indigenous legal aid funding (ATSILS)</td>
<td>$2.75</td>
</tr>
<tr>
<td><strong>Total Australian Government funding</strong></td>
<td><strong>$12.40</strong></td>
</tr>
<tr>
<td><strong>Grand total: legal aid funding</strong></td>
<td><strong>$28.01</strong></td>
</tr>
</tbody>
</table>

Source: Strategic Framework, Commonwealth Attorney General Department, NLA data

*LARI data

Total per capita expenditure by governments on legal aid services delivered through LACs is approximately $23.87 per capita. Other programs which have been included in the international comparisons set out below include Commonwealth funding for ATSILS and CLCs (approximately $4.15 per capita). Therefore the total legal aid per capita expenditure on legal aid in Australia equates to $28.01.

6.1.2 International Comparisons

In considering the various signposts for the adequacy of legal aid funding a number of countries’ legal aid budgets have been considered. Table 9 sets out these comparisons.
Table 9 Cross country comparison of per capita spending on legal aid

<table>
<thead>
<tr>
<th>Country</th>
<th>Per capita spend AUD (exchange rate 3 March 2009*)</th>
<th>Per capita spend AUD (1999 to 2009, 10 year average exchange rate*)</th>
</tr>
</thead>
<tbody>
<tr>
<td>England and Wales^</td>
<td>83.68**</td>
<td>86.63</td>
</tr>
<tr>
<td>Scotland/Northern Ireland^</td>
<td>68.27**</td>
<td>70.67</td>
</tr>
<tr>
<td>Canada^</td>
<td>22.02</td>
<td>22.80</td>
</tr>
<tr>
<td>New Zealand^</td>
<td>22.02</td>
<td>22.80</td>
</tr>
<tr>
<td>Ireland^</td>
<td>15.42</td>
<td>15.96</td>
</tr>
<tr>
<td>Germany^</td>
<td>8.81</td>
<td>9.12</td>
</tr>
<tr>
<td>France^</td>
<td>6.61</td>
<td>6.84</td>
</tr>
<tr>
<td>Sweden^</td>
<td>2.20</td>
<td>2.28</td>
</tr>
<tr>
<td>Netherlands^^</td>
<td>52.00</td>
<td>N/A</td>
</tr>
<tr>
<td>Australia</td>
<td>28.01</td>
<td>N/A</td>
</tr>
</tbody>
</table>


Comparisons with international jurisdictions can never be absolutely precise. For example:

- Exchange rates can make comparisons difficult. For example, in the last six months exchange rate variations which have seen the pound sterling fall approximately 22 per cent below its ten year average against the Australian dollar. These movements have been driven largely by the economic circumstances associated with the Global Financial Crisis which could lead to a significantly stronger Australian dollar against the pound Sterling over the long term. The result is the relative value of British legal aid spending will have fallen relative to Australian legal aid spending.

- Each country’s justice system is unique in the approaches it takes to various aspects of the delivery of legal aid and indeed justice. However, when considering Table 9 those countries which have similar legal systems to Australia’s include Britain, Canada and New Zealand.

Interestingly both Canada and New Zealand have very similar per capita spends to Australia. At the same time both countries have faced considerable pressure from the providers of legal aid due to a perceived lack of funding. In New Zealand, lawyers have threatened to stop providing legal aid in response to continual funding cuts.\(^60\) Meanwhile, in Canada, legal

\(^60\) Lawyers in New Zealand to March as Legal Aid Cut’, 25 June 2009, Bay of Plenty Times.
professionals have threatened similar action with criminal lawyers boycotting legal aid services.61

At the upper end of the international range is England and Wales where on current exchange rates the per capita expenditure is $68.36.62 This represents an increase of over 200 per cent on the current expenditure in Australia. This provides the upper end of the signposts considered by this report. For Australia to increase the legal aid budget to this level the increase in the legal aid budget would be over $1 billion per annum.

6.2 The signposts

The provision of legal aid services helps to protect the rule of law which in turn is one of the primary drivers of economic activity. At the same time there is no perfect level of funding. Indeed the current level of funding is heavily underpinned by the returns available in the various public purpose funds. The absence of an optimal level of funding is similar to the questions associated with health care funding where additional funding results in additional services. However, there are limits to the ability and willingness of governments to fund these services.

Having defined the core legal aid expenditure budget this section looks at the following five signposts to increase this expenditure:

- Signpost 1 – Commonwealth replaces funding from PPF and other LAC self generating sources of income
- Signpost 2 – Commonwealth matches spending from PPF and other LAC self generating sources of income
- Signpost 3 – A 12.5 per cent increase to increase means test
- Signpost 4 – A return to 1997 funding levels from the Commonwealth Government
- Signpost 5 – return to pre 1997 proportional share of funding of Commonwealth and State and Territory Governments.63

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61 Ontario’s legal aid problems, June 8, 2009 The Globe & Mail Kirk Makin
63 Including funding from the PPF and other LAC self generating sources of income.
6.2.1 Increasing funding to match 2008-09 PPF income

In considering the various signposts it is important to first consider the case which ensures that the current funding level is met irrespective of the performance of the various state based public purpose accounts, or the interest on lawyers’ trust accounts. This particular signpost does not increase the overall pool of legal aid directly but it does allow LACs some flexibility to plan for their annual budgets with greater certainty as to the financial outcomes.

Currently the funding which is derived from the various PPFs is $6.86 per head. The necessary increase in Commonwealth spending would be approximately $145.2 million per annum.

Table 10 Signpost 1 – Commonwealth replaces PPF

<table>
<thead>
<tr>
<th>Signpost 1</th>
<th>Per capita</th>
<th>Increase in expenditure (’000)</th>
<th>Commonwealth in future</th>
</tr>
</thead>
<tbody>
<tr>
<td>PPF as proportion of expenditure</td>
<td>$6.86</td>
<td>$145,209</td>
<td>$19.26</td>
</tr>
</tbody>
</table>

6.2.2 Adding back in the PPF

Assuming that the Australian Government is able increase funding for legal aid to the equivalent value of the PPF it would be appropriate to reconsider the funds from the PPF.

Initially these funds were set up to fund various legal programs. Effectively the funds from the PPF represent a cross subsidy between the revenue generated from the trust accounts and the legal aid system. Once they were included as part of the overall revenue the new revenue for legal aid would be $145.2 million or approximately $6.86 per head of population. This would effectively be a matching of Commonwealth funds for the client funds currently being used to support the legal aid system.

Table 11 Signpost 2 – Commonwealth matches PPF spending

<table>
<thead>
<tr>
<th>Signpost 2</th>
<th>Per capita</th>
<th>Increase in expenditure (’000)</th>
<th>Total Commonwealth</th>
</tr>
</thead>
<tbody>
<tr>
<td>Add back PPF</td>
<td>$6.86</td>
<td>$145,209</td>
<td>$19.26</td>
</tr>
</tbody>
</table>
6.2.3 Increasing the means test to meet the Henderson poverty index

As set out in section 3, the current means test is effectively insufficient to meet the definition of socio economic disadvantage measured by the Henderson poverty index. Across all jurisdictions the incremental increase in legal aid to at least meet the Henderson index \(^{64}\) has been assumed to be approximately 12 per cent. This would lead to an increase of $3.10 per capita.

Table 12 Signpost 3 – 12.5 per cent increase to increase means test

<table>
<thead>
<tr>
<th>Signpost 3</th>
<th>Per capita</th>
<th>Increase in expenditure ('000)</th>
<th>Total Commonwealth</th>
</tr>
</thead>
<tbody>
<tr>
<td>Henderson</td>
<td>$3.10</td>
<td>$65,630</td>
<td>$15.50</td>
</tr>
</tbody>
</table>

6.2.4 Equating 1997 Commonwealth expenditure to today’s dollars

In 1996, the Commonwealth announced significant reductions in its legal aid funding contribution. This has been followed by modest increases in funding since then. However, funding has not returned to the 1997 level.

This signpost reflects the level of expenditure that would be required to provide support to LACs equivalent to that provided by the Commonwealth in 1997.

In order to ensure the same level of funding per capita, allowances have been made for both population growth and movements in the CPI. Over this time the CPI measured by the Australian Bureau of Statistics has increased 38 per cent. At the same time the population has also grown by approximately 15 per cent.

The corresponding increase in overall funding per capita is $1.39, resulting in a rise from the existing $8.26 per capita funding level in 2008-09 to the $9.65 level prevailing in 1996-97 (measured in 2008-09 dollars).

In 2008-09 the Commonwealth contribution to LACs was $178.5 million. A return to 1996-97 levels would have required an additional $30.1 million.

If an effort was made in 2010-11 to return Commonwealth per capita LAC funding back to 1996-97 levels, this would require a $43.2 million increase over the 2008-09 actual expenditure of $178.5 million.

\(^{64}\) While not disadvantaging on the current system through a simple reallocation of funds between the states
6.2.5 Returning to the pre 1997 share of federal/state funding

Over the past 10 years funding from the State and Territory governments, including the various PPF programs, has increased both in absolute and proportional terms.

Holding the amount of money contributed by the States and the PPF constant the final signpost would increase the Commonwealth share of funding to the proportional share assumed prior to the 1997 funding reductions. Between 1972 and 1997, federal funding generally represented approximately 55 per cent to the States’ share of 45 per cent. Currently, the State share of the overall funding mix is $15.76 per capita. Holding this constant, a 55 per cent share of the total funding would be equivalent to $19.08 per capita.

The resulting increase would be equal to an increase of $10.83 per capita and an increase in the Commonwealth budget of $229.3 million. An alternative to such an approach would be to base relative funding shares specifically on the amounts provided by respective tiers of government to LACs themselves, and seeking an outcome whereby the Commonwealth effectively matched the State and Territory contributions (from consolidated revenue) to LACs.

Table 14 Signpost 5 – return to pre 1997 proportional share of funding

<table>
<thead>
<tr>
<th>Signpost 5</th>
<th>Per capita</th>
<th>Increase in expenditure ('000)</th>
<th>Total Commonwealth</th>
</tr>
</thead>
<tbody>
<tr>
<td>55% 45% share</td>
<td>$10.83</td>
<td>$229,275</td>
<td>$19.08</td>
</tr>
</tbody>
</table>

6.3 Discussion of signposts

Table 15 summarises the various signposts for consideration, while Table 16 examines the impact that each of these signposts has on the overall budget for legal aid.

