1.0 Introduction

The mixed model and Judicare legal aid schemes established in a number of welfare capitalist societies after WWII relied to varying degrees on private legal practitioners to supply legal services. Much of the success of these schemes is attributable to the active involvement of the law societies and bar associations, and the presence of viable labour markets for legal aid work. Since the late 1970s many of the premises of social citizenship in which the post-war schemes originated have been challenged by new political economies of market capitalism. Legal aid policies changed, and governments curtailed expenditure on legal aid schemes. By the mid-1990s payments by legal aid providers were generally well below market rates. Private practitioners were widely reported as having ceased to perform legal aid work. The resulting changes to labour markets for legal aid means that issues and problems in supply are now on policy agendas in Australia, Canada, England, New Zealand, Scotland and The Netherlands and other societies with mixed model or Judicare legal aid schemes.

In the Australian mixed model disengagement from legal aid work first emerged as an issue in the late 1980s. In 1990 the National Legal Aid Advisory Committee (NLAAC) reported (p. 151) evidence “of a disinclination on the part of many private legal practitioners to undertake legally-assisted cases”. As elsewhere the major complaint was that legal aid work was not a profitable activity. Private practitioners complained that payments by State and Territory legal aid commissions had not kept pace with practice costs, and the amounts paid by self-funding clients for comparable work in markets for legal services. ¹

¹The Northern Territory Legal Aid Commission, the Legal Services Commission of South Australia, Legal Aid Queensland, Legal Aid Commission of NSW, Legal Aid Commission of Tasmania, Legal Aid Western Australia and Victoria Legal Aid are the major legal aid providers in Australia.
Initially the issue attracted little attention from governments, policy makers and legal aid commissions. Private practitioner discontent with the terms of legal aid work and levels of public expenditure on legal aid services was a familiar undercurrent. In the 1980s many in the private legal profession had consistently sought to increase market share, arguing that private practitioners were more cost-effective suppliers than salaried legal practitioners in legal aid commissions (see generally Meredith 1983; see also Cooper 1983: pp. 7-17). Many others had reportedly disavowed legal aid work, but with no obvious adverse effects on supply.

However, the experience in the 1990s was different. Over 1993-95 the focus of citizens’ access to law policy shifted away from legal aid towards an integrated access to justice approach (see AJAC 1994; AGD 1995). A growing body of evidence (see NLAAC 1990: p. 269, LCA 1994: pp. 9-24 & NLA 1996: pp. 5-11) indicated that levels of public funding were inadequate, either to finance services provided by legal aid commissions, or to satisfy popular expectations for access to legal aid services. Legal aid commissions increasingly rationed expenditure in “an attempt to spread limited legal aid funds among as many matters as possible” (SLCRC 1998: p. 79). The real value of amounts paid to private practitioners declined. In 1996, for instance, National Legal Aid (NLA) reported (pp. 3 & 13) that amounts paid for legal aid work did not cover costs incurred in providing services to persons approved legal aid. Accordingly many private practitioners were no longer willing or able to represent legally aided clients. Changes to Commonwealth policy in 1996/97 were also widely believed (Fleming 2000: pp: 343-54; see also Noone & Tomsen 2001: pp. 259) to have compounded existing shortcomings in funding and eligibility for legal aid services.

The politics of the legal aid interest groups also changed in the 1990s. Mutual concerns about levels of Commonwealth and State funding, the newly contested status of legal aid in access to justice policies and alarm at the changes to the Commonwealth-State legal aid agreements encouraged NLA, the legal aid commissions, community legal centres, the Law Council of Australia (the Law Council) and the law societies and bar associations to bury old enmities. The public face of the new politics amongst the interest groups was co-operative advocacy chronicling and highlighting concerns about legal aid funding (LCA 1994 & 1996; NLA 1996), and co-ordinated opposition to the changes to expenditure and eligibility in respect of legal aid in Commonwealth law matters (see LCA 1996; Legal Aid Forum 1999).

In the late 1990s the interest group advocacy began to concentrate on the issue of disengagement from legal aid work, in particular, to highlight claims that representing legally aided persons was an unprofitable activity. This and associated issues, such as concerns that underpayment for legal aid work was impacting adversely on quality and supply, promised a lever to force governments to increase legal aid funding, an objective which was common to all the interest groups. Initially this strategy relied on anecdotal reports from the private legal profession that growing numbers of practitioners had ceased to represent legally aided persons. Later the interest group arguments drew on empirical evidence that began to emerge in 1998. The result was that disengagement from legal aid work was high on political agendas when the Commonwealth-State legal aid agreements were re-negotiated in 1999.

Sufficiently so that the Commonwealth Attorney-General indicated that he would work to improve fees paid to private practitioners when he announced an increase in legal aid

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2 In the 1980s the Directors/CEOs of the eight legal commissions combined at a national level to form National Legal Aid. See URL: [http://www.nla.aust.net.au/](http://www.nla.aust.net.au/).

3 In 2003 there were 207 community legal centres in Australia. See URL: [http://www.nacle.org.au/](http://www.nacle.org.au/).
expenditure by $63m over four years under new legal aid agreements to operate until 30 June 2004 (Williams 1999 (a)).

Over 2000-04 interest group concerns that legal aid funding is inadequate and that legal aid commissions are unable to satisfy community demands for legal aid have continued. In June 2003 the Commonwealth Senate announced an inquiry into legal aid. Its Legal and Constitutional Committee (the Senate Committee) is now investigating the capacity of legal aid and access to justice arrangements to meet community needs. 4 Submissions include expressions of concern that what the interest groups believe to be unacceptably high economic costs incurred by private practitioners representing legally aided persons will generate “increasing instances of law firms and experienced lawyers withdrawing from legal aid work” (LCA 2003 (b): p. 13).

The evidence reporting that private practitioners have disengaged from legal aid work clearly demonstrates that labour markets for legal aid in Australia have changed since 1990. However, the dimensions of labour market change and its significance for the mixed model is less clear. Little, if any, of the available evidence constitutes definitive labour market data. We do not know, for instance, the size or composition of the labour market in 1990, or how markets for legal aid work have changed since. Nor is it clear if market change has adversely affected the supply of legal aid services. Whilst labour markets for legal aid are almost certainly smaller today than in 1990 it is less certain that disengagement from legal aid work has affected access to private practitioners by persons approved legal aid. However, supply may be a problem in some rural areas and fewer firms may be accessible to those seeking to apply for legal aid, or to obtain preliminary legal advice. The evidence is also inconclusive on the effect of market change on quality of service delivery. Some practitioners appear to have maintained quality standards, whilst others are likely to have responded to increases in opportunity costs incurred in legal aid work by skimping on quality, delivering reduced services to legally aided clients.

This paper explores these and other unanswered questions. We begin by describing the paper’s scope, methodology and limitations. Next we provide an account of the major sources of evidence reporting private practitioners disengaging from legal aid work. We briefly describe the interest group and research-based evidence, and assess its credentials as evidence that labour markets for legal aid in Australia have changed. In the third part of the paper we consider why private practitioners have disengaged from legal aid work. Specifically we review the existing evidence and other evidence and data relating to changes in markets for legal aid and other legal work to identify the range of economic and social factors that have contributed to private practitioners ceasing to represent persons eligible for legal aid. The fourth part of the paper considers the impact of disengagement from legal aid work. We examine the evidence to assess if persons eligible for legal aid in Commonwealth law matters have been disadvantaged, first, by changes in supply in labour markets for legal aid, and, secondly, by changes in the quality of services provided to persons approved legal aid. In the final part of the paper we discuss options for policy development, and changes to funding and management in the Australian mixed model.

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2.0 Scope, methodology and limitations

The Commonwealth Attorney-General’s Department (AGD) commissioned the paper as part of a project investigating changes in labour markets for legal aid. In doing so the AGD sought to achieve two objectives. The first was to assist the Legal Aid Renegotiations Team in reviewing the evidence reporting private practitioners disengaging from legal aid work to assess its significance for the 2004-08 Commonwealth-State legal aid agreements. The second objective was that AGD wished to obtain an independent analysis of the evidence to assist in developing new funding and policy responses, particularly with respect to issues and problems affecting persons eligible for legal aid in Commonwealth law matters.

Since 1997 the Commonwealth-State agreements have distinguished between legal aid matters arising under Commonwealth law, and State or Territory law. Guidelines restrict expenditure of Commonwealth funds to prioritised matters arising under Commonwealth law, including proceedings under the *Family Law Act 1975*, the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection Act) 1988*. Guidelines also prioritise eligibility in Commonwealth criminal and civil cases, and in certain other matters, such as family law matters, when domestic violence is present or likely.5

As indicated briefly above, and discussed in greater detail below, the body of evidence reporting disengagement from legal aid work is problematic.6 Consequently in preliminary discussions with the AGD we suggested that new and targeted empirical research would promote the objectives of the paper, and enrich its analysis and conclusions, and proposals for a Commonwealth response. One suggestion was that several case studies of legal aid work in representative solicitors’ firms be conducted. Another suggestion was that the AGD obtain disaggregated data reporting changes in the numbers and size of solicitors’ firms referred legal aid work in the States and Territories. The AGD was not in a position to act on either suggestion, not being convinced of the benefits of a limited case study approach, or willing to impose on legal aid commissions the burden of obtaining additional data.