Table 15 Signposts 1 through 5

<table>
<thead>
<tr>
<th>Signpost</th>
<th>Per capita</th>
<th>Increase in expenditure ('000)</th>
<th>Total Commonwealth</th>
</tr>
</thead>
<tbody>
<tr>
<td>PPF as proportion of expenditure</td>
<td>$6.86</td>
<td>$145,209</td>
<td>$19.26</td>
</tr>
<tr>
<td>Add back PPF</td>
<td>$6.86</td>
<td>$145,209</td>
<td>$19.26</td>
</tr>
<tr>
<td>Henderson</td>
<td>$3.10</td>
<td>$65,630</td>
<td>$15.50</td>
</tr>
<tr>
<td>1997 funding</td>
<td>$1.39</td>
<td>$30,142</td>
<td>$13.79</td>
</tr>
<tr>
<td>55% 45% share</td>
<td>$10.83</td>
<td>$229,275</td>
<td>$19.08</td>
</tr>
</tbody>
</table>
Table 16 Impact on funding from each signpost

<table>
<thead>
<tr>
<th>Signpost</th>
<th>Commonwealth in future</th>
<th>State</th>
<th>PPF</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current funding</td>
<td>$12.40</td>
<td>$8.90</td>
<td>$6.72</td>
<td>$28.01</td>
</tr>
<tr>
<td>PPF as proportion of expenditure</td>
<td>$19.26</td>
<td>$8.90</td>
<td>$0.00</td>
<td>$28.15</td>
</tr>
<tr>
<td>1997 funding</td>
<td>$13.79</td>
<td>$8.90</td>
<td>$6.86</td>
<td>$29.55</td>
</tr>
<tr>
<td>Henderson</td>
<td>$15.50</td>
<td>$8.90</td>
<td>$6.86</td>
<td>$31.25</td>
</tr>
<tr>
<td>Add back PPF</td>
<td>$19.26</td>
<td>$8.90</td>
<td>$6.86</td>
<td>$35.01</td>
</tr>
<tr>
<td>55% 45% share</td>
<td>$23.23</td>
<td>$8.90</td>
<td>$6.86</td>
<td>$38.98</td>
</tr>
</tbody>
</table>

In considering each signpost it is important to assess each level of funding against other legal aid systems. Figure 8 compares each signpost against international benchmarks.

Figure 8 Legal spend per capita across various jurisdictions and signposts

Unfortunately there is no unique signpost which can be defined as the correct level of funding. For example while Australia compares favourably to the New Zealand and Canadian examples there is evidence to suggest that legal aid funding in these two countries is currently inadequate. Indeed the signposts considered here do not involve increases in the overall spending on legal aid in Australia to the level of the Netherlands, Scotland, Northern Ireland, Wales or England.

These signposts have been provided as a tool to consider the impact on the budget of increased funding. However, any increase must be seen in the context of the funding arrangements between the Australian and State and Territory Governments. Chapter seven outlines these arrangements.
The challenge of ‘cooperative federalism’ for legal aid funding arrangements

Key points

- Cooperative federalism was introduced by the Rudd Government as a reform of Commonwealth-State financial relations that emphasised shared purposes, clear goals and a cooperative approach.
- SPPs were rationalised and moved away from prescriptive input controls, in favour of more cooperative working arrangements.
- Indexation is a key feature of payments to the State and Territories under revised agreements. These must include allowances for changes in cost drivers and demand for services.
- There can be trade-offs between the principle of shared goals and defined responsibilities.
- The current purchaser-provider arrangement for legal aid funding does embrace the shared goals in the way that cooperative federalism envisages, and can be seen as more of a contractual, rather than a cooperative approach.
- Legal aid falls technically under the new NP arrangements but the structure of its funding is yet to be brought into line with the principles of cooperative federalism.
- There is a significant reform opportunity presented by cooperative federalism – opening the way for genuinely agreed, cooperative actions based on shared goals rather than an artificial distinction between the responsibilities of different levels of government.

Since the 1970s, legal aid has been a shared responsibility between the Commonwealth and State and Territory governments. As a result, the funding arrangements for legal aid are inextricably linked to the broader financial arrangements which exist between the tiers of government in Australia. This chapter outlines the new paradigm for these arrangements – cooperative federalism – and where legal aid funding sits in this context.
7.1 Philosophical roots of cooperative federalism

The election of the Rudd Labor Government in November 2007 commenced a process of reform of Australia’s federal structure, including Commonwealth-State financial relations. The broad philosophy underpinning these reforms was spelled out by Kevin Rudd as a then senior Shadow Minister in an address to the Don Dunstan Foundation in July 2005:

The challenge for a future Labor government will be to rebuild the federation… Federation can be rebuilt based on the principles of co-operative (rather than coercive) Federalism. If Federal Labor succeeds in this enterprise, it will create a sustainable political and constitutional mechanism to deliver lasting reform to the nation.  

The momentum for federal reform was further boosted by the formation of an ALP Advisory group on Federal-State Reform, which issued a discussion paper in July 2007. That paper pointed out that SPPs, since the 1960s, had become an accepted part of the Commonwealth-State financial landscape, resulting in substantial Commonwealth involvement in traditional areas of State Government service delivery such as health, education and transport. The paper pointed to the problems of the existing system as being:

- a degree of confusion in the community as to which level of government was responsible for what
- a tendency for levels of government to blame one another, resulting in a lack of democratic accountability
- a tendency towards cost-shifting between levels of government
- potential distortion of priorities as a result of prescriptive conditions being placed on SPPs by the Commonwealth
- a degree of duplication and overlap in the administration of SPPs
- a proliferation of small SPPs based on political, rather than overriding national, priorities.

Despite these shortcomings, the advisory group acknowledged that SPPs ‘represent the practical expression of Federalism’. Their reform recommendations were based on the need to use SPPs as a vehicle to develop effective partnerships between levels of government to deliver mutually agreed policy outcomes. This would require that the SPPs

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65 Kevin Rudd ‘The Case for Cooperative Federalism’, Address to the Don Dunstan Foundation, 15 July 2005


themselves focus on outcomes rather than inputs, that these outcomes be based on a partnership approach, and that states be left with a significant degree of autonomy in the way those outcomes are delivered.

The main recommendations of the advisory group included:

- rationalisation of SPPs through consolidation into a handful of significant payments
- a clearer delineation of responsibility between tiers of government
- use of purchaser-provider models to separate and clarify responsibilities in some instances
- a reduction in the conditionality placed on SPPs, particularly where the conditions are highly prescriptive
- the replacement of prescriptive conditions with agreed output and outcome conditions, ideally with the absence of any requirements for matching funding by the States and Territories.

In essence, the drive for wholesale reform of the Federation stemmed from a widespread view that the existing system had become inefficient, combative and unduly focused on detailed inputs (such as the requirement for flagpoles outside government schools) rather than outcomes. It was also recognised that the responsibility for driving those outcomes was effectively shared, particularly in those areas with significantly overlapping responsibilities. Finally, there was a growing recognition of the fact that poorly designed or targeted policy by one level of government could generate broader society-wide costs which impacted on other levels of government.

### 7.2 Implementation of cooperative federalism

Following the election of the Rudd Government, the Council of Australian Governments (COAG) agreed in December 2008 to a new model of Commonwealth-State financial relations. The reformed arrangements, broadly described here as ‘cooperative federalism’ were enacted through an overarching intergovernmental agreement (IGA) and a series of individual subsidiary agreements between the Prime Minister and State and Territory Premiers and Chief Ministers. The overarching IGA was based on the observation that ‘in signing [the] Agreement, the Parties acknowledge that coordinated action is necessary to address many of the economic and social challenges which confront the Australian community.’

The reformed arrangements had a number of important features.
The existing proliferation of Commonwealth payments were consolidated down to six National SPPs in the areas of:

- health
- early childhood development and schools
- vocational education and training
- disability services
- affordable housing
- indigenous policy

Each SPP was governed by a National Agreement between the Commonwealth and the States. An important feature of these agreements was that they were silent on the issue of funding, which was dealt with in an overarching agreement on payment arrangements. The individual agreements relating to each SPP focused instead on the outcomes and shared aspirations of COAG in the relevant policy area.

In addition to National SPPs, a series of National Partnerships (NPs) were agreed. These NPs fall into three main categories:

- Project NPs, based on payments for particular programs to be delivered by the States and Territories and territories with a funding contribution from the Commonwealth.
- Facilitation NPs, aimed at assisting the States and Territories and territories to implement agreed nationally significant reforms.
- Reward NPs, payable on the achievement of agreed performance indicators.

Each National SPP and NP agreement sets out an overarching objective – effectively a high level aspiration – as well as more concrete outcomes. The outcomes are supported by specified outputs which are to be delivered under the agreement, along with a clear statement of the respective responsibilities of the tiers of government for delivery of aspects of the agreement. Importantly, each agreement incorporates detailed performance indicators, setting out metrics by which the success of the agreement can be judged.

The agreements moved away from prescriptive input controls, in favour of a ‘shared commitment to genuinely cooperative working arrangements’.

Although National SPPs are associated with National Agreements, there is no provision for the funding to be withheld because of a jurisdiction’s failure to meet a performance benchmark. Although National SPP funding is required to be spent in the relevant broad service sector (eg health), States

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68 Intergovernmental Agreement on Financial Relations, December 2008, paragraph 11
and Territories ‘have full budget flexibility to allocate funds within that sector as they see fit to achieve any mutually agreed objectives for that sector.’

This represents a radical departure from the previous prescriptive, input-based SPPs which placed significant conditions on Commonwealth funding. This, combined with the consolidation of SPPs from over 90 to just six, has provided the States and Territories with substantial budgetary flexibility, thus avoiding some of the distorted priorities which came about as a result of small, conditional SPPs in the past.

Enhancing this budget flexibility is an additional principle that National Partnership arrangements should generally have limited time horizons. Where ongoing funding is deemed necessary, the IGA notes that funding ‘may more appropriately be provided through the relevant National SPP Agreement or general revenue assistance’. The conversion of NPs – particularly project NPs such as the proposed legal aid NP – to National SPPs or general revenue assistance would have the effect of removing almost all constraints on the specific application of the money by States and Territories in meeting agreed broad objectives.

Overall, the objectives of the cooperative federalism reforms can be summarised as:

- identification of national goals, as distinct from Commonwealth or State ones
- a move to a shared, cooperative approach to addressing these national policy issues
- a focus on outputs, outcomes and objectives rather than inputs and prescriptive funding conditions
- a high degree of budget flexibility for States and Territories in allocating funds to achieve the agreed outcomes

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69 Intergovernmental Agreement on Financial Relations, December 2008 Schedule D, Payment Arrangements, paragraph D14

70 The IGA’s second paragraph identifies the role of national goals, when it states: ‘In signing this Agreement, the parties acknowledge that coordinated action is necessary to address many of the economic and social challenges which confront the Australian community’

71 The IGA’s first objective involves ‘collaborative working arrangements’ (IGA paragraph 5).

72 Paragraph 9 of the IGA states: ‘The parties agree that there will be a rigorous focus on the achievement of outcomes – that is, mutual agreement on what objectives, outcomes and outputs improve the well being of Australians

73 2008-09 Budget Paper 3 states: ‘The reforms will result in...increased flexibility for resources to be allocated to areas where they will produce the best overall outcomes for the community.’ (page 5)
an emphasis on measurable performance indicators, transparent reporting and shared accountability;\textsuperscript{74}

- a clarification of the responsibilities of the roles of each level of government;\textsuperscript{75}

- the subsidiarity principle, reflecting the view that ideally, decisions are taken by a level of government closest to those affected, subject to the need for broader coordination and harmonisation in some instances;\textsuperscript{76}

- less incentive for cost-shifting between levels of government

- a particular focus on social inclusion;\textsuperscript{77}

- reduced administrative and compliance overheads.\textsuperscript{78}

Already this approach has borne fruit through the completion of a number of National Agreements relating to SPPs as well as specific NP agreements in relation to specific national priorities.\textsuperscript{79}

Some specific features of National Agreements are discussed in the following sections.

\textsuperscript{74} Schedule E to the IGA notes that: 'National Agreements will specify performance indicators to enhance public accountability.' (paragraph E13). Schedule C sets out the key attributes of good performance indicators as being meaningful, understandable, timely, comparable, administrative simple and cost effective, accurate and hierarchical.

\textsuperscript{75} The IGA states that 'the intent of the Parties is that the National Agreements should clarify the responsibilities and accountabilities of the Commonwealth and States and Territories (paragraph 7).

\textsuperscript{76} The subsidiarity principle is not explicitly invoked in the IGA, but is identified as a key priority by the ALP Advisory Group. In addition, 2008-09 Budget Paper 3 identifies 'more responsive governments' as a key advantage of a federal structure. In addition, the IGA incorporates an explicit recognition 'that the States and Territories have primary responsibility for many of the service sectors covered by the National Agreements appended as schedules to the agreement.' (IGA paragraph 6).

\textsuperscript{77} The National Policy and Reform Objectives associated with the IGA stated that: "Each National Agreement contains a clear, mutually agreed statement of objectives and outcomes, outputs, roles and responsibilities and performance indicators, setting out…what the Commonwealth and the States and Territories expect to achieve from their joint involvement…including a focus on enhancing social inclusion and addressing Indigenous disadvantage."

\textsuperscript{78} 2008-09 Budget Paper No. 3, page 5.

\textsuperscript{79} See Box 1 and Box 3 for examples of the practical impact of new federalism in service delivery areas and the way in which agreements are being used to cooperatively pursue shared objectives
7.2.1 Indexation arrangements under National Agreements

An important element associated with the negotiation of national agreements relating to SPPs has been the realisation by the Commonwealth that funding to States and Territories, if it is to achieve the shared objectives set out in the agreement, must be indexed to adequately reflect the underlying drivers of growth in the relevant area.

This generally requires two forms of indexation:

- to cover the increased cost of delivering an existing level of services (price indexation)
- to reflect the rise in demand due to population growth and other demographic or other drivers (quantity or volume indexation).

This is most clearly illustrated in relation to the National Healthcare Agreement (see Box 1), which introduced indexation to reflect:

- a health-specific cost index (as opposed to a generic measure of inflation such as the CPI)
- population growth, weighted for estimated hospital utilisation
- a technology factor, reflecting the cost impact of constantly improving and more expensive technology being used in the health sector.

Other national agreements also combine price and quantity indexation. The National Schools SPP includes indexation to reflect the growth in average government school recurrent cost (generally higher than CPI) and growth in full-time equivalent enrolments in government schools. The National Disability Services SPP is indexed according to a rolling 5-year average of nominal GDP growth, which implicitly (to the extent that real per capita GDP growth is at least zero) provides indexation to cover both cost increases and demand increases brought about by population growth.

These indexation arrangements underscore the need to assess funding adequacy in real per capita terms. To the extent that a per capita level of funding is identified as offering an appropriate quantum, indexation needs to reflect both cost increases and population growth if this funding level is to be maintained in real per capita terms.
Box 1 case study – National healthcare agreement

The new National Healthcare Agreement effectively amalgamates four previously existing SPPs, including the health care grants (formerly known as Medicare grants) to States and Territories in respect of public hospitals.

The agreement identifies a series of objectives, each with measurable progress indicators and outputs which can contribute to their achievement.

Importantly, the outputs identified as contributing to the various objectives represent a combination of Commonwealth and State and Territory funding responsibilities. The agreement clearly identifies those responsibilities resting with the Commonwealth, those resting with the States and Territories and those which are shared. The agreement also sets down performance benchmarks by which the achievement of desired outcomes can be judged.

Aside from the clarity and measurability of these performance indicators, an important observation is that their achievement cannot be attributed to any one level of government. For example, emergency department efficiency is partly a function of State and Territory funding and management, but also relies on the availability of nearby Federally-funded GP clinics to handle those cases which are best handled through the primary care system.

More detail on this Agreements is included in Appendix A

7.2.2 Clarity of function versus shared objectives

A significant stated aim of the cooperative federalism financial arrangements is to clarify ‘the role of each jurisdiction and the responsibilities they undertake to be accountable for’\(^80\) This aim goes to the heart of addressing the ‘blame game’ which can arise when levels of government seek to ascribe responsibility for failure to one another.

On the other hand, the reform principles emphasise the need for shared objectives and a focus on ‘what the Commonwealth and the States and Territories expect to achieve from their joint involvement…’ In other words, there is an understanding of the fact that achievement of stated objectives is a cooperative task. This, if anything, could be seen to blur, rather than clarify, the respective roles and responsibilities of individual levels of government, since it could be difficult to identify the underlying reason for non-performance in relation to a shared objective.

\(^80\) National Policy and Reform Objectives, Schedule E, paragraph E7.
In reconciling these two aims, it is important to recognise that the roles and responsibilities which are being clarified generally refer to inputs, such as funding or regulatory responsibilities. For example, the National Healthcare Agreement identifies a number of Commonwealth roles such as access to pharmaceuticals and private medical care, a number of State and Territory roles such as ambulance services and community health and a number of shared roles such as funding public hospitals and sub-acute care. This is a way of identifying the overlapping responsibilities which exist as a result of historic practices.

By contrast, the outcomes and objectives identified in the agreements are genuinely shared. There is not an attempt to allocate responsibility for some outcomes to a particular level of government and other outcomes to another. Rather, there is an ‘intention to outline transparently the contribution of both levels of government to achieving performance benchmarks and to achieving continuous improvement against the outcomes, outputs and performance indicators.’

This is inevitably a difficult task, because measuring the contribution to shared objectives requires a degree of judgment. However, the design of the reforms suggests that this was a preferable structure to one which sought to completely separate out Commonwealth ‘outcomes’ from State and Territory ‘outcomes’. The approach taken reflects an accommodation of the desire for greater clarity on the one hand, with the acknowledgment of genuinely shared outcomes and objectives on the other. The inevitable blurring of accountability for the delivery of these shared goals is a necessary and desirable trade-off for a framework which places a high importance on coordination and shared national priorities.

It is not the intention of the reforms to achieve clarity through the complete separation of Commonwealth from State and Territory involvement in a given policy area.

In this respect, cooperative federalism can be seen as an approach which accepts the reality of substantial overlapping responsibilities between levels of government, and the impossibility of creating a ‘perfect’ federation in which all roles and responsibilities can be clearly defined with precision.

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81 IGA Public Accountability and Performance Reporting, Schedule C, paragraph C5
Box 2 The approach to road funding

The ALP Advisory Group on Federal-State reform outlined a number of reform options for SPPs. Many of these options were not mutually exclusive, but some effectively were (ie they represented distinct directions for reform which were not necessarily consistent with other options).

One option presented was to attempt to more clearly separate responsibilities by swapping areas of shared responsibility so that only one government retains responsibility for previously shared functions. For example, under the previous Labor Government, the Commonwealth was solely responsible for national roads, and the States or local government were solely responsible for all other roads.’

This potential reform option would certainly bring the benefit of clarity regarding inputs, by effectively requiring each level of government to retreat to a well defined and understood function, or set of funding responsibilities. The difficulty with such an approach is that accountability for overarching objectives and outcomes – such as reducing traffic congestion or cutting freight costs – might not be aided by such a fragmented approach. Because the road transport system represents a network, with each element impacting on all others, the ability to deliver these desired outcomes could be hampered by such prescriptive approach to defining responsibility.

In fact, national policy on transport infrastructure has taken a different approach. This approach has been based on a departure from rigid distinctions between Commonwealth and State responsibilities, in favour of coordinated approaches to infrastructure delivery. As Infrastructure Australia (IA) states: ‘Infrastructure Australia has taken a national perspective in setting priorities for infrastructure investment by adopting a principle-based approach with a strong cooperative national focus.’

Rather than determining funding responsibilities through a simple classification of roads (eg national vs. other), IA effectively introduces a set of broad principles which can aid judgment concerning the appropriateness of Commonwealth funding. These principles include:

- whether the project is closely linked to a current or emerging national objective (such as addressing Indigenous advantage of social inclusion)
- whether the project has ‘national public good’ benefits, such that the benefits spill over from one jurisdiction to another

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82 Infrastructure Australia, Report to COAG, December 2008
• whether the project has a strong impact on aggregate demand or sensitivity to the economic cycle
• whether the project addresses a need for harmonisation between the States in order to reduce barriers to the movement of capital and labour.

This principle-based approach provides scope for a cooperative and flexible system for allocating funds to projects based on shared national goals. It arguably does so at the expense of the input-based clarity which comes from clearly defined and rigidly distinct ‘ownership’ of funding responsibilities.

However, as already noted, greater clarity over responsibility for inputs can lead to a greater blurring of responsibility for outcomes, when the issue concerns highly inter-dependent or networked systems.

7.2.3 Purchaser-provider arrangements under cooperative federalism

Another specific reform option raised by the ALP Advisory Group was the increased use of purchaser-provider models. For example, the Advisory Group noted that in some policy areas, funds could be pooled so that the Commonwealth became the sole funding source for a program, purchasing an agreed number of ‘units’ at an agreed price which the States would deliver.

Purchaser-provider funding arrangements have been employed by governments in a range of settings, in order to improve the clarity and efficiency with which public money is spent. Under a typical purchaser-provider structure, a government entity specifies the specific services or outputs which it seeks to ‘purchase’ in return for a given sum of funding. Such funding structures have been used, for example, in contracting with not-for-profit organisations for the delivery of social welfare services. They have also been employed between government entities, such as through service agreements between Commonwealth Government ‘policy’ departments and Centrelink.

LACs operate partly on a purchaser-provider basis when funding private practitioners to undertake legal services for legal aid clients. As such, they are a useful mechanism for the delivery of services which a funding entity, such as a legal aid commission, cannot always provide in-house.

In the context of federalism, however, the potential use of purchaser-provider models generally refers to inter-government arrangements – that is, where one level of government acts as a purchaser and another as the deliverer of services. This is the context in which the ALP Advisory Group referred to the use of purchaser-provider relationships as a potential reform direction for SPPs.
Legal aid funding can be characterised as a form of inter-government purchaser-provider arrangement in relation to Commonwealth matters, for which the Commonwealth provides conditional funding to State legal aid commissions to provide legal aid services specifically in relation to Commonwealth matters. Despite a degree of flexibility in delivering these services, there are important Commonwealth conditions, including a common merits test, which limit flexibility.

There is an important question as to the extent to which inter-government purchaser-provider arrangements fit alongside the cooperative federalism reforms. Purchaser-provider models have the virtue of clarity concerning roles, with one entity (or level of government) responsible for funding (and priority setting) and the other responsible for delivery. Aside from some marginal definitional questions around the boundary between policy decisions and delivery decisions, there is little blurring.