Instead the AGD asked that we restrict our analysis to three existing sources of evidence. The first was the anecdotal and semi-anecdotal evidence from the private legal profession, legal aid commissions and other interest groups reporting disengagement from legal aid work. The second source was the available empirical evidence. In 1998 researchers at Griffith University (Dewar et. al) published a report into the impact of changes to legal aid in Queensland since 1992 on criminal law and family law practice. Also in 1998 the Springvale Legal Service reported on the impact on solicitors and firms in Victoria representing family law clients of the 1996-97 changes to Commonwealth legal aid policy. A 1998-99 Justice Research Centre (JRC) project comparing legal services received by legally aided and self-funded family law litigants also investigated changes in legal aid work (Hunter 1999 & 2000). In 1999 (see Fleming 2002) and again in 2001 NLA (2002 (a)) conducted surveys of changes in legally aided family law work in solicitors’ firms.7 The AGD also asked that we review the evidence contained in the legal aid commission (NTLAC 2003, LAWA 2003, LAQ 2003,

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6 pp. 10-12.
We agreed with the AGD to provide a report on the participation of legal practitioners in the legal aid market. In particular, the report was to address three questions. One, are persons eligible for legal aid in Commonwealth law matters disadvantaged in obtaining access to legal representation from solicitors and solicitors’ firms? Secondly, if so, why, and how, are legally aided parties in Commonwealth law matters disadvantaged in accessing legal services from solicitors and solicitors’ firms? Thirdly, what options exist to improve the access of legally aided parties in Commonwealth law matters to legal representation from solicitors and solicitors’ firms?

Much of the methodology in the paper applies techniques of labour market economics. As there are no definitive sets describing labour markets for legal aid we were unable to use these techniques alone. In any event the dynamics of legal aid work extend beyond labour market factors. Public legal aid schemes are state projects, and affected by changes to politics and public policy. Legal aid is also a modern socio-legal institution, in which the private legal profession has a major social investment, in addition to participating in markets for legal aid work.

Accordingly we have also applied an inter-disciplinary approach. We draw on law, Public Policy and socio-legal studies to identify the problems and issues arising out of the evidence that private practitioners have disengaged from legal aid work. In particular we have also adapted two techniques of Public Policy scholarship. The first is the “puzzling out” approach (Davis et. al 1988: p. 61), and investigative technique used to explore and explain outcomes of state decision-making processes (ibid: p. 8). In the absence of definitive labour market data, or a comprehensive description of how markets for legal aid work changed over 1990 to 2003, we have examined, probed and tested the available evidence to assess its significance for the operation of the mixed model.

We also employ the comparative techniques of public policy. In the paper we compare and contrast the evidence reporting disengagement from legal aid work with other evidence about changes in labour markets for legal aid. In particular we refer to data reporting changes over 1990 to 2003 in matters such as the numbers of applications for legal aid by law type, applications approved by law type, applications serviced in house and referred to private practitioners, average case costs, Commonwealth, State and Territory expenditure and hourly rates for legal aid work referred to private practitioners contained in the LASSIE database administered by the AGD.

We also compare the available evidence with other data that is relevant to understanding changes in labour markets for legal aid. We frequently refer to the Australian Bureau of Statistics (ABS) surveys of the legal services industry conducted in 1987/88, 1992/93, 1995/96, 1998/99 and 2001/02. We also referred to other relevant published data such as the review of scales of legal professional fees in Federal jurisdictions (AGD 1998). As labour markets for legal aid are linked to the legal profession we have also referred to evidence of the composition and changes in mainstream markets for legal professional work. In Australia data about the legal profession and its work is patchy and incomplete. Even the Law Council (2001: p. 15) has been unable to compile more than a “rough sketch”. Nevertheless a diverse
body of evidence exists, and we refer to relevant parts of that evidence. We also refer to our own recent research (Daly et al. 2002 & 2003) into changes over 1986 to 2001 in legal professional labour markets.

We also compare the Australian experience with evidence of developments affecting labour markets in the mixed model and Judicare legal aid schemes in Canada, England and Wales, New Zealand, Scotland, The Netherlands, and, in relevant instances, the salaried schemes in the United States. In doing so we are not suggesting that these cross-national experiences are mirrored in Australia, or vice versa. However, Canada, Britain, New Zealand, Scotland, The Netherlands and the United States are amongst the countries conventionally compared with Australia in comparative public policy studies (see Castles 1991). Comparative legal aid scholarship also acknowledges cross-national synergies in legal aid policy, politics and funding (Zemans 1979 & 1985, Abel 1985 & Regan et al. 1999; see also ILAG 2001 & 2003). The dynamics behind legal aid in Australia, Canada, Britain, New Zealand, The Netherlands and the United States are also highly comparable. In all six countries the private legal profession has dominated modern markets for legal services. Britain, Canada, New Zealand, Scotland, The Netherlands and the United States also expanded arrangements for citizens’ legal aid after WWII, and have witnessed major changes to the original funding and policy premises of the post-war response, a result in the other English-speaking countries as in Australia of macro-economic and regulatory reform since the mid-1970s (Castles 1990), and in The Netherlands, as a result of changes to legal aid policy, first in 1994, and again in 1999 (Levenkamp 1999; Klijn 1999).

The paper has three major limitations. The first is that the adage that water cannot rise above its source applies. Much of the evidence on which the analysis and conclusions in the paper are based is incomplete, incompatible or inconclusive. A definitive picture of labour markets for legal aid in Australia remains an aspiration of policy makers and researchers. In examining, probing, testing and comparing the available evidence we have sought to identify evidence that demonstrates, indicates or suggests particular developments or changes. In some cases we have been able to reach definite conclusions. In many cases our conclusions are qualified, often highlighting the need for further investigations or research.

The second limitation is that the paper concentrates on changes in legal aid work in family law matters. One reason is that family law work is the emphasis of the empirical evidence. Only the Griffith report considers changes in legal aid work in criminal law matters. The major reason is that we were asked to identify problems and issues affecting persons eligible for legal aid in Commonwealth law matters. In aggregate most applications approved for legal aid are in criminal law matters. The data in Figure 1 below shows that over 1990/91 to 2001/02 approvals of legal aid in criminal matters rose from 50 per cent to 66 per cent of the total number of applications approved by legal aid commissions. The number of approvals in 2001/02 was 68 per cent higher than in 1990/1. In contrast the number of approvals of legal aid in family law matters over that period has trended downwards. Approvals fell from 34 per cent to 26 per cent of the aggregate number of applications approved by legal aid.

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Law societies now publish regular reports on developments in solicitors’ practice, including demographic details, practice type and location and incomes. The annual profiles published by the Law Society of NSW are an important instance. Other evidence includes research on women in private practice (e.g., Key Young Research 1995; The Victorian Bar 1998; Women Lawyers Association of Tasmania 1996) and the public sector (e.g., NSW Department of Women 1995), law graduate employment data (for example, Karras & Roper 2000)) and free-to-air updates on employment trends published by consultancy firms (e.g., Mahlab Recruitment 2003).

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See Paterson 1991 for an outline of the features of mixed model, Judicare and salaried legal aid schemes.
commissions, although there has been some increase recently, with approvals in family law matters in 2001/02 approximating 1990/91 levels. ¹⁰

**Figure 1: Applications Approved by Type, Australia, 1990/91-2001/02**

![Applications Approved by Type, Australia, 1990/91-2001/02](image)

**Source:** LASSIE database administered by the Commonwealth Attorney-General’s Department

**Notes:**
1. LASSIE is an unofficial statistical record and subject to alteration as errors are discovered, or new data added. Figure 1 summarises LASSIE data as recorded in October 2003.

In Commonwealth law matters the distribution of matters approved legal aid is different. The data in Figure 2 below shows that over 1990/01 to 2001/02 family law matters fluctuated between 80 and 90 per cent of all approvals of legal aid. Approvals in Commonwealth criminal law matters grew slightly, from approximately 3 per cent in 1990/91 to approximately 5 per cent in 2001/02, although increasing mid-period, to almost 10 per cent in 1996/97. Approvals in civil law matters grew from approximately 6 per cent in 1990/91 to approximately 10-11 per cent in 1992/93 to 1996/97, falling in each subsequent year to less than 5 per cent of total approvals of legal aid in Commonwealth law matters in 2001/02.

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¹⁰ Approvals in civil legal aid fell from approximately 1.8 per cent to 0.8 per cent of total applications approved.
The remaining limitation is that the paper concentrates on changes in legal aid work amongst solicitors and firms. Once again one reason is the content of the empirical evidence. Only the Griffith report considers changes in legal aid work amongst barristers, and its evidence is restricted to the experience of barristers in Queensland. Once again the other reason is that our research contract with the AGD directed us to the experience of solicitors and firms.

### 3.0 The evidence and its credentials

We begin our analysis with an account of the evidence under review, and assess its credentials. We briefly describe the interest group evidence and the evidence contained in the Griffith, Springvale and JRC reports and the NLA surveys. Next we ask the question, is this evidence convincing? Does the interest group and empirical evidence demonstrate that since the early 1990s private practitioners in Australia have disengaged from legal aid work?

The weight of the evidence is contained in anecdotal and semi-anecdotal reports from the interest groups. The major source is complaints from private practitioners. The principal complaint is that amounts paid for legal aid work are seriously inadequate. Representing legally aided persons is believed to be an unprofitable activity, in the sense that private practitioners can only perform legal aid work at a financial loss, or at an unacceptably low rate of return. The Australian Law Reform Commission has reported (2000: p. 344) a “common consensus of practitioners” that “fee reductions have made it less viable for specialist private solicitors to continue to do legal aid work”.

A similar picture emerges from other interest group evidence. In 1996 NLA reported (p. 13) payments for legal aid work did not cover the cost of providing services to persons approved legal aid, and that many private practitioners were no longer willing or able to represent...

The evidence from the empirical research tends to corroborate this picture. The Griffith, Springvale and JRC reports and the NLA surveys show private practitioners disengaging from legal aid work, and indicate that practitioners’ concerns that legal aid work is not adequately remunerated are a major factor. The Griffith researchers found (p. 79) that a “significant number” of family law solicitors had “consciously opted to discontinue offering legally aided services”. A similar situation appeared to exist in criminal law practice. Interviewees reported (p. 84), “experienced practitioners had become less available to handle legally assisted cases”. Whilst the numbers of firms ceasing to do legal aid work had reportedly increased since the introduction of a preferred supplier scheme by Legal Aid Queensland in 1997 the evidence of “a number of highly regarded, experienced, practitioners” (p. 79) suggested disengagement had been evident in Queensland since 1993.

The Springvale and JRC reports contain comparable findings. The Springvale researchers reported (p. 3) a trend in Victoria in 1998 of “practitioners voting with their feet and reducing or eliminating legally aided caseload”. The JRC researchers also found “successive changes to legal aid funding have had an adverse impact on the supply side of the legal aid market in family law” (Hunter 2000: p. 248). A majority of interviewees reported a decrease in the amount of legally aided family law work performed in solicitors’ firms (ibid: p. 242). A minority who reported no change had either never represented legally aided clients, “or had felt the same pressures as their colleagues, but had decided to continue to act for philosophical reasons”, such as a belief that “there needs to be equality of opportunity at law as well as other aspects of society” (ibid: p.246).

The evidence from the two NLA surveys is comparable. In the 1999 survey the majority of the 254 respondent firms reported performing progressively less legal aid work over the period 1994/95 to 1999 (Fleming 2002: pp. 3-4). Almost 70 per cent of firms reported performing less legal aid work than in 1994/95 (ibid). The survey also showed a decline in the number of family law solicitors who performed legal aid work. In 1994/95 91 per cent (n = 239) of all family law solicitors in respondent firms performed legal aid work. In 1994/95 91 per cent (n = 239) of all family law solicitors in respondent firms performed legal aid work, compared to only 83 per cent (n = 251) in 1996/97 and only 72 per cent (n = 225) almost 20 per cent less than in 1994/95 (ibid: p. 4). In the 2002 NLA survey 28 per cent (n = 36) of the 127 respondent firms reported decreasing the amount of legally aided family law work between 1999 and 2001. Almost 25 per cent (n = 31) reported no change in the amount of legal aid work, and 22 per cent (n = 28) reported not performing legal aid work in 1999 or 2001, the majority (n = 19) indicating “that they had ceased doing legal aid work prior to 1999/2000 because of the low fees” (NLA 2002 (a)).

We now return to the question posed earlier, is the existing evidence convincing? Does the interest group evidence and the findings and evidence from the empirical research demonstrate that private practitioners in Australia have disengaged from legal aid work? In particular from the AGD perspective does it have the credentials to enable the AGD to argue
the case in Canberra policy markets that Commonwealth expenditure on legal aid should be increased?

As we have already indicated the existing evidence is not unproblematic. Much of the interest group evidence emanates from anecdotal or semi-anecdotal sources, and is necessarily subjective and episodic in content. It cannot be said to systematically report changes in the numbers of private practitioners and firms doing legal aid work, or other changes in labour markets for legal aid. The evidence can also be criticised as founded in self-interest. The major interests stand to benefit if the AGD is convinced that disengagement from legal aid work has disadvantaged persons eligible for legal aid in Commonwealth law matters, and the Federal Government responds by increasing Commonwealth expenditure. Politically, in the case of the Law Council, the law societies and bar associations and NLA, politically and financially, in the case of the legal aid commissions, and financially, in the case of private practitioners and firms representing legally aided persons.

Conversely there is no reason to believe that the evidence from the private legal profession is describing other than the genuinely held beliefs and opinions of private practitioners. Nor is there any reason to believe that the evidence from legal aid commissions is not describing real experiences of changes in supply. Moreover to discount the interest group evidence on the grounds of self-interest alone is to ignore key elements of the Australian mixed model, in particular, the social investment of the private legal profession in legal aid, its contribution historically to legal aid funding and administration, and the role of NLA and the legal aid commissions in advocating the wide range of public interest served by the legal aid scheme.

Similarly the research-based evidence is not free from difficulty. As we have indicated none amounts to definitive labour market data, or presents or claims to present a comprehensive picture of private practitioner disengaging from legal aid work. Its probative value can be challenged on methodological and technical grounds. Most of the evidence adduced by the Griffith and Springvale researchers is sourced in the testimony of private practitioners, and is snapshot evidence at best, with few, if any, longitudinal dimensions. The evidence from the two NLA surveys is similarly limited. The evidence obtained from solicitors and firms in the JRC research is the most reliable of the research-based evidence, although it is also predominantly snapshot in character. Moreover prima facie differences exist in the evidence, most notably between the Griffith report and the JRC research and the first NLA survey on the issue of juniorisation, as we discuss below.

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11 The mixed model was once described as a “partnership” (NLAAC 1990: p. 109) between governments, legal aid commissions, the private legal profession and community legal centres. See pp. 28-30 below for an elaboration of the social investment of the private legal profession in legal aid.

12 Historically private practitioners have represented legally aided persons at 80 per cent of scale fees or amounts ordinarily charged to self-funding clients (see p. 16 below). In 1990 NLAAC estimated (pp. 69 & 150) the value over 1984/85 to 1988/89 of this in-kind contribution at $87m. Applying similar premises the in-kind contribution of private practitioners in 1999/2000 was at least $53m. The private legal profession has also often claimed payments to legal aid commissions from interest earned solicitors’ special trust and statutory funds as another contribution to the costs of legal aid. Over 1990 to 2002 such payments averaged $27.5m ($1990/91) per year, or 43 per cent of State and Territory government funding. This claim can only be sustained indirectly. The private legal profession does not own the solicitors’ special trust and statutory funds; nor does interest accrued belong to private practitioners. The existence of such funds does highlight the links between legal aid and the regulation of legal professional work (see also below).

13 The first NLA survey, for instance, had methodological defects (see Fleming 2002: pp. 1-2 & nn. 4, 6, 9 & 12). The Griffith researchers (p. 15) interviewed, for example, only 27 practitioners, judges or magistrates, with “structured dialogue” on another eight occasions.

14 “Juniorisation” is a term coined to describe the phenomenon whereby new entrant and less experienced practitioners are said to have replaced experienced practitioners in legal aid work. The Griffith researchers found (p. 78) juniorisation in family law and criminal law cases if private practitioners doing legal aid work had less than two years post-admission experience, or if less than 75 per cent of their total practical experience had been in family law cases.
On the other hand the research-based evidence is a significant body of evidence. The Griffith, Springvale and JRC reports are the products of systematic investigations of matters arising out of the interest group evidence. The results of the NLA surveys are the product of a genuine attempt by NLA to assess the numbers of family law solicitors that have ceased to represent persons eligible for legal aid, and its significance for supply. The similarities far exceed the few differences, and the research-based evidence presents a coherent and consistent if incomplete picture of private practitioners and firms disengaging from legal aid work.

Moreover the existing Australian evidence resonates with the evidence of the recent cross-national experience. Problems and issues in labour markets for legal aid are also evident in other mixed model and Judicare schemes. In New Zealand research conducted for the former Legal Services Board in 1997 showed (Maxwell et. al. 1997) “marked dissatisfaction with some aspects of remuneration for legal aid work” amongst legal practitioners. In Canada Bar Association research (2000: p. 59) shows private practitioners turning “away legal aid work” as “recent trends, particularly underfunding, have made it extremely difficult for lawyers to take on legal aid and maintain their practices”. In The Netherlands policy makers are concerned about the low numbers of young private practitioners engaged in legal aid work (Levenkamp 2000). In Scotland researchers have reported (SLAB 2001: pp. 28 & 26) concerns civil legal aid has “become marginalised by solicitors because it is no longer profitable work”

Similar issues are evident in England and Wales, with reports (The Law Society 2003: p. 6; LSC 2002 (b): p. 8) that the “legal profession has become disillusioned with legal aid” and complaints legal aid work “is at best marginally profitable” (see also Moorhead 2003: pp. 2-5). The Legal Services Commission (LSC) has reported “intelligence through our regional offices that up to 50% of firms are seriously considering stopping or significantly reducing publicly funded work” (2002 (b): p. 8). The problems appear to extend to the Bar. The LSC now provides training and income guarantees to selected barristers, “mindful of the need to ensure a sufficient supply of barristers who undertake legally aided work, especially in priority areas”(LSC 2002 (a): p. 2).