However it is also important to note that purchaser-provider arrangements do not generally embrace shared goals in the way that cooperative federalism envisages. The purchaser-provider model can be seen more as a contractual, rather than a cooperative approach. The entity responsible for funding sets the policy and overarching priorities, while the entity responsible for delivery can be seen as upholding a contractual obligation.

Although purchaser-provider arrangements are often governed by an agreement, these agreements differ in kind from those associated with cooperative federalism. The former type of agreement sets out the services which are to be delivered in return for funding, while the latter seeks to set out shared goals and aspirations, along with implementation plans.

Purchaser-provider models are not necessarily inconsistent with cooperative federalism, and arguably have a part to play, where appropriate, in clarifying responsibilities for funding and delivery of services. Nonetheless, the main focus of cooperative federalism is on identifying shared aspirations which are a collective responsibility and identifying actions which different levels of government can take to achieve those goals cooperatively. To the extent that purchaser-provider models are used, they are likely to play a relatively minor role in the cooperative federalism vision.

7.2.4 Conclusion

There is a significant reform opportunity presented for legal aid funding by cooperative federalism – opening the way for genuinely agreed, cooperative actions based on shared goals rather than an artificial distinction between the responsibilities of different levels of government.
8 Possible approaches to funding legal aid

Key points

- Key principles have been identified that form the desirable attributes of a funding structure under cooperative federalism. These are used as criteria for the assessment of the current and potential new funding models for legal aid.

- The existing legal aid funding arrangements perform relatively poorly in the assessment against cooperative federalism principles, particularly in relation to the shared approaches and goals and funding flexibility.

- Block funding with a genuine national partnerships approach performs well against many of the criteria.

- Appropriate indexation is essential to block funding to ensure that funding reflects changes in costs and demand over time.

- A 'fee for service' model could provide a high degree of clarity of roles, and because it is open-ended, can automatically reflect the underlying growth in demand for legal aid services in the community. However the model reduces budget flexibility, creates incentive for cost-shifting and violates the subsidiarity principle.

- A casemix funding model would be complex to design, but has some attractive features, including an ability to reflect the multi-layered needs which legal aid clients often present.

- Lump sum incentives could be a useful complement to block funding to ensure the continued participation of private practitioners in legal aid work.

- Overall a block funding approach, with appropriate indexation, and potentially including some lump sum incentive for legal practitioners, best fulfils the cooperative federalism funding principle and addresses the current challenges facing the providers of legal aid.

Chapter 7 provided an overview of the new funding paradigm for services funded jointly by Commonwealth, and State and Territory Governments.

Under the new arrangements legal aid funding is to be provided via a new project NP, following the expiry of previous agreements in December 2008. Nevertheless changes to the structure of legal aid funding are yet to occur.

In this chapter we assess the current funding arrangements against the principle of cooperative federalism and explore other options for legal aid funding arrangements, assessing them against these same principles.
8.1 Desirable attributes for a funding model

Funding models set out the structures and mechanisms by which services are paid for by government. They can range from relatively simple structures such as grants or block funding, to more complex arrangements including activity-based or fee-for-service models. In the context of a federation, funding models must pay close attention to the respective roles of Commonwealth and State governments, in order to ensure that governance arrangements do not stand in the way of achieving positive outcomes and value for money.

This section sets out a selection of funding models that could inform the structure and scale of new funding arrangements for legal aid. It also assesses these funding models against the criteria for funding models as defined by the cooperative federalism paradigm. For completeness the current funding arrangements for legal aid are assessed under the same criteria.

Throughout the analysis it is important to note that funding models can be discussed in two possible contexts:

- the interface between the Commonwealth and the States – ie the mechanism by which Commonwealth funding is provided either to the States, the legal aid commissions or directly to practitioners or their clients, or
- the method by which legal aid funding (irrespective of its source) is used to fund a mix of services to legal aid clients.

The emphasis of this section is on the first of these contexts. Thus the discussion of fee-for-service models or lump sum incentives is specifically focused on the possibility of the Commonwealth using these models as an alternative to existing funding arrangements. In principle, legal aid commissions can (and in relation to fee for service models, do) use these approaches to deliver legal aid services under existing Commonwealth-State arrangements.

The assessment of each funding model should be seen specifically through the prism of Commonwealth-State financial relations and the question as to whether the Commonwealth specifically should adopt a different approach to that which is currently used in providing money to the state legal aid commissions.

8.1.1 Criteria for assessment of funding models

In Chapter 7 the key attributes which are relevant to the cooperative federalism were described. It is the Australian Government policy that these attributes be applied to Commonwealth/State funding arrangements. The merits of the funding models outlined in this sections are assessed against these cooperative federalism attributes, to test their alignments with the objectives of this policy and workability in the cooperative federalism context.
The cooperative federalism principle for funding models used in the assessments are as follows:

- Identification of national goals
- A shared, cooperative approach to addressing issues
- A focus on outputs, outcomes and objectives
- A high degree of budget flexibility in allocating funds
- An emphasis on measurable performance indicators
- Clarification of roles and responsibilities between levels of government
- Subsidiarity
- Less incentive for cost-shifting
- A focus on social inclusion
- Reduced administrative and compliance overheads
- Reflection of underlying cost drivers.

8.1.2 Assessment of current legal aid funding by cooperative federalism principles

The implementation of cooperative federalism reforms and the completion of several new agreements across a range of policy areas provide a context within which to assess current legal aid funding arrangements. To do this the current legal aid funding arrangements have been assessed against the identified goals of the cooperative federalism reforms, outlined in section 6.2. This assessment is set out in Table 17.

Funding arrangements are given a score of high, medium or low against each cooperative federalism principle. This is intended as a guide to the qualitative comparison of current arrangements with potential alternatives rather than any definitive quantitative measure. Although the scoring involves a degree of subjective judgment, it provides a basis for the structured discussion of the strengths and weaknesses of each potential funding model.
<table>
<thead>
<tr>
<th>Principle</th>
<th>Assessment of current legal aid funding arrangements</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>A shared, cooperative approach to addressing issues</td>
<td>Current arrangements move away from a shared approach by segmenting responsibilities for Commonwealth, as distinct from State and Territory legal matters. There is presently no mechanism by which the Commonwealth gives practical voice to any aspirations concerning legal representation relating to State matters for those in need. This is left as a State responsibility.</td>
<td>Low</td>
</tr>
<tr>
<td>A focus on outputs, outcomes and objectives</td>
<td>Current arrangements provide for some output focus in relation to Commonwealth matters, through the funding agreements and principles set out in them. However, the Commonwealth-State divide can lead to a focus on inputs rather than outcomes. This is particularly true in relation to those matters which cross over from the Commonwealth to the State jurisdiction, such as family law matters which also involve a family violence dimension. There is no clear focus on overarching objectives in relation to the legal aid system as a whole.</td>
<td>Medium</td>
</tr>
<tr>
<td>A high degree of budget flexibility in allocating funds</td>
<td>The Commonwealth-State divide creates a degree of inflexibility which can impose administrative costs and result in distortions to funding decisions. However, within the respective Commonwealth and State ‘silos’, legal aid commissions have a high degree of funding flexibility in meeting their obligations. In general, policies such as means and merits tests for state matters are set by the commission boards, as are practitioner fees. Means tests for commonwealth matters can also be set by legal aid commission boards.</td>
<td>Low</td>
</tr>
<tr>
<td>An emphasis on measurable performance indicators</td>
<td>The LACs must report in the services they have provided in relation to Commonwealth law; however they are not required to do this for the state based matters they deal with. Each LAC issues an annual report setting out their performance for the year but there are no set national standards or KPIs that sit across all legal aid services.</td>
<td>Medium</td>
</tr>
<tr>
<td>Clarification of roles and responsibilities between levels of government</td>
<td>Current arrangements provide significant clarity concerning the funding responsibilities of each level of government through the distinction between Commonwealth and State legal matters.</td>
<td>High</td>
</tr>
<tr>
<td>Subsidiarity</td>
<td>The use of legal aid commissions, as a means to distribute funding, and the flexibility they have in making funding decisions provides a high degree of subsidiarity. For example, individual commissions can make decisions concerning the fee levels required to attract practitioners in the relevant location (rather than a one-size-fits-all approach). The Commonwealth-State divide creates some barrier to the subsidiarity principle, since it mandates the split of funding between Commonwealth and State matters irrespective of local circumstance.</td>
<td>Medium</td>
</tr>
<tr>
<td>Less incentive for cost-shifting</td>
<td>Initially the introduction of a split between Commonwealth and State funding responsibilities, according to the areas of law a matters relates, allowed for the Commonwealth to decrease their funding share. However once in place these arrangements, which provide a clear split between Commonwealth and State funding and the uses to which it can be put would appear to have been effective in limiting significant cost shifting.</td>
<td>High</td>
</tr>
<tr>
<td>A focus on social inclusion</td>
<td>Legal aid funding, by its nature, aims to promote social inclusion and address disadvantage. However, the narrow focus of legal aid funding agreements has meant that there is little explicit formal recognition of the role played by legal aid in addressing broader disadvantage issues. This is in contrast to homelessness, where the new National</td>
<td>Low</td>
</tr>
</tbody>
</table>
Possible approaches to funding legal aid

<table>
<thead>
<tr>
<th>Principle</th>
<th>Assessment of legal aid funding arrangements</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partnership agreement identifies the inter-connected nature of the causes and characteristics of homelessness across a wide range of service delivery areas.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reduced administrative and compliance overheads</td>
<td>The Commonwealth-State distinction has created a degree of administrative complexity through the need to allocate costs of some services (such as telephone help lines, educational programs and information provision) across Commonwealth and State jurisdictions.</td>
<td>Medium</td>
</tr>
<tr>
<td>Accurate reflection of underlying cost drivers</td>
<td>Block funding arrangements do not automatically reflect underlying cost drivers. Current indexation arrangements do not take account of the underlying growth in demand for legal aid services.</td>
<td>Low</td>
</tr>
</tbody>
</table>

**Box 3 Case Study — National Partnerships Agreement on Homelessness**

The Commonwealth, State and Territory Governments have entered into National Partnerships Agreement on homelessness. This is in recognition that all the parties are committed to addressing the issue of social inclusion, and therefore all have shared goals; that it is in their mutual interest to improve outcomes in relation to homelessness. Importantly the agreement acknowledges that they need to work together to achieve those outcomes.

The agreement sets out the outcomes that parties are committed to achieving, and the outputs required to reach these objectives. The agreement also sets out the roles and responsibilities of the Commonwealth, the States and Territories and their shared responsibilities. Both parties make roughly equal funding contributions.

This agreement demonstrates how various levels of government can come together to work collaboratively towards the shared goal of addressing a complex and multi-faceted issue. Is it clear in its allocation of responsibilities and its shared funding commitments from all parties.

More detail on this Agreements is included in Appendix A.