The interest group and research-based evidence clearly demonstrates that labour markets for legal aid work have changed. There are certainly fewer private practitioners doing legal aid work than in 1990. The evidence also clearly demonstrates that solicitors and barristers doing family law and criminal law work are amongst the practitioners that have ceased to represent legally aided persons. The existing evidence also demonstrably identifies problems and issues associated with disengagement from legal aid work that are properly a concern of the AGD and other legal aid policy makers.

The existing evidence provides a credible foundation for policy makers seeking to understand changes in labour markets for legal aid. However, not all the evidence actually demonstrates labour market change. Much of the evidence is circumstantial, particularly the anecdotal and semi-anecdotal accounts from the private legal profession, and other interest groups. Other parts of the existing evidence are only indicative, not demonstrating actual market change, or actual changes in supply, but indicating that because some private practitioners and firms have, for instance, disengaged from legal aid work, we can anticipate others have behaved similarly. In other respects the existing evidence has significant gaps. The picture it presents of changes in the size and composition of labour markets for legal aid over 1990 to 2003 is far
from complete. Moreover it is a picture that tends to divorce changes in labour markets for legal aid from other developments affecting legal aid and legal professional work.

Even within the realms in which the existing evidence is inconclusive and incomplete it represents a valuable resource for policy makers concerned to better understand why, how many and which private practitioners have disengaged from legal aid work, and to assess its significance for persons eligible for legal aid, and the supply of legal aid services in the Australian mixed model. In the next two sections of the paper we analyse the interest group and research-based evidence and other evidence relevant to explaining change in labour markets for legal aid to explore, first, why private practitioners have disengaged from legal aid work, and, secondly, to assess the impact of disengagement from legal aid work on persons eligible for legal aid in Commonwealth law matters.

4.0 Why private practitioners have disengaged from legal aid work

We begin our analysis by asking the question, why have private practitioners disengaged from legal aid work? The evidence of the private legal profession would suggest the answer to this question is obvious. Since at least the early 1990s many private practitioners have believed that representing legally aided persons is an unprofitable activity. The Griffith researchers identified (p. 79) “reductions since 1992 in rates of remuneration” as one of the most common explanations and “most frequently cited reason” for disengagement from legal aid work. Underpayment was also the (Hunter 2000: p. 242) “most popular” explanation offered to the JRC researchers. Almost 60 per cent of solicitors interviewed reported, “legal aid work did not pay sufficiently to justify continuing” (ibid). The belief that legal aid work is underpaid is also a key factor in disengagement from legal aid work elsewhere. In Canada in 2000, for instance, the “vast majority” of private practitioners in a Bar Association survey reported legal aid rates “did not fairly compensate them for the legal services they provided” (p. 54). Recent research in Scotland has also reported (SLAB 2001: pp. 28 & 26) concerns that civil legal aid has “become marginalised by solicitors because it is no longer profitable work”.

Underpayment of private practitioners is an important factor in explaining disengagement from legal aid work. But it is not the sole factor. Financial reward is not the only motivation in representing legally aided persons. As we have already indicated the private legal profession and its practitioners have a significant social investment in legal aid. Decisions to engage or disengage in legal aid markets are also affected by other economic factors such as changes in demand by legal aid commissions, changes in supply and demand for legal work and income in the market for legal services. Explaining why private practitioners have disengaged from legal aid work, especially an explanation sought for policy making purposes, including assessing the significance of labour market change for the mixed model scheme, must consider these social and economic factors, in addition to the amounts paid to private practitioners.16

16 In any event the evidence that legal aid work is underpaid does not sustain a coherent concept of ‘profitability’. The Griffith researchers found that (p. 131) “practitioners mean different things when they talk about concepts such as “profit”, “loss”, “overheads” and so on”. Claims of unprofitability generally failed to distinguish between optimal or preferred profit levels, and profit and income levels that solicitors and firms might reasonably anticipate in legal services markets (see pp. 120-5).
An examination of the available evidence shows that there are three major economic factors that account for the presence of fewer private practitioners in labour markets for legal aid. The first factor is changes in expenditure. Figure 3 below summarises Commonwealth expenditure over 1990/91 to 1999/2000 on legal aid adjusted for inflation. The data shows that real Commonwealth expenditure was 6.4 per cent lower in 1999/2000 than in 1990/01, although displaying substantial fluctuations over the period, including in 1996/97 and 1997/98, reflecting changes to Commonwealth legal aid policy.

**Figure 3: Real Expenditure on Legal Aid, 1990/91-1999/2000**

![Graph showing real expenditure on legal aid from 1990/91 to 1999/2000 with fluctuations and a decrease in 1999/2000.]

**Source:** LASSIE database administered by the Commonwealth Attorney-General’s Department

**Notes:**
1. LASSIE is an unofficial statistical record and subject to alteration as errors are discovered, or new data added. Figure 3 summarises LASSIE data as recorded in October 2003.
2. Dollars are expressed in 1990/91 values.

State and Territory expenditure also changed over the period. Table 1 below summarises real expenditure on legal aid in the States and Territories over 1990/01 to 2001/02. The data shows that in the large population States of NSW and Victoria real expenditure fell, whilst increasing over the period in the ACT, the Northern Territory and Western Australia.
Table 1: Real Expenditure on Legal Aid by States and Territories, 1990/91 – 1999/2000 ($ 1990/91 = 100 $’m)

<table>
<thead>
<tr>
<th></th>
<th>1990/91 $’m</th>
<th>1991/92 $’m</th>
<th>1992/93 $’m</th>
<th>1993/94 $’m</th>
<th>1994/95 $’m</th>
<th>1995/96 $’m</th>
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<th>1997/98 $’m</th>
<th>1998/99 $’m</th>
<th>1999/00 $’m</th>
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<tbody>
<tr>
<td>NSW</td>
<td>75</td>
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<td>83.9</td>
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<td>86.4</td>
<td>86.7</td>
<td>86.5</td>
<td>81.2</td>
<td>79.9</td>
<td>760.7</td>
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<tr>
<td>Vic</td>
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<td>67.3</td>
<td>68.3</td>
<td>73.8</td>
<td>82</td>
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<td>Qld</td>
<td>37.2</td>
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<td>SA</td>
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<tr>
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<td>18.2</td>
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<td>22.5</td>
<td>22.3</td>
<td>24</td>
<td>22.3</td>
<td>24.2</td>
<td>22.8</td>
<td>22.1</td>
<td>22.8</td>
</tr>
<tr>
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<td>6.3</td>
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<td>8.3</td>
<td>8.5</td>
<td>6.9</td>
</tr>
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<td>5</td>
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<td>5.3</td>
<td>6.2</td>
<td>4.1</td>
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</tr>
<tr>
<td>NT</td>
<td>2</td>
<td>3.3</td>
<td>2.8</td>
<td>3</td>
<td>3.5</td>
<td>6.7</td>
<td>4.4</td>
<td>3.6</td>
<td>4.1</td>
<td>4.4</td>
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<td>Total</td>
<td>220.8</td>
<td>253.6</td>
<td>244</td>
<td>243.8</td>
<td>259.1</td>
<td>274.3</td>
<td>265.2</td>
<td>241.5</td>
<td>243.4</td>
<td>244.8</td>
</tr>
</tbody>
</table>

Source: LASSIE database administered by the Commonwealth Attorney-General’s Department

Notes: 1. LASSIE is an unofficial statistical record and subject to alteration as errors are discovered, or new data added. Table 1 summarises LASSIE data as recorded in October 2003.
2. Dollars are expressed in 1990/91 values.

Reduced expenditure has led to the imposition of stringent income, assets and merit tests on eligibility for legal representation. Whilst eligibility varies as between States and Territories the financial eligibility criteria have become so stringent that only people on very low incomes qualify for legal aid. Not all those on welfare benefits and pensions have been eligible for full legal aid (see Waters and Percival 2001). In family law matters as the JRC researchers found (Hunter 2000: pp. 244-5) some solicitors have ceased legal aid work because their clients are no longer eligible for legal aid.

A change in demand for legal aid work is the second major contributing factor. One measure of changed demand is changes in the numbers of applications for legal aid requiring representation by legal practitioners. Figure 4 below summarises the number of such applications received per 1000/population in each State and Territory over 1990/91 to 2001/02. Over the period except in NSW and the ACT there was a declining trend in the applications received for legal aid requiring representation by legal practitioners.
Figure 4: Applications Received /1000 population by State

The expenditure driven decline in eligibility appears to have also discouraged family law litigants from applying for legal aid. A Family Court study (Smith 1999: p. 21) into the effects of the 1996/97 changes to Commonwealth funding shows that 35.8 per cent of respondents who did not apply for legal aid had been told they were ineligible; another 47.8 per cent of respondents believed they were ineligible.

Changes in the numbers of approvals of legal aid requiring representation by legal practitioners is another measure of changes in demand for legal aid work. Figure 5 below summarises the number of such applications approved per 1000/population in each State and Territory over 1990/91 to 2001/02. In most States and Territories the number of applications for legal aid approved requiring representation by legal practitioners fell until 2000/01, when approvals increased in some States, most notably in NSW.
Change in the opportunity cost of legal aid work is the third major contributing factor. Opportunity cost is “a measure of the economic cost of using scarce resources to produce one particular output in terms of the alternatives thereby foregone” (Pass et. al. 1988: pp. 367-8). In this context there are two relevant dimensions of opportunity cost. The first is the economic cost incurred by private practitioners in representing a legally aided person, if the alternative is to represent a self-funding client in a comparable type of matter, such as family law proceedings, or a criminal trial.

We would expect private practitioners representing legally aided clients to have incurred opportunity costs. Payments by legal aid commissions have always been less than fees paid by self-funding clients. In the 1970s the legal profession agreed that private practitioners “should receive a reduced rate of payment as their contribution towards legal aid and that ... a 20% reduction from the normal scale [was] an acceptable contribution”(AGD 1984: p. 81). Payments for legal aid work “whether paid on an item remuneration basis or a lump sum fee basis, [were] based upon 80% of the amount that would normally be paid by a non legally assisted person” (ibid; see also NLAAC 1990: p. 68-9). In the 1980s legal aid work was paid on this basis with no obvious adverse affects on supply, regular grumbles from private practitioners notwithstanding.

Accordingly if a change in opportunity cost has been a factor in disengagement from legal aid work the evidence should show the economic costs incurred by private practitioners representing legally aided clients instead of self-funding clients increased. We would expect

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17 The Law Council (2003 (b)) submission to Senate inquiry into legal aid suggests the agreed rate of payment was 90 per cent. This may be based on the fees paid by the Australian Legal Aid Office (1976: p. 1), which in family law cases appears to have paid private practitioners 90 per cent of the fees prescribed by the Family Law (Costs) Regulations, or, in the absence of a relevant scale, 90 per cent of the “normal proper fee” charged to self-funding clients.
at the very least that the evidence shows that in the 1990s payments by legal aid commissions fell below 80 per cent of scale fees, or alternatively, fell below 80 per cent of the fees ordinarily charged by private practitioners to self-funding family law and criminal law clients.

Scale fees in family law work are fixed by regulations made under the *Family Law Act*.\(^\text{18}\) There are generally no scale fees prescribed in criminal law work. Table 2 below summarises the hourly rates paid by legal aid commissions for family law work over 1991-2003 expressed as a proportion of the *Family Law Act* scale. In 1991 legal aid commissions in Victoria, NSW, Queensland, the Northern Territory and Western Australia paid private practitioners hourly rates equivalent to or exceeding 80 per cent of the costs scale for family law work. In Tasmania, the ACT and South Australia payments for legally aided family law work were less than 80 per cent of the scale hourly rate. In Victoria and NSW generally hourly rates for legally aided family law work remained constant at 80 per cent of the scale rate over the period. In the ACT and Tasmania hourly rates paid for legal aid work as a proportion of scale rates increased, in the ACT from 77 per cent in 1991 to 81 per cent in 2003, and in Tasmania from 57 per cent in 1991 to 65 per cent in 2003. In the Northern Territory hourly rates remained constant at 90 per cent of the family law scale. In the other jurisdictions payments for legally aided family law work as a proportion of scale rates declined, in Queensland from 84 per cent in 1991 to 74 per cent in 2003, in Western Australia from 81 per cent in 1991 to 77 per cent in 2003 and in South Australia from 75 per cent in 1991 to 70 per cent in 2003.

### Table 2: Hourly Rates paid for Family Law Matters by LACs as a Proportion of the Family Law Rate, 1991-2003.

<table>
<thead>
<tr>
<th>Year</th>
<th>Tas</th>
<th>Vic</th>
<th>ACT</th>
<th>NSW</th>
<th>Qld</th>
<th>NT</th>
<th>WA</th>
<th>SA</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>0.57</td>
<td>0.80</td>
<td>0.77</td>
<td>0.80</td>
<td>0.84</td>
<td>0.90</td>
<td>0.81</td>
<td>0.75</td>
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<tr>
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<td>0.80</td>
<td>0.74</td>
<td>0.80</td>
<td>0.82</td>
<td>0.90</td>
<td>0.80</td>
<td>0.75</td>
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<tr>
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<td>0.90</td>
<td>0.80</td>
<td>0.80</td>
<td>0.90</td>
<td>0.80</td>
<td>0.73</td>
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<tr>
<td>1994</td>
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<td>0.80</td>
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<td>0.84</td>
<td>0.77</td>
<td>0.90</td>
<td>0.80</td>
<td>0.71</td>
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<tr>
<td>1995</td>
<td>0.70</td>
<td>0.80</td>
<td>0.88</td>
<td>0.84</td>
<td>0.77</td>
<td>0.90</td>
<td>0.80</td>
<td>0.71</td>
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<tr>
<td>1996</td>
<td>0.74</td>
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<td>0.85</td>
<td>0.85</td>
<td>0.75</td>
<td>0.90</td>
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<td>1997</td>
<td>0.69</td>
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<td>0.80</td>
<td>0.70</td>
<td>0.90</td>
<td>0.76</td>
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<td>0.77</td>
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<td>0.90</td>
<td>0.77</td>
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<tr>
<td>1999</td>
<td>0.63</td>
<td>0.74</td>
<td>0.74</td>
<td>0.74</td>
<td>0.65</td>
<td>0.90</td>
<td>0.74</td>
<td>0.59</td>
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<tr>
<td>2000</td>
<td>0.61</td>
<td>0.79</td>
<td>0.71</td>
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<td>0.71</td>
<td>0.90</td>
<td>0.71</td>
<td>0.64</td>
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<td>2001</td>
<td>0.60</td>
<td>0.76</td>
<td>0.83</td>
<td>0.76</td>
<td>0.69</td>
<td>0.90</td>
<td>0.69</td>
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<tr>
<td>2002</td>
<td>0.58</td>
<td>0.80</td>
<td>0.81</td>
<td>0.81</td>
<td>0.74</td>
<td>0.90</td>
<td>0.77</td>
<td>0.70</td>
</tr>
<tr>
<td>2003</td>
<td>0.65</td>
<td>0.80</td>
<td>0.81</td>
<td>0.81</td>
<td>0.74</td>
<td>0.90</td>
<td>0.77</td>
<td>0.70</td>
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<table>
<thead>
<tr>
<th>Year</th>
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</thead>
<tbody>
<tr>
<td>2003</td>
<td>96</td>
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</tbody>
</table>

Source: Family Law and Legal Assistance Division, Commonwealth Attorney-General’s Department

Notes: LASSIE is an unofficial statistical record and subject to alteration as errors are discovered, or new data added. Table 1 summarises LASSIE data as recorded in October 2003.

\(^{18}\) Scale fees generally apply in default of agreement between solicitor and client, and to calculate the amount of party and party costs for the purposes of costs orders.
In summary the data in Table 2 does not show any dramatic changes in the disparity between hourly rates paid to private practitioners in family law matters and hourly rates fixed by the Family Law Act costs scale. In some States hourly rates paid by legal aid commissions for family law work remained slightly below 80 per cent of scale rates. In most States and the ACT hourly rates either increased towards 80 per cent of scale, or were generally equivalent to scale. Hourly rates paid by the Legal Aid Commission of the Northern Territory were stable at 90 per cent of the family law scale across the period. Measured against changes in the Family Law Act fees scale the opportunity costs incurred by private practitioners doing legally aided family law work did not change significantly over 1991-2003.

The alternative is that the evidence demonstrates that payments by legal aid commissions have fallen below 80 per cent of fees ordinarily charged by private practitioners to self-funding family law and criminal law clients. We cannot definitively measure changes in the amounts paid by legal aid commissions. There are no definitive benchmarks of the amounts paid for legal aid work in 1990, or how such payments changed over 1990 to 2003. Legal aid commissions use internal fee scales. Some legal aid work referred to private practitioners is paid at hourly rates; other referred cases are paid on a lump sum or fixed fee basis. Nor can we definitively measure changes in the amounts charged by private practitioners for self-funded family law and criminal law work, or how those amounts changed over the period. In any event comparing payments paid for legal aid work and fees charged to self-funding clients is problematic. It was impracticable, for instance, for the Griffith researchers (p. 156) to compare payments by legal aid commissions and hourly rates in cost agreements between solicitors and self-funding clients, as it was, for that matter, to compare such payments and amounts paid by government agencies or allowed in statutory costs scales.

We do know the nominal value of hourly rates paid by legal aid commissions in work referred to private practitioners, including in Commonwealth law matters. Table 3 below summarises hourly rates paid by legal aid commissions in referred family law cases over 1991-2003. The data shows, first, that hourly rates increased over time, and, secondly, that hourly rates paid by legal aid commissions varied amongst the State and Territories. In 2002 the highest amount was in the Northern Territory at $133.80 per hour, and the lowest was in Tasmania at $86.00 per hour. We understand that legal aid commissions paid comparable hourly rates in criminal law matters.
There is also indicative evidence of the hourly rates charged by private practitioners to self-funding clients. In family law work the best the Griffith researchers could say with any certainty (p. 145) was that in 1998/99 private practitioners in Queensland believed “there was a significant disparity between remuneration they received for legally aided work as compared with the remuneration they received for work performed for self-funding family law clients”. One firm reported (p. 126) needing $90.00 per hour to recover fixed operating costs. The JRC research did not specifically compare payments for legal aid work and fees charged to self-funding family law clients. However the researchers did find (Hunter 2000: p. 224) that “legal aid clients have considerably less funds at their disposal to spend on family law litigation than do ordinarily prudent self-funding clients in comparable cases”.