**Conclusion**

Current arrangements do not seek to identify national goals. Rather, they identify key Commonwealth goals in relation to the provision of legal aid for Commonwealth matters. These are enshrined in the principles which form part of the legal aid funding agreements. Identification of national goals would encompass a broader view, including the provision of adequate legal representation to those in need across the full range of legal matters.
The existing legal aid funding arrangements perform relatively well on two key objectives: the clarification of respective funding roles and the avoidance of cost-shifting.84

Both of these attributes stem from the presence of the distinction between Commonwealth and State legal matters. This is not surprising, since the introduction of the Commonwealth-State distinction in 1997 was motivated by cost-containment objectives by the Commonwealth government. On this fiscal score, the distinction has been effective.

However, the focus on the twin objectives of clarifying respective roles and minimising the scope for cost-shifting can be argued to reflect the defensive mindset which has characterised previous Commonwealth legal aid funding policies. The strengths of the existing model (which are primarily fiscal) are also its weaknesses, such as a lack of focus on the overall outcomes and objectives which legal aid funding policy should be seeking to address.

For example, as noted in section 7.2.2, the provision of greater clarity can often be at odds with the desire for shared goals and cooperative approaches to meeting them. Cooperative federalism grapples with this potential conflict and seeks to accommodate it by allocating responsibilities for inputs by agreeing shared responsibility for overall outcomes. An important element of cooperative federalism is that the input responsibilities are consistent with these broader shared aspirations. Although clarity can be seen as a positive attribute for a funding model, it is less desirable if it comes at the expense of an overarching vision for the outcomes which governments would collectively like to achieve.

84 In this context, it has been argued that the introduction of the Commonwealth-State split in 1997 involved a degree of cost shifting from the Commonwealth to the States. However, in the context of judging funding models in this report, cost shifting refers to the tendency of individual behaviours to be distorted – possibly at the encouragement of one level of government or another – so that the services of one level of government are utilised rather than those of another, often to the disadvantage or the additional cost to the system as a whole. Examples include the treatment of patients who have primary health care issues in hospital emergency departments because they are open 24 hours and free to the consumer, notwithstanding that GP treatment is the most appropriate form of service delivery. In the context of legal aid, scope for cost-shifting at the individual level is minimised by virtue of the clarity which exists between Commonwealth and State matters. In most cases it is difficult to re-classify a State matter as a Commonwealth one in order to benefit from Commonwealth legal aid funding.
As a result of the focus on clarity and cost-shifting, the current legal aid funding arrangements score relatively poorly on the issues of:

- identification of national goals
- shared cooperative approaches to addressing issues
- a focus on outputs, outcomes and objectives
- a focus on social inclusion
- reduced administrative and compliance overheads.

Legal aid funding arrangements score moderately well in relation to subsidiarity, because of the presence of legal aid commissions who effectively make funding decisions on the ground in response to local circumstances (subject to overarching policy constraints including the Commonwealth-State distinction). Thus commissions can determine the allocation of money to core court-related work as distinct from educational, advice, information or alternative dispute resolution programs. They can also set fees for practitioners according to local circumstances, subject to their overall budget constraint and the need to meet policy objectives set out in the means and merits tests.

The ‘medium’ score in relation to outputs, outcomes and objectives reflects the fact that, under present arrangements, there is some focus on outputs (defendants assisted or potential litigants advised), but less explicit focus on outcomes and objectives. Outputs in this context refers to the services being provided, which, in relation to Commonwealth legal matters, are to some extent a focus of existing Commonwealth funding arrangements.

### 8.2 Potential new funding models

There are five main funding models which can be explored as alternatives to the current legal aid funding structures. All could be seen as possible models to be adopted under a cooperative federalism-inspired approach, and thus all can be evaluated against the principles used to judge existing legal aid funding arrangements. The funding models are intended to provide an indication as to broad directions in which funding arrangements could be reformed. In practice, some combinations of the different types might be possible. The funding models identified are:

- Block funding under a National Partnership Agreement approach of funding to legal aid commissions based on shared national goals.
- A national fee for service program for court-related work, funded either by the Commonwealth Government or a single purchaser using pooled resources.
- Existing arrangements supplemented by lump sum incentives to private practitioners to encourage a specified level of legal aid caseload.
- Casemix funding arrangements, with client-based funding for specific legal issues.
- Alternative structures of payment and requirements for legal practitioners.
Underlying these models is the understanding, drawing on the conclusions from Chapters 5 and 6, that there is a need for increased funding to support legal aid. These models, however, seek to ensure that any additional financial support for legal aid is couched within a modern and best practice funding model.

A detailed description of each model, its strengths and weakness and its appropriateness as a model for legal aid funding is set out in the sections below. Each model is assessed based on the criteria as set out in the Australian Government’s principle for funding models under cooperative federalism.

8.2.1 Block funding under a National Partnership Agreement

Overview

A legal aid National Partnership agreement could take many forms, but would have to be developed and agreed upon by the Commonwealth, States and Territories. One suggested form is set out in this section below.

Under a National Partnership agreement legal aid funding would continue to be delivered through a combination of State and Commonwealth funding. Both Commonwealth and State contributions would continue to be paid to legal aid commissions, allowing the commissions to make decisions over the allocation of money to specific outputs, including court related services.

Commonwealth funding would be paid pursuant to an agreement with the States, either through COAG or the Standing Committee of Attorneys-General. Thus in many respects, the basic funding model would be very similar to that which exists today.

The key differences would be the adoption of the principles of the Cooperative Federalist approach, including a renewed focus on objectives and outcomes and an emphasis on measurable performance indicators. This would see the removal of prescriptive controls on inputs, including the current requirement that Commonwealth funds be devoted solely to Commonwealth matters. It could also lead to a move away from a nationally uniform merits test relating to Commonwealth matters, in favour of means and merits tests determined by the LACs based on their judgments as to how best to meet the agreed national objectives and outcomes.

If legal aid funding arrangements were structured along the lines of a National Partnership Agreement in keeping with the approach taken under cooperative federalism reforms, then it would have the following main elements:

- Objectives – specifying the overarching national aspirations which the Parties commit to pursue.
- Outcomes – including medium and long term targets to which the agreed actions in the agreement will contribute.
• Outputs – identifying the specific actions and initiatives which will be taken under the agreement in order to achieve the outcomes.

• Roles and responsibilities – clarifying who will be responsible for the specific initiatives outlined.

• Performance benchmarks and reporting – setting out the specific quantifiable indicators and timelines which will be used to judge performance and the way in which these indicators will be reported publicly.

• Financial arrangements – setting out the funding contribution which the different levels of government will make towards the achievement of the objectives of the agreement. This will include indexation and growth factors.

Objectives, outcomes and outputs

The objectives and outcomes would be based on the overarching goal of providing access to justice and adequate legal representation for the most disadvantaged Australians when faced with serious legal issues.

The mixed model of services that currently are provided by the LACs, would continue to be the outputs that are required to be provided under the Agreement. This would therefore result in the provision of information and education services, legal and representation, duty lawyer services and dispute resolution services. The mix of these services would be determined by the LACs, as it is currently, but without the current funding divide that exists between Commonwealth and State law matters. Trade offs, and prioritisation would need to occur, as it currently does to arrive the best mix of services to be provided. This satisfies the principle of subsidiarity which requires that the organisation closest to the legal problems faced by prospective clients can respond with the most appropriate mix of services to address them. Nevertheless the agreement could set out agreed minimum standards or focus areas which the LACs commit to provide, for example:

• Assistance for matters where imprisonment or other deprivation of liberty is a potential outcome.

• Assistance for family law matters where the safety and well-being of a child is threatened or there are immigration or mental health problems.

• Assistance to those who fall under the Henderson poverty line (or other agreed indicator of disadvantage).

• Assistance to those who rely on Centrelink for a significant proportion of their income.

• Assistance for homeless.

• Priorities for specific information and education campaigns, or assistance focussing on a matter of law, cohort or issue that is deemed a particular area of cross government attention at a point in time eg new consumer credit arrangements.

• In addition the LACs would be held accountable to meet and report on agreed performance indicators and standards for the both the effectiveness and efficiency of the services they are providing.
Funding design and responsibility

An appropriate National Partnership agreement in relation to legal aid would also take adequate account of the underlying drivers of cost and demand growth in determining indexation. This would require that the base level of Commonwealth funding be indexed both for cost increases and for demand growth. The simplest approach would be for the cost index to be based on CPI or one of the Commonwealth-determined Wage Cost Indexes (WCIs). Population growth could be used as the demand-growth indexation factor, in the absence of a more robust proxy. If both the Commonwealth and the States were bound to provide these levels of indexation, then the amounts provided to legal aid would be maintained in real per capita terms over time. This would have the benefit of maintaining an appropriate per capita funding level as identified in the discussion in Chapter 7.

A potential criticism of this model would be that, contrary to one of the key themes of cooperative federalism, it requires a commitment from the States and Territories not to diminish their funding contributions in reaction to any Commonwealth funding increase. Although this is generally seen as inconsistent with the principles of cooperative federalism, some national partnership agreements have already contained such provisions, granting a degree of protection to the Commonwealth to ensure that additional funding contributions result in additional services rather than a financial windfall to the States and Territories. Arguably, provisions of this type will be required whenever there is a shared funding responsibility and the Commonwealth seeks to boost funding overall.

Assessment according to funding principles

Provisions of this nature are still superior to the current approach of separating responsibility arbitrarily along the lines of Commonwealth or State legal matters, since the latter approach does not involve a cooperative approach to shared outcomes. Indeed, the present funding approach effectively involves both levels of government eschewing responsibilities for aspects of the legal aid system, whereas a genuine National Partnerships approach would see them sharing those responsibilities and enshrining those shared goals through the NP agreement and associated funding arrangements.
### Table 18 Assessment of funding model under cooperative federalism criteria