The two NLA surveys provide the best direct evidence of hourly rates charged to self-funding family law clients. Forty per cent of respondent firms in the first survey charged self-funding clients scale hourly rates, in 1999, $136.00 per hour. Amongst the 57 per cent of firms that reported charging self-funding clients fees exceeding the Family Law Act scale the mean hourly rate was $216.56. The mean hourly rate for family law work amongst all respondent firms was $176.00 (Fleming 2002: p. 5). The results of the 2001 NLA survey are comparable. The average fee charged to self-funding clients in the 127 respondent firms was $199.00 per hour, in the case of employed solicitors, and $249.00 per hour, in the case of principals (NLA 2002 (a)).

In criminal law work the Griffith report is the major source of evidence. The researchers sought to compare hourly rates for legal aid work in Queensland in 1998 with fees paid by self-funding accused, and Federal and Queensland Government agencies. Comparison was not facilitated by the fact that practitioners did not “adopt a consistent approach in setting fees
for private criminal law work (there being no statutory Scale)” (p. 148). Inquiries revealed that practitioners strongly believed (ibid) that payments for legally aided criminal law work compared “unfavourably with fees rates they could expect from privately funded clients”. One respondent reporting (p. 85) that, no legal work “pays worse than legal aid crime but there’s no legal work that pays better than privately-funded crime”. The Griffith researchers found (pp. 153-4) that hourly rates paid by Legal Aid Queensland for criminal law work were comparable to rates paid by other Queensland Government agencies, but less than hourly rates paid for legal representation in criminal matters by the Commonwealth Director of Public Prosecutions and the Australian Government Solicitor. Overall hourly rates paid to private practitioners in Queensland for legal aid work were found (p. 155) to be “generally below what government departments and agencies will pay for legal services”, taking into account factors such as cost capping and fixed fees.

Another and more recent source of evidence is data from financial performance surveys conducted by FMRC Legal Pty. Ltd. (FMRC Legal).19 In 2002 the Law Council asked FMRC Legal to examine changes in the cost of running a solicitors’ practice. Table 4 reproduces the FMRC Legal data provided to the Law Council on the cost of delivering “a chargeable hour of legal time” (2003(b): p. 20) in 1994, 1998 and 2002 in five types of solicitors’ practices. Charge out costs have reportedly increased on average by 25 per cent over the period, with cost increases of almost 50 per cent in the case of principals in mid-sized city firms and firms in regional cities. The data reports the cost of a chargeable hour of legal time per employed solicitor and per principal in 2002 in CBD firms at $155.00 and $232.00, in solicitors’ firms in regional cities, $140.00 and $212.00, in suburban practices, $153.00 and $266.00, and in solicitors firms’ in remote country regions, $132.00 and $194.00.

Table 4: Changes in Total Charge Costs 1994-2002

<table>
<thead>
<tr>
<th>Year</th>
<th>Mid-Sized CBD Firm</th>
<th>Mid-Sized CBD Principal</th>
<th>Small-Sized CBD Solicitor</th>
<th>Small-Sized CBD Regional City Solicitor</th>
<th>Regional City Solicitor</th>
<th>Regional City Principal</th>
<th>Suburban Solicitor</th>
<th>Suburban Principal</th>
<th>Country Solicitor</th>
<th>Country Principal</th>
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</thead>
<tbody>
<tr>
<td>1994</td>
<td>129</td>
<td>183</td>
<td>135</td>
<td>157</td>
<td>109</td>
<td>143</td>
<td>138</td>
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<td>124</td>
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<tr>
<td>1998</td>
<td>134</td>
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<td>171</td>
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<td>164</td>
<td>131</td>
<td>154</td>
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<tr>
<td>2002</td>
<td>155</td>
<td>232</td>
<td>155</td>
<td>232</td>
<td>140</td>
<td>212</td>
<td>153</td>
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<td>31</td>
<td>69</td>
<td>15</td>
<td>30</td>
<td>8</td>
<td>39</td>
</tr>
</tbody>
</table>

Source: Law Council of Australia, Erosion of Legal Representation Project, Draft Report, November 2003, p. 20

Notes: Hourly rates do not appear to be indexed, or to be expressed in real $ terms.

The data in Table 4 does not directly report the cost of a chargeable hour of legal time in family law or criminal law matters. However it is likely to do so indirectly. FMRC Legal selected the costs data on the basis (ibid: p. 20) that “small to mid-sized practices” were firms “that have traditionally provided legal aid and pro bono services”. As most approvals of legal aid are in family law or criminal matters we would expect the data in Table 4 to reflect at least in part the costs of a chargeable hour expended in representing a legally aided person. Other

19 The annual FMRC surveys do not include barristers. As it appears proportionately more “larger and successful firms” participate the results are not representative of the financial performance of solicitors’ practices as a whole (Law Council 2003(b): pp. 19-20).
FMRC Legal data links hourly rates charged by solicitors' firms to profitability. The 2001 FMRC Legal (2002: pp. 6-7) financial performance survey reported hourly rates of $247.00 for principals and $196.00 for employed solicitors in solicitors' firms generating an average net profit of only $42,945.00 per partner. This data is also likely to be indirectly reporting, once again, at least in part, hourly rates charged in self-funded family law and criminal law matters. The ABS legal services industry data demonstrates a link between operating profit and firm size. Smaller firms tend to be the least profitable, and smaller firms are those most likely to undertake family law and criminal law work, as we discuss below.

In summary the available evidence clearly indicates an increase in the disparity between hourly rates charged in self-funded family law and criminal law matters and hourly rates paid to solicitors and firms representing legally aided persons. The mean costs of a chargeable hour of legal work in 2002 amongst the firms described in Table 4 above was almost $182.00 per hour. Whereas Table 3 above shows that the mean hourly rate paid for legally aided family law work was $113.50. In the other words the hourly rate paid for legally aided family law work in 2002 was only 62 per cent of the costs of a chargeable hour of legal time amongst the small and medium-sized solicitors’ firms reported in the FMRC Legal study.

As we would expect the evidence shows that the indicative increase in opportunity costs incurred by private practitioners in representing legally aided persons has not been evenly distributed. In solicitors’ firms in remote country regions the FMRC Legal study reports charge out rates in 2002 of $132.00 per hour. In these firms it seems likely hourly rates paid by legal aid commissions continued to approximate 80 per cent of hourly rates ordinarily charged in family law and criminal law matters. The FMRC Legal study suggests that a not dissimilar situation many existed amongst employed solicitors. The data reported in Table 4 indicates the charge out cost of an employed solicitor’s time in 2002 ranged from $140.00 to $155.00 per hour. In which event the mean hourly rate paid by legal aid commissions for family law work in 2002 is likely to have approximated between 70 and 80 per cent of charges ordinarily made for the cost of an employed solicitor’s time in family law and criminal law matters. This was not so in the case of principals. The data in Table 4 reports the cost of a principal’s time as ranging from $212.00 to $232.00 per hour. Using the mean hourly rate ($113.50) paid for legally aided family law work in 2002 the suburban, mid and small sized CBD and regional city firms in the FMRC Legal study incurred opportunity costs significantly greater than 20 per cent of charges ordinarily made for the cost of a principal’s time in family law and criminal law matters.

There are incompatibilities in the evidence of rates charged to self-funding clients. Hourly rates, as reported in the NLA surveys, are not obviously the same as charge out costs as measured by FMRC Legal. The rates reported in low profit firms in the 2001 FMRC Legal survey and the two NLA surveys are consistently greater than the charge out rates in the data provided by FMRC Legal to the Law Council. It is also notable that in the first NLA survey in 1999 40 per cent of firms reported charging the Family Law Act scale rate, $136.00 per hour, to self-funding clients, an amount significantly lower than the mean hourly rate of $216.56 charged by the majority of the respondent firms. This may reflect, as we discuss below, differences in the composition of the labour market for legal aid. We would expect differences in the evidence. Obtaining information about fees charged to self-funding clients is akin to asking the price of the airfare from Melbourne to Sydney.20 There are different prices, as there are many variables. This does not detract from the value of the evidence in

20 Thanks to Pascoe Pleasence, LSC Director of Research, for this useful analogy.
indicating that hourly rates charged to self-funding clients are significantly greater than hourly rates paid by legal aid commissions.