<table>
<thead>
<tr>
<th>Principle</th>
<th>Assessment</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identification of national goals</td>
<td>The block funding approach under a National Partnership agreement would facilitate the identification of national goals, focusing on adequate access to justice and cutting across the existing Commonwealth-State division of responsibilities. The identified goals could be based on international obligations or other clear statements of the overarching desire to provide legal assistance to the disadvantaged.</td>
<td>High</td>
</tr>
<tr>
<td>A shared, cooperative approach to addressing issues</td>
<td>Block funding under a national partnership approach maximises scope for a shared, cooperative approach, since it avoids the division of responsibility for different aspects of the legal aid system.</td>
<td>High</td>
</tr>
<tr>
<td>A focus on outputs, outcomes and objectives</td>
<td>Block funding allows legal aid commissions to spend money according to its most appropriate use – including across the full range of interventions – in order to achieve agreed outcomes. This avoids prescriptive focus on inputs.</td>
<td>High</td>
</tr>
<tr>
<td>A high degree of budget flexibility in allocating funds</td>
<td>Block funding provides full budget flexibility to States and Territory Governments and legal aid commissions to allocate funds, as long as prescriptive input controls, such as the Commonwealth-State divide – are removed as part of the move to a National Partnership approach.</td>
<td>High</td>
</tr>
<tr>
<td>An emphasis on measurable performance indicators</td>
<td>Block funding arrangements can include measurable performance indicators. They do not however, provide the same degree of clarity as to what is being delivered in return for Commonwealth funding as models based on more direct funding of specific services.</td>
<td>Medium</td>
</tr>
<tr>
<td>Clarification of roles and responsibilities between levels of government</td>
<td>Block funding arrangements, coupled with the removal of the Commonwealth-State division would somewhat blur the precise roles and responsibilities of the different levels of government, since both Federal and State governments would effectively be contributing to a common funding pool.</td>
<td>Low</td>
</tr>
<tr>
<td>Subsidiarity</td>
<td>Block funding arrangements provide a high degree of subsidiarity, since State and Territory Governments and legal aid commissions would make key decisions about the precise way in which scarce legal aid funding should be spent, including the trade-off between practitioner fees, the precise mix of services and the appropriate application of the means and merits tests.</td>
<td>High</td>
</tr>
<tr>
<td>Less incentive for cost-shifting</td>
<td>Block funding approaches might need to incorporate explicit requirements for States and Territories to maintain existing funding or match funding increases in order to ensure that any Commonwealth funding increase did not result in a corresponding funding reduction at the state level.</td>
<td>Medium</td>
</tr>
<tr>
<td>A focus on social inclusion</td>
<td>Block funding based on agreed national partnership goals can be tailored to ensure that they place suitable emphasis on the overarching goal of achieving greater social inclusion.</td>
<td>High</td>
</tr>
<tr>
<td>Reduced administrative and compliance overheads</td>
<td>Block funding with the removal of the Commonwealth-State division is simple and ensures minimal administrative and compliance overheads, since Commonwealth funding is provided on the basis of the achievement of outcomes and objectives rather than prescriptive inputs.</td>
<td>High</td>
</tr>
<tr>
<td>Accurate reflection of underlying cost drivers</td>
<td>Block funding arrangements do not automatically reflect underlying cost drivers, The ability of a funding agreement to anticipate growth in costs and demand is dependent on the agreement of appropriate levels of indexation.</td>
<td>Medium</td>
</tr>
</tbody>
</table>
Conclusion

For the same reason, a genuine National Partnership approach would be preferable to any incremental extension of the Commonwealth sphere of responsibility to a (slightly) broader range of beneficiaries. In this respect, the move towards a National Partnership model represents a significant reform, not only in comparison to the arrangements which have existed since 1997, but also the arrangements which existed since the commencement of the national legal aid system in the 1970s, under which the Commonwealth took responsibility for ‘Commonwealth persons’ as well as Commonwealth matters. This underscores the significance of the reform opportunity presented by cooperative federalism – opening the way for genuinely agreed, cooperative actions based on shared goals rather than an artificial distinction between the responsibilities of different levels of government.

8.2.2 National fee for service approach to court related work

Overview

This model would involve the introduction of a national fee for service funding system for legal representation of eligible legal aid clients. The model would be conceptually similar to the Medicare Benefits Schedule for medical procedures, with a scheduled fee payable to practitioners for specific types of services delivered. The fee schedule would cover services relating to both State and Commonwealth law.

Objectives, outcomes and outputs

In reality, practitioners are already paid on a fee for service basis by LACs in individual States and Territories. The key difference would be that the fees for each service type would be determined nationally, and would be based on a rational assessment of the remuneration appropriate to each type of service. Clients would need to satisfy a means and merits test, and these would most likely be applied at a national level (thus eliminating any state-by-state divergences in eligibility rules, even for matters arising under state law). Such an approach would differ from the present situation where fees are set in large part based on a finite funding allocation and the need for LACs to ration resources between non-court related services, the additional volume of services offered each year and the fees payable to practitioners for the delivery of those services.

Such an approach thus sits more easily with a ‘safety net’ or even a ‘rights-based’ paradigm, effectively guaranteeing funding for particular situations as and when they arise instead of leaving the availability of funding in any given situation to the vagaries of finite legal aid commission budgets. This is particularly pertinent in those cases of high profile and costly prosecutions (such as trials under state or federal counter-terrorism laws) for which legal aid funding might not always be available under the present system, without ad hoc and one-off funding injections from one level of government or the other.
Funding design and responsibilities

This proposed model would set the fees and index them for an appropriate cost escalation factor (possibly CPI, which applies to the MBS). There would be no need to explicitly index funding for demand growth since the funding quantum would be open-ended – those clients eligible for legal aid assistance would be ‘funded’ for the appropriate service at the set fee.

A key design issue in relation to such a model would be which level of government would fund the payment of fees to practitioners. One answer would be that the Commonwealth would fund the system on the basis that it was a genuine national system in the style of the MBS for health. This would, however, represent a significant shift from existing government funding shares by leaving the Commonwealth to effectively fund all court-related services. An alternative approach would be to use pooled funding arrangements so that both levels of government contributed to the funding pool – bearing in mind that the funding pool is effectively open-ended in the same way that the MBS is.

A clear feature of this approach is that it would remove LACs from the role of funding private practitioners for legal aid services. They would be left with responsibility for broader advice, education and dispute resolution services, duty lawyer schemes and salaried lawyers. This would leave them with considerably smaller budgets and a narrower range of responsibilities than is presently the case. As a result, the expertise and local knowledge of legal aid commissions would be bypassed to some extent under such a system. This could also lead to some degree of cost-shifting from legal aid commissions towards nationally funded court-related services, in the same way that cost-shifting can occur between levels of government in health when the Commonwealth has responsibility for the MBS and pharmaceutical benefits scheme while the states have responsibility for managing public hospitals.

Another issue with the adoption of an approach like this is its potential cost. A move towards a national, fee for service system would possibly highlight the extent of under-provision of legal aid at present. For example, if many of the services currently being performed by duty lawyers were effectively replaced by legal representation attracting a fee, the overall cost of the system could grow significantly. It has also been noted that the ‘fee for service’ funding model has potential inefficiencies as it may reward lawyers for extending cases.  

To prevent this cost increase there may be a drive to control costs by setting the national means and merits test at a level that limits the amount of funding required for those who are eligible. This may result in a more extreme tightening of the tests and further unmet demand as model designers take a conservative approach to limit their funding exposure. This could be prevented by setting key minimum objectives at the outset for

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85 Legal Aid Review, Improving the Legal Aid System – A public discussion paper, New Zealand, September 2009
whom and what kinds of matters it is legal aid’s objective to assist. However this may serve to lessen government’s funding flexibility and security of level of funding levels, effectively locking them into a level of service provision.

Nevertheless its has been repeatedly commented that the lack of clear objectives in relation to who and what situations legal aid aims to assist has led to the erosion of its funding and uncertainty around its role and responsibility, and what it is mandated to achieve.

**Table 19 Assessment of funding model under Cooperative federalism Criteria**

<table>
<thead>
<tr>
<th>Principle</th>
<th>Assessment</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identification of national goals</td>
<td>A fee for service funding model can be consistent with the specification of national goals, though the main goal which the fee for service aspect seeks to achieve is an element of guaranteed funding for specific services under specified circumstances.</td>
<td>Medium</td>
</tr>
<tr>
<td>A shared, cooperative approach to addressing issues</td>
<td>A fee for service model may reflect a cooperative approach if it was bolstered by a broader agreement dealing with shared goals, and the contribution made by the fee for service funding to the achievement of these goals was made explicit.</td>
<td>Medium</td>
</tr>
<tr>
<td>A focus on outputs, outcomes and objectives</td>
<td>Fee for service arrangements incorporate a strong emphasis on outputs, but not necessarily on outcomes and broader objectives. To the extent that an open-ended fee for service model results in a focus on delivering more court-related services, it is arguable that the broader objectives and outcomes can get lost due to the strong focus on outputs (ie number of services offered).</td>
<td>Medium</td>
</tr>
<tr>
<td>A high degree of budget flexibility in allocating funds</td>
<td>This model offers relatively low budget flexibility, since it effectively earmarks a portion of the legal aid funding quantum to the provision of specified court-related services.</td>
<td>Low</td>
</tr>
<tr>
<td>An emphasis on measurable performance indicators</td>
<td>Fee for service approaches provide a high degree of accountability for performance in delivering outputs (services) but can tend to ignore other performance indicators (including quality) or fail to adequately link the delivery of services to performance in achieving outcomes.</td>
<td>Medium</td>
</tr>
<tr>
<td>Clarification of roles and responsibilities between levels of government</td>
<td>A Commonwealth-funded fee for service model would provide a high degree of clarity of funding function between the Commonwealth (responsible for fees paid to private practitioners) and the States (responsible for other legal aid programs, including salaried lawyers).</td>
<td>High</td>
</tr>
<tr>
<td>Subsidiarity</td>
<td>This model violates the subsidiarity principle since it requires a nationally uniform approach to the means and merits tests and to the level of fees paid to private practitioners. It also removes from the legal aid commissions part of the responsibility for determining the allocation of funding between court-related and non-court related services.</td>
<td>Low</td>
</tr>
<tr>
<td>Less incentive for cost-shifting</td>
<td>A Commonwealth-funded fee for service model provides a high incentive for cost shifting by guaranteeing a degree of funding for certain matters which go to court. This could arguably undermine the incentive to engage in alternative dispute resolution or other preventive measures.</td>
<td>Low</td>
</tr>
</tbody>
</table>
### Principle | Assessment | Score
---|---|---
A focus on social inclusion | By guaranteeing a certain level of funding for specified contexts, the fee for service model could be consistent with a desire for social inclusion. However, it may be less easily linked with other initiatives which aim to achieve greater social inclusion. | Medium
Reduced administrative and compliance overheads | A fee for service model is more administratively complex than a block funding model, as it requires the establishment of a mechanism by which practitioners can claim their fees from a centralised payment processor. | Low
Accurate reflection of underlying cost drivers | Fee for service models, when open-ended, automatically incorporate appropriate indexation for demand growth. Indexation of fees to an appropriate cost bases (such as CPI) would ensure that the model can accurately reflect underlying cost drivers. | High

### Conclusion
Overall, a national fee for service approach has two main virtues – it provides a high degree of clarity as to Commonwealth as distinct from State and Territory roles, and because it is open-ended, it can automatically reflect the underlying growth in demand for legal aid services in the community. These advantages come at a significant cost, however.

The model reduces budget flexibility, creates incentive for cost-shifting and violates the subsidiarity principle by effectively taking key funding decisions away from legal aid commissions. It could also accentuate the divide between salaried lawyers and private practitioners.

Overall, the model is a useful benchmark against which to judge existing approaches and some other alternatives, but is likely to prove unrealistic at a practical level.

#### 8.2.3 Lump sum incentives for legal aid practitioners

### Overview
A broad funding model to be considered involves lump sum incentives for legal aid practitioners. This involves a variation on the block funding model outlined as the first option – that is, with court-related services being funded on a fee for service basis by legal aid commissions – but with an additional lump sum incentive paid to practitioners who undertake a specified level of legal aid work in a year.

### Objectives, outcomes and outputs
The intention of such a scheme would be to target any funding increase at those practitioners who might otherwise exit from the legal aid sector as a result of the relative decline in fees. Underlying this approach are two key considerations.
The first aspect is the supply-side impact of lower relative fees which has seen a reduction in the extent to which practitioners will undertake legal aid work as the sole or primary focus of their practice. Rather, there is some evidence that the tendency to lower fees has had the effect of encouraging lawyers to undertake small amounts of legal aid work as part of a diversified practice, rather than specialising in the provision of legal aid services. This is a predictable response to the reduction in remuneration from legal aid work, effectively requiring practitioners to undertake more privately paid work to cross-subsidise legal aid work. To the extent that the provision of legal aid services in a given area of law tends to involve some specialisation of skill, it is desirable to have at least a component of legal aid services being performed by those for whom it is a significant focus of their overall practice. The provision of lump sum incentives is a well-targeted way to deliver increased remuneration to those who will specialise to some extent in the provision of legal aid.

The second considerations is that across a range of industries, there is a degree of uncertainty in estimating the elasticity of supply of labour – that is, the extent to which skilled practitioners will offer their services in return for an increase in price (ie wage, or in this case, fee). In the case of legal aid, the relative reduction in fees has been accompanied by a noticeable exit from the sector, suggesting some positive elasticity of supply. There may, however, remain some uncertainty about the extent to which increased fees, of themselves, will attract additional practitioners. To the extent that increased fees simply provide additional remuneration to existing ‘incumbents’ (those providing some legal aid services already) without attracting additional services, they can be argued to be poorly targeted.

Lump sum incentives have been effective in other areas of service delivery. In relation to health, for example, the Practice Incentives Program (PIP) effectively supplements the income derived by doctors from the MBS through additional payments, made on a per patient basis, for the treatment of specified chronic conditions or other primary health priorities. Such priorities have included asthma and diabetes. The logic of the PIP is that the provision of per-patient payments is a better-targeted approach than a fee-based strategy, which would see an increase in the MBS schedule fee for general practitioner consultations dealing with the relevant priority.

In a similar vein, the Federal Labor Party’s 2003 policy on bulk-billing involved the payment of lump sum incentives to general practitioners who met a prescribed level of bulk billing (expressed as the percentage of overall services being bulk billed by the GP). This was in contrast to the alternative approach, promoted by the medical profession, of increasing MBS fees across the board as a means of encouraging bulk-billing. Arguably, the ALP’s approach involved a more targeted focus, with money specifically conditional on achievement of the desired outcome – a higher incidence of bulk-billing across the profession.

Funding design and responsibilities

Unlike the national fee for service funding model, the lump sum incentive model does not involve the same problems of cost-shifting, or of sidelining the traditional role of the legal aid commissions. Legal aid commissions would continue to determine fees for the provision of legal aid services as
current approach, the only incentive for cost-shifting by legal aid commissions would come about if they sought to reduce fees to practitioners in the knowledge that lump sum incentives would, to some extent, cushion the blow for those undertaking a significant volume of work.

As with the national fee-for-service model, a question arises as to which level of government should fund the incentive payments. One possibility would be for the Commonwealth Government to fund them, reflecting a national objective of ensuring adequate legal representation for the disadvantaged. Another alternative would be for the Commonwealth and States to share the funding through contributions to a funding pool, most likely in the same proportions as they would share the contribution to the overall amount of legal aid funding under a National Partnerships-type approach.

Lump sum incentives are amenable to other policy fine-tuning. For example, in addition to being linked to a given volume of legal aid work, they could be targeted at those practitioners whose overall practice income falls below a specified level – effectively avoiding the potential issue of providing additional payments to relatively high-income barristers and solicitors.

Lump sum incentives would require some indexation for cost pressures, such as to CPI or a WCI. In relation to volume, however, the program would not require explicit indexation as it would be open-ended, albeit the overall cost would be less variable than a national fee-for-service model would be, since the payments would be linked to eligible practitioners rather than to the exact number of services delivered.

This has some similarities with the United States where in jurisdictions a contract systems exist, in which private attorneys contract with a unit of government to represent an agreed upon number of indigent defendants, usually for an agreed upon price.

Table 20 Assessment of funding model under Cooperative federalism Criteria

<table>
<thead>
<tr>
<th>Principle</th>
<th>Assessment</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identification of national goals</td>
<td>A lump sum incentive model can be consistent with the specification of national goals, though the main goal which the incentive seeks to achieve is that of attracting and retaining specialist practitioners in the industry.</td>
<td>Medium</td>
</tr>
<tr>
<td>A shared, cooperative approach to addressing issues</td>
<td>A lump sum incentive model may reflect a cooperative approach if it was bolstered by a broader agreement dealing with shared goals, and the contribution made by the lump sum incentives to the achievement of these goals was made explicit.</td>
<td>Medium</td>
</tr>
<tr>
<td>A focus on outputs, outcomes and objectives</td>
<td>Lump sum incentives incorporate a strong emphasis on one particular class of outcome – the number of practitioners undertaking legal aid work as a relative speciality. This may not necessarily create a focus on other outcomes and broader objectives.</td>
<td>Medium</td>
</tr>
<tr>
<td>A high degree of budget flexibility in allocating funds</td>
<td>Lump sum incentives remove budget flexibility relative to block funding models, since they effectively earmark a portion of legal aid funding to the payment of incentives.</td>
<td>Low</td>
</tr>
<tr>
<td>An emphasis on measurable performance indicators</td>
<td>Lump sum incentives provide the ability to closely track one main performance indicator – the number of practitioners (and the services delivered by them) – undertaking legal aid work as a speciality. However, this does not guarantee a focus on other performance indicators relating to outcomes and objectives.</td>
<td>Low</td>
</tr>
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</table>
Possible approaches to funding legal aid

<table>
<thead>
<tr>
<th>Principle</th>
<th>Assessment</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clarification of roles and responsibilities between levels of government</td>
<td>A Commonwealth-funded lump sum incentive would provide a degree of clarity as to roles, with the legal aid commissions funding general fees for practitioners as well as other services, while the Commonwealth funded the lump sum incentives. In practice, the Commonwealth would likely contribute some funding to legal aid commissions in addition to the lump sum practitioner incentives.</td>
<td>High</td>
</tr>
<tr>
<td>Subsidiarity</td>
<td>A lump sum incentive undermines the subsidiarity principle to the extent that it prescribes a specific use for a portion of overall legal aid funding rather than leaving this entirely at the discretion of states and the legal aid commissions.</td>
<td>Medium</td>
</tr>
<tr>
<td>Less incentive for cost-shifting</td>
<td>A lump sum incentive provides less scope for cost-shifting than a fee for service model, but still could result in some reduction in fees if legal aid commissions felt that the incentives led to a greater preparedness by practitioners to work for low fees.</td>
<td>Medium</td>
</tr>
<tr>
<td>A focus on social inclusion</td>
<td>The lump sum incentive can be consistent with social inclusion, with its emphasis on encouraging a committed specialised profession of legal aid practitioners.</td>
<td>Medium</td>
</tr>
<tr>
<td>Reduced administrative and compliance overheads</td>
<td>The lump sum incentive is less complex than a fee for service approach but more complex than the block funding arrangements.</td>
<td>Medium</td>
</tr>
<tr>
<td>Accurate reflection of underlying cost drivers</td>
<td>The lump sum incentive is arguably designed to reflect underlying cost drivers, since it reflects something of a market mechanism. To the extent that practitioners are accessing the incentive, this is because it accurately reflects the amounts required to adequately reward practitioners for their specialised service.</td>
<td>High</td>
</tr>
</tbody>
</table>

**Conclusion**

Unlike a fee for service model, the lump sum incentive model could be used as a complement to a block-funding model. Its main advantages are that it can address the underlying problem of attracting skilled professionals into the industry with fewer of the drawbacks associated with a fee for service model.

In particular, the lump sum incentive provides a degree of clarity for the Commonwealth in relation to its role. This also allows the Commonwealth to attach any funding increase to a clearly identifiable new program. It achieves this with fewer of the disadvantages of the fee for service approach. It involves less incentive to cost-shifting, less administrative complexity and a greater respect for the subsidiarity principle.

To the extent that the Commonwealth sought to introduce a specific, targeted new initiative which could form part of a National Partnership agreement and which could focus on the need to encourage practitioners into providing legal aid services, the lump sum incentive model could be an appropriate addition to a block funding option.
8.2.4 Case-mix approaches

Casemix approaches have been used in the funding of public and private hospital services, both in Australia and overseas. In principle, they are similar to the fee for service model already outlined in that they attach funding to the services delivered to individual clients. In this context, however, a casemix approach could be regarded as encompassing a broader range of interventions than the fee for service model already discussed. Whereas the latter provided funding to the practitioner for delivering some specified court-related service, a casemix model might be based on attaching a specific funding allocation to a client, and allowing a legal aid commission or a practitioner to determine the appropriate service for that individual.

Under such a system, funding would be provided on the basis of the legal situation faced by the client. Because the funding is attached to the client (based on legal situation) rather than the specific service provided, there is an incentive for the commission or the practitioner to use the least-cost, or most efficient form of intervention in order to address the client’s needs.

In practice, such a system requires a very significant amount of work in the design phase to ensure that the categories under which funding is provided are adequate and accurate and do not distort incentives. The system has been useful in the funding of public hospitals because it is based on diagnosed conditions, which provide a degree of objectivity. By contrast, legal matters, by their very nature, involve a high degree of subjectivity as to diagnosing the precise legal situation faced by any particular individual. Legal dispute arises as a result of a difference in subjective opinion as to the legal standing of two participants. This poses challenges for the design of a casemix system.

Nonetheless, the principle of a casemix funding system is attractive, in that it offers the possibility of reflecting in a funding formula the reality that many client needs are complex, multi-layered and not necessarily restricted to the need for legal representation.

Conclusion

In the context of health, casemix funding has been used effectively in relation to surgical procedures in public hospitals, but to date no similarly robust system has been developed to cover the funding of emergency services or preventive care. In practice, at least in the short term, a casemix funding system is unlikely to be practical in relation to legal aid. Nonetheless, a move towards casemix models for some defendants might be worthy of further investigation, as they have the potential to more accurately reflect the often complex and multi-layered problems which a legal aid client might present. This may involve attempts to link client-based funding to broader services than just legal representation.
8.2.5 Alternative structures of payment and requirements for legal practitioners

In addition to the broad funding models already outlined, there is a range of further alternatives. In general, however, these further alternatives are relevant to the way in which legal aid services are procured by, or on behalf of, legal aid clients, rather than the way in which the Commonwealth might make its funding contribution to legal aid.

However, two further alternatives are worthy of mention because of their links to the options outlined above.

The first such alternative is an increased use of salaried lawyers, as distinct from private practitioners, in the delivery of legal aid services. Salaried lawyers, under some circumstances, can provide a relatively low-cost alternative to the briefing of private practitioners. However, in principle, this is a matter of judgment for legal aid commissions rather than for the Commonwealth government. The Meredith Report on this issue came to no firm conclusion. 86

The principle underlying the use of salaried lawyers is effectively an extension of the provision of lump sum incentives outlined above. It allows a legal aid commission to require a specified level of service in return for an annual salary, rather than paying practitioners on per-service basis. The use of salaried lawyers has potential incentive effects. A lawyer paid an annual salary might be more likely to spend excessive time on individual cases rather than delivering greater volume of services. By contrast, a fee for service funding arrangement can have the opposite effect – encouraging throughput at the expense of diligence and quality.