However, changes in the value of the nominal hourly rate paid by legal aid commissions is not the only measure demonstrating an increase in opportunity cost in legal aid work. In the 1990s legal aid commissions introduced measures to cap or limit expenditure in matters approved legal aid “to spread limited legal aid funds among as many matters as possible, and to encourage the more efficient conduct of the cases in which they apply” (SLCRC 1998: p. 79). One such measure was cost capping, “set at various levels and applying in various circumstances” (ibid). In Commonwealth law matters cost caps limiting payment of professional costs to $10,000.00 in family law matters and $15,000.00 in child representation matters, including witnesses expenses and other disbursements, have been applied since 1 July 1998 (AGD 2003(a)). Costs are not capped in Commonwealth criminal law matters. Legal aid commissions must consider alternative funding if the costs in any criminal trial will exceed $40,000.00. 21

The only evidence of the impact of cost capping in family law matters refers to experiences in the late 1990s. In 1998 an earlier Senate inquiry into legal aid reported evidence (SLCRC: p. 85) that cost caps applied to family law matters approved legal aid were set at “too low a level”. The weight of the evidence supports this view, although in the Springvale research one respondent (p. 12) estimated that family law cases settled at a conciliation conference would cost $10,000.00 or less. Data obtained from firms in the review of professional cost scales in Federal jurisdictions in 1997 also indicated (AGD 1998: p. 35) pre-trial professional costs per party in non-complex family law matters of less than $10,000.

In most other instances the evidence clearly indicates a cost of $10,000.00 is inadequate. The Family Court costs scale proposed in the Federal professional cost scales review (the Federal professional costs review) (AGD 1998: p. 33) recommended practitioners’ costs of $9,000.00-$14,000.00 in more complex family law matters resolved after a pre-hearing conference. In family law matters that proceed to trial the evidence convincingly indicates that practitioners’ costs significantly exceed $10,000.00. The original data collected in the Federal professional costs review (ibid: p. 36) predicted costs of $17,625.00 per party in an average three-day trial. Additional data was subsequently obtained from solicitors and firms, because of concerns that the number of legally aided cases had skewed the sample, so that the data did not accurately report market rates. The additional data predicted (ibid) total costs of $20,715.00 per party in an average three-day trial of a family law matter of standard complexity. In the Springvale research the majority of solicitors estimated (p. 12) the average cost of contested family law matters at $15,001.00 to $20,000.00 per party. One solicitor estimated $10,000.00-$15,000.00 for a short trial, and up to $30,000.00 per party for a complex trial. Only a minority of respondents believed (p. 12) $10,000.00 was a more or less accurate reflection of the average cost of a contested family law matter.

It is not clear that the cost-cap of $10,000.00 is a major factor contributing to the increased opportunity costs of legal aid work. There are few legally aided cases in Commonwealth family law matters in which costs exceed $10,000.00. Figure 6 below summarises the data reporting average case costs in legally aided family law and all legally aided cases over 1998/99 to 2001/02. The average cost of family law matters approved in all years in the

21 Authorised alternatives are handling the matter in-house, using a Public Defender or retained counsel, or negotiating a fee package with a legal practitioner. An alternative funding package is subject to a strict limit on total costs. In trials in which the costs or commitment will exceed $40,000.00 legal aid commissions are required to inform the AGD (AGD 2003(a)).
period was less than $2,300.00. This suggests that the cost cap applied to Commonwealth family law matters operates less as an opportunity cost factor than as a disincentive to private practitioners to represent persons approved legal aid in Commonwealth family law matters at all, faced with the prospect that funding will cut out when professional costs reach $10,000.00.

**Figure 6: Average Case Cost, family and total, Australia**

The other measure capping expenditure in matters approved legal aid is stage of matter payments, which impose two types of limits on amounts paid to private practitioners. The first is that approval of legal aid is limited to a particular stage in a matter, in a family law matter, for instance, up to the conclusion of a pre-hearing conference. The second limitation is that payments to private practitioners in legally aided matters approved on a stage of matter basis are cost capped. An upper limit is imposed on the amounts that are payable to private practitioners, irrespective of the actual services required by a legally aided person, or actually provided by the private practitioner. In Victoria in 2002, for example, the maximum amount payable to solicitors representing a legally aided applicant in proceedings in the Family Court or the Federal Magistrates Court for a further recovery order was $780.00. In similar proceedings in the Magistrates Court the maximum amount payable was $600.00 (NLA 2002 (b): p. 5).

The interest group evidence is that amounts paid to solicitors and firms in family law matters approved legal aid on a stage of matter basis are inadequate. One respondent to the Springvale survey reported (p. 12) that, “the stage of matter limits are woeful”. This view is shared by others, the Law Council, for instance, reporting that (2003: p. 21) stage of matter
payments “are poorly calculated and inflexible, solicitors are having to do more hours than the lump sum funding allows for, thereby effectively pushing down the hourly rate”.

Amongst the research-based evidence the principle source is the second JRC report, which sustained solicitors’ complaints that the amount of work done in family law cases “invariably exceeded the amount allowed in the grant” of legal aid (Hunter 2000: p. 226). In almost 60 per cent of the cases investigated (ibid) the researchers found evidence that the cost of the work actually performed by solicitors for legally aided family law clients exceeded the amount paid by legal aid commissions, or evidence that firms incurred additional expenses, such as disbursements and agents’ or barristers’ fees, not included in the approval of legal aid. In most cases the cost of the unpaid hours of legal work or unrecovered expenses exceeded legal aid payment by 45 per cent, with an average unpaid amount of $1,625.00 (ibid: p. 227).

In the JRC sample the mean amount for fees, disbursements and barristers’ fees paid to solicitors for legally aided pre-hearing work was $3,372.00, or approximately 45 per cent less than the mean aggregate amount ($6,066.00) in self-funded family law cases not proceeding to a hearing (ibid: p. 255). The mean amount of solicitors’ professional fees (ibid: p. 224) in legally aided cases was $1,980.00, or approximately 50 per cent of the mean amount ($3,886.00) in self-funded family law matters. As only eight family law cases in the JRC sample proceeded to final hearing no meaningful data was available on legal aid fees paid at trial. In the eight cases that did cases solicitors were paid on average $4,290.00, compared to the estimated average amount of $14,000.00 paid by self-funding clients in final hearing cases (ibid: p. 225).

Comparing the evidence obtained in the Federal professional costs review and legal aid commission fee scales tend to confirm the JRC findings. The stages of matter classifications in these two sources of evidence are different. Nor do legal aid commission fee scales distinguish between direct, standard and complex cases. Nevertheless comparison suggests that amounts allowed in legal aid commission fee scales in family law work approved legal aid on a stage of matter basis are significantly less than fees charged to self-funding family law clients for comparable work. The Federal professional costs review reported (AGD 1998: p. 35) average fees of $2,070.00 in a direct matter, $4,915.00 in a standard matter and $37,660.00 in a complex matter, although the latter, for statistical reasons, conveyed little information, in matters disposed of following a conciliation conference, and up to a pre-hearing conference. Amounts paid by legal aid commissions to solicitors representing legally aided parties in family law matters up to the conclusion of a pre-hearing conference ranged from $360.00 (maximum 3 hours) in the ACT to $600.00 (maximum 6 hours) in NSW (NLA 2002 (b): p. 5). We would expect further comparisons of the Federal professional costs review data and legal aid commission fee scales to indicate similar disparities.

22 Similar concerns are evident in Canada. Bar Association research in 2000 found expenditure or service ceilings prevented private practitioners from recovering the full cost of services performed for legally aided clients. One respondent reported (p.59) practitioners “end up spending much more time than this on most files and working for nothing”. Respondents estimated (p. 53) legal aid payments in ‘typical’ cases averaged CAN$850.00 as compared to an average estimate of CAN$2,678.00 as the market value of the services actually delivered to legally aided clients. The average estimated legal aid payment in ‘extraordinary cases’ was CAN$2,820.00, or $8,629.00 less than the market value (CAN $11,449.00) of the services actually delivered.

23 Data on the amounts paid in self-funding cases in the JRC sample could not be disaggregated into separate amounts for pre-hearing and hearing costs. Costs in the self-funding cases are probably skewed towards the lower end of the spectrum, with the result that the disparity in payments made by legal aid providers and fees paid by self-funded clients is understated (Hunter 2000: 224).

24 The JRC research demonstrated a wide range in the figures for average amount billed per private family law file. Whilst there were no significant differences between types of firms in average amounts bills there was a significant negative correlation between percentage of family law income earned from legal aid and the average amount billed per private family law file, i.e. the less legal aid work undertaken by the firm the higher its average bill, and vice versa (Hunter 1999: 69).
The evidence discussed above convincingly indicates that a significant disparity exists between amounts paid in legal aid work approved on a stage of matter basis and fees charged to self-funding clients by private practitioners. The evidence adduced in the JRC research and the Federal professional costs review presents a strong case that the disparity is in the order of 50 per cent of fees ordinarily charged by private practitioners in family law matters, and may be greater in some instances. If so, stage of matter approvals of legal aid in referred family law matters are likely to be a major factor contributing to the increased opportunity costs incurred by private practitioners in representing legally aided persons.