Ultimately, a decision as to whether there is scope for greater use of salaried lawyers is a judgment to be made by existing legal aid commissions, and is reflected by the present mix of in-house lawyers and briefing private practitioners.

A second alternative is to allow even greater choice for clients of legal aid in sourcing their legal representation. The current English system is one which provides this level of choice.

The English system mirrors the way in which clients select lawyers in privately retained civil cases, with the goal of fostering mutually positive attorney client relationships. Since clients choose their solicitors, clients are believed likely to trust their solicitors; and, in turn, solicitors have a powerful incentive to represent clients conscientiously in order to obtain their repeat business, as well as referrals from others needing defence representation.

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Some features of the English legal aid system to maintain quality of legal aid defence barristers include:\(^87\)

- Solicitors must first qualify for a ‘general criminal contract’ in order to qualify for government reimbursements for providing criminal legal aid.
- The quality of the work performed by solicitors is monitored, case files are randomly reviewed, are audited when questions arise about the quality of representation being furnished by solicitors, and can be peer assessed.
- Defendants have the right to representation when they are in police custody and their representation is entitled to attend police interviews of suspects.
- Clients may choose their own solicitor from among those who have signed a contract with the LSC. Even solicitors practicing in public defender offices must compete for their clients against the other solicitors in the community authorized by the LSC to provide criminal legal aid.

These arrangements exist to some extent in Australia in relation to the services of solicitors. In other cases, the legal aid commission effectively briefs practitioners on the clients’ behalf, and adoption of universal client choice would represent a more significant departure from existing arrangements. Nonetheless, in the event that a national fee for service model was adopted, a degree of client choice could be included as a component of the model. This would make it more comparable with the structure of the Medicare Benefits Schedule in relation to out-of-hospital health services.

### 8.2.6 Appropriate indexation for funding models

Currently Commonwealth legal aid funding is allocated to the States and Territories based on a model that takes into account the drivers of demand for legal aid in those areas. This kind of model could also be used to calculate the overall required quantum of legal aid funding.

A base year can be established and then appropriate drivers of demand for legal aid identified and then weighted to create an indexation factor that reflects the legal needs of the community.

In this scenario, issues may arise as to where funding responsibility lies. The preferred approach could involve set funding shares (such as equal shares) provided by the Commonwealth and the States and Territories.

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\(^87\) Norman Lefstein 2004, ‘Criminal defense representation in England and the United States’, prepared for the International Society for the Reform of Criminal Law, 18th International Conference, Montreal (Canada), August
Possible approaches to funding legal aid

Some examples of factors which could be included in the capitation model include:

- CPI
- Wage Cost index
- population
- costs of providing services
- utilization and applications for services
- legal needs based for example on a survey
- drivers of demand
  - policy
  - socio-economic
    - unemployment
    - welfare recipients
    - immigrants
    - indigenous population
    - divorce
  - demography
- Socio-Economic Indexes for Areas (SEIFA) developed by the ABS to assess of the welfare of Australian communities, including:
  - Index of Relative Socio-economic Disadvantage: this is derived from Census variables related to disadvantage, such as low income, low educational attainment, unemployment, and dwellings without motor vehicles
  - Index of Relative Socio-economic Advantage and Disadvantage: this is a continuum of advantage (high values) to disadvantage (low values) which is derived from Census variables related to both advantage and disadvantage, like household with low income and people with a tertiary education
  - Index of Economic Resources: this focuses on Census variables like the income, housing expenditure and assets of households
  - Index of Education and Occupation: this includes Census variables relating to the educational and occupational characteristics of communities, like the proportion of people with a higher qualification or those employed in a skilled occupation.

Each LAC could be given a ‘capitation’ for legal services – that is expected expenditure over a period as determined by need, allowing for variables and social factors, such as those set out above. The legal aid resource allocation for a LAC for a period would be a sum of each of their member’s capitation amount.
Issues to consider in relation to indexation

The identifiers required to allocate funds on a person or sub-population on basis would need to be comprehensive and thoroughly tested.

It is often preferable to use such models to allocate shares of a set pool of funding rather than to determine the overall quantum. The factors to include can be subjective, complicated and open to debate.

8.3 Conclusion

There is a significant reform opportunity presented by cooperative federalism – opening the way for genuinely agreed, cooperative actions based on shared goals rather than an artificial distinction between the responsibilities of different levels of government.

Judging the identified funding models against the principles underpinning cooperative federalism, our analysis indicates that:

- The existing legal aid funding arrangements perform relatively poorly in the assessment against cooperative federalism principles, particularly in relation to the shared approaches and goals and funding flexibility
- Block funding with a genuine national partnerships approach performs well against the many of the criteria
- Appropriate indexation is essential to block funding to ensure that funding reflects changes in costs and demand over time
- A ‘fee for service’ model provides a high degree of clarity of roles, and because it is open-ended it can automatically reflect the underlying growth in demand for legal aid services in the community. However the model reduces budget flexibility, creates incentive for cost-shifting and violates the subsidiarity principle
- A casemix funding model would perform well under that principle but the high cost of its development would count against its use in a legal aid context at present
- Lump sum incentives could be a useful complement to block funding to ensure the continued participation of private practitioners in legal aid work.
Overall a block funding approach, with appropriate indexation, and potentially including some lump sum incentive for legal practitioners, best fulfils the cooperative federalism funding principles and addresses the current challenges facing the providers of legal aid.
Appendices

Appendix A  Examples of new national funding agreements  95
Appendix B  The means test  99
Appendix A  Examples of new national funding agreements

C1  The National Healthcare Agreement

The new National Healthcare Agreement effectively amalgamates four previously existing SPPs, including the health care grants (formerly known as Medicare grants) to States and Territories in respect of public hospitals.

The agreement identifies a series of objectives, each with measurable progress indicators and outputs which can contribute to their achievement. The table below summarises some of the objectives with their corresponding progress measures and outputs.

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<th>Output</th>
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Importantly, the outputs identified as contributing to the various objectives represent a combination of Commonwealth and State and Territory funding responsibilities. The agreement clearly identifies those responsibilities resting with the Commonwealth, those resting with the States and Territories and those which are shared. The agreement also sets down performance benchmarks by which the achievement of desired outcomes can be judged, such as:

- Reducing the age-adjusted prevalence rate for Type 2 diabetes to 2000 levels within 15 years
- Reducing the national smoking rate by 10 per cent by 2018
- Ensuring that by 2012-13, 80 per cent of emergency department presentations are seen within clinically recommended triage times
- Reducing the proportion of ‘potentially preventable’ hospital admissions by 7.6 per cent by 2014-15.

Aside from the clarity and measurability of these performance indicators, an important observation is that their achievement cannot be attributed to any one level of government. For example, emergency department efficiency is partly a function of State and Territory funding and management, but also relies on the availability of nearby Federally-funded GP clinics to handle those cases which are best handled through the primary care system.

The finalisation of the agreement has been accompanied by a number of Commonwealth initiatives aimed at assisting with the achievement of these shared objectives, including a $500 million injection to help States and Territories address public hospital waiting lists.

**C2 The National Partnership Agreement on Homelessness**

The Commonwealth, State and Territory Governments have entered into National Partnerships Agreement on homelessness. This is in recognition that all the parties are committed to addressing the issue of social inclusion, and therefore all have shares goals, that it is in their mutual interest to improve outcomes in relation to homelessness. Importantly the agreement acknowledges that they need to work together to achieve those outcomes.

The agreements sets out the outcomes that parties committed to achieving, being:

a) Fewer people will become homeless and fewer of these will sleep rough
b) Fewer people will become homeless more than once
c) People at risk of or experiencing homelessness will maintain or improve connections with their families and communities, and maintain or improve their education, training or employment participation
d) People at risk of or experiencing homelessness will be supported by quality services, with improved access to sustainable housing
Outputs

The Agreement recognises that addressing homelessness will require action around three key strategies:

a) Prevent and intervene early to stop people becoming homeless and also lessen the impact of homelessness.

b) Breaking the cycle of homelessness by helping people get back on their feet, find stable accommodation and, wherever possible, obtain employment.

c) A better connected service system

Then the Agreement identifies a set the core-outputs that will best deliver on it objective and outcomes. In addition it also lists prioritised the additional outputs that effort will be applied to.

Roles and responsibilities

The agreement then sets out the roles and responsibilities of the Commonwealth, the States and Territories and their shared responsibilities.

The Commonwealth will have responsibility for:

a) supporting the State and Territories to deliver funded measures in their respective Implementation Plans

b) delivering the Commonwealth-only funded measures in the Implementation Plans

c) contributing funding to the States and Territories as specified in he agreement

d) monitoring performance against the performance indicators and benchmarks specified in this Agreement and the Implementation Plans

e) providing performance and financial reporting as required

The States and Territories will have responsibility for:

a) delivering the State-only funded measures in their respective Implementation Plans

b) contributing funding as specified in the agreements

c) delivering the measures funded by the Commonwealth and identified for delivery by the States and Territories in their respective Implementation Plans

d) participating in processes to support the Commonwealth in its delivery of its measures

e) providing performance and financial reporting as required
Within the COAG framework, the Commonwealth, the States and Territories will have shared Responsibility for:

a) working in partnership to refine or further develop performance indicators and provide data to enable performance reporting and evaluation of outcomes of this Agreement

b) maintain and develop national data sets required to allow comparative reporting of jurisdictional service delivery effort

Implementation plan

The Commonwealth agree on an Implementation Plan with each State and Territory to achieve the objectives of this Agreement. The Plans are reviewed by the Parties on an annual basis, and updated by the Commonwealth following the review. They include timelines for achieving the performance benchmarks

Funding and governance arrangements

The agreements set out the funding level for the four years to 2012-13 and the Commonwealth and State and Territory levels of contribution are roughly equal. Allocation of Commonwealth funding between the States and Territories in proportion with their shares of the homeless population.

The Agreement is to be review every two years and may be amended at any time by agreement in writing by all the Parties.
# Appendix B The means test

<table>
<thead>
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<th></th>
<th>ACT</th>
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RH – set in reference to the Henderson Poverty index,
RM – set with reference to the housing market.

^ from second income,

* Tasmania has an allowance for three zones across the state between $100 and $125
Western Australia has three rent allowances to include the housing stress in Mining towns of $360,
all other rural environments it is $230,
NSW has a rural allowance of $220.

# Typically an allowance for child care costs. The allowance for children is applied equally across those with custody and those paying maintenance and child support.
## Possible approaches to funding legal aid

### Legal aid funding

**Source:** PwC Calculations, ABS

*Lower earning (typically single income living in a rural settings)*

* Upper earning (typically dual income living in the capital city – WA is the exception living in North west mining town).

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Source: PwC Calculations, ABS