Another way of portraying this disparity is by reference to differences in hourly rates. We could assume, for example, that the evidence from the JRC research and the Federal professional costs review survey also indicates that solicitors are only paid for 50 per cent or less of the time spent in representing legally aided family law clients. In that case the evidence suggests a significant disparity between actual and nominal hourly rates in family law matters approved legal aid on a stage of matter basis. In 2002, for instance, the nominal value of the mean hourly rate paid by legal aid commissions in family law matters was $133.50, but, if, in effect, solicitors are only for 50 per cent of their time, the actual hourly rate was in the order of $55.00. Payment at $55.00 per hour was approximately 37 per cent of the scale rate for family law work in 2002, $148.50, per hour, or 22 per cent of the published rates, $247.00 per hour, in low profit firms in the 2001 FMRC Legal survey, or only 28 per cent of partner’s hourly rates, $249.00, in the 2001 NLA survey. We cannot assume that the evidence from the JRC research or the Federal professional costs survey translates into differences in actual and nominal hourly rates. Moreover, lump sum payments in legal aid commissions fee scales are not necessarily time based, and not all legal aid work approved on a stage of matter basis is underpaid. Nevertheless we would expect further research to demonstrate that actual hourly rates in legal aid work paid on a stage of matter basis are below scale rates, and significantly below hourly rates charged by solicitors to self-funding family law clients.

Stages of matter payments have also discouraged private practitioners from agreeing to represent persons eligible for legal aid. The Springvale research reports (p. 14) some solicitors believed payments were insufficient to finance appropriate standards of legal representation, and had ceased legal aid work to avoid an increased risk of professional negligence actions by disgruntled family law clients. Other evidence shows some solicitors believe expenditure restrictions mean that an approval of legal aid now confers negligible benefits. The Griffith researchers reported (p. 98) one practitioner who suggested that legal aid “had become a funding source of ‘last resort’, to be used only where there were absolutely no other sources of funds available to fund representation ... it may be preferable for a party, even where eligible for legal aid in a particular matter, to find other sources of finance”.

Anecdotal reports to the AGD in 2003 also indicate that solicitors and firms are contracting with persons otherwise eligible for legal aid in Commonwealth law matters to provide representation at reduced rates of payment, as an alternative to obtaining a grant of legal aid.

The other opportunity cost factor incurred in representing persons eligible for legal aid is transaction costs, that is, costs incurred by private practitioners in transacting the approval system, negotiating with legal aid commissions, and other costs associated with approvals and refusals of legal aid. Solicitors interviewed in the Griffith research, for instance, identified (p. 79) the “‘hassle’ of dealing with Legal Aid Queensland (including frustrations arising from ‘merits’ decisions being made by legally unqualified LAQ staff)” as the second most common
reason for ceasing legal aid work. The JRC research also identified transaction costs as a relevant factor. Some solicitors had (Hunter 2000: p. 244) stopped “doing legal aid work because the Legal Aid Commission was too difficult to deal with”. Others complained (ibid: p. 00) changes to funding arrangements had “shifted control in running the case from the solicitor to the Legal Aid Commission” (see also Hunter 1999: p. 69). Similar claims are apparent in the cross-national evidence.25

Obviously not all solicitors and firms representing legally aided persons have incurred similar opportunity costs. As the Griffith researchers pointed out (p. 129) “the choice for some is not between doing legal aid work and private work, but between doing legal aid work and nothing”. Whilst this was likely to be true of some solicitors and firms it was not the choice faced by private practitioners generally. Since the early 1990s high demand for legal work has resulted in significant income growth in the Australian legal services industry. Real income expressed in $2002 rose from $5940m in 1992/93 to $8379m in 2001/02, representing an increase of 41 per cent in real terms over the period. Income growth was particularly marked between the 1992/93 and 1998/99 ABS Legal Services Industry surveys.

Table 4 below summarises the ABS data on sources of income in the legal services industry over 1992/93 to 2001/02. Demand as measured by changes in sources of income for criminal law work declined, from 4.7 per cent of the total income of the legal services industry in 1992/93 to 1.7 per cent in 2001/02. Real income from criminal law work declined by over 50 per cent over the period. Without knowing the sources of income for criminal law work, and how those sources changed over the period, we cannot interpret this data with any reliability. It suggests that private practitioners with no choice but criminal law work may not have incurred the same magnitude of opportunity cost in representing legally aided accused. Save that the fall in demand and income from criminal law work is likely to have encouraged criminal law practitioners into other areas of legal work, leaving labour markets for legal aid. Table 4 also shows that demand over 1992/93 to 2001/02 for family law work did not change significantly, although real income increased by 25.5 per cent. Once again we cannot explore this data in detail. The increase in income over the period in the face of no significant change in demand clearly suggests the presence of a healthy market amongst private clients for family law work. As such it indicates that the opportunity costs described above were a tangible factor in decisions by private practitioners to accept or decline instructions from persons approved legal aid in family law matters.

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25 Private practitioners in Canada complain of costs incurred in satisfying requirements to vary grants of legal aid and compliance with billing and accountability procedures (CBA 2000: p. 61). Similar complaints are evident in England, with 40 per cent of solicitors surveyed in 2002 identifying too “much (The Law Society 2003: p. 47) bureaucracy” as the second most important reason why firms were ceasing or scaling back legal aid work.
### Table 4: Real Income for the Legal Services Industry, 1992/3-2001/2, $2002

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<td>146</td>
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<td>1.7</td>
</tr>
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<td>86</td>
<td>80</td>
<td>-22.1</td>
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<td>2391</td>
<td>3011</td>
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<td>7428</td>
<td>8379</td>
<td>41.1</td>
<td>100.0</td>
</tr>
</tbody>
</table>

**Source:** ABS (1994, 2000, 2003)

**Notes:**
- a. The other category includes such areas as personal injury, industrial relations, intellectual property and administrative and constitutional law.

This discussion leads into the second relevant dimension of opportunity cost. In this case we measure the opportunity cost of legal aid work, not by reference to fees charged to self-funding family and criminal law clients, but if the alternative is that private practitioners perform other legal work in demand in markets for legal services. Table 4 above shows that over 1992/93 to 2000/01 demand for property and commercial-type legal work remained strong, with real income from property law increasing by almost 31 per cent, and, in the case of commercial, business and finance work, almost 27 per cent. Demand and income growth was strongest in personal injury, industrial relations, intellectual property, administrative and constitutional law and other matters work. Income from these types of legal work increased from 23 per cent of total income in 1992/93 to almost 36 per cent in 2001/02. Real income from such work increased by slightly more than 100 per cent over the period.

There is no data that definitively reports the fees charged by private practitioners for legal work in property and commercial, business and finance matters and the other types of legal work exhibiting strong demand and income growth, or how those fees changed over 1992/93 to 2001/2. Indicative data is almost certainly held by some legal employment agencies, practice consultancy firms such as FMRC Legal and law societies. The available evidence indicates that solicitors’ fees of $300.00- $400.00 per hour are not uncommon in commercial-type and major personal injury legal work. In 2001 amongst high profit firms generating an average net profit of $526,417 per partner FMRC Legal reported (2002: pp. 6-7) average published hourly rates of $304.00 for principals, and $224.00 per hour for employed solicitors. Partners in a prominent personal injury firm reportedly (AFR 2003: p.55) charged $350.00 per hour in 1999, and $395.00 per hour in 2003, and associates $295.00 per hour in 1999, and $340.00 per hour in 2003. More recent evidence (SMH 2004: p. 3) from the Chief Justice of NSW suggests that some partners, senior solicitors and consultants charge fees in the range of $500.00-$750.00 per hour for commercial-type legal work.

This indicative evidence allows us to demonstrate the alternative measure of the opportunity costs incurred by private practitioners doing legal aid work. In 2001, for instance, the mean
hourly rate for legally aided family law work was $106.95, or only 35 per cent of the $304.00 per hour charged by partners in the high profit firms in the FMRC Legal survey, the lower end of partners’ hourly rates described above. In 2003 the mean hourly rate for legally aided family law work was $106.95, or only 15 per cent of $700.00 per hour, the top end of the hourly fees charged by partners, senior solicitors and consultants for commercial-type legal work reported by the Chief Justice of NSW. These disparities are increased if we factor in the indicative evidence discussed above that the actual value of payments for legal aid work may sometimes be in the order of 50 per cent less than the nominal value in legal aid commission fee scales. The second dimension of opportunity costs suggests that private practitioners have few, if any, financial incentives to do legal aid work, if real opportunities exist to undertake commercial and business-type work, and other highly paid legal work available in markets for legal services.

There are also social factors that have contributed to disengagement from legal aid work. In earlier parts of the paper we have referred to social investment of the private legal profession in legal aid, and the social dimensions of its participation in legal aid work. Although state legal aid schemes are public policy projects the social functions of legal aid are not limited to the delivery of free or subsidised legal services, or enabling persons eligible for legal aid to protect legal rights and interests. Legal aid is also a socio-legal institution, its existence not contingent on state patronage or expenditure, and is closely linked historically to the interests, aspirations and responsibilities of the legal profession. The JRC research, for instance, revealed (Hunter 2000: p. 246) some solicitors “had felt the same [costs] pressures as their colleagues” to cease legal aid work, but had decided to continue to represent legally aided clients “for philosophical reasons”, such as a belief that “there needs to be equality of opportunity at law as well as other aspects of society”. Similarly the Griffith researchers found “considerable evidence” (p. 26) that the goodwill of family law and criminal law practitioners was an important factor in maintaining service delivery in a cash poor legal aid system in Queensland.

Little attention has been paid to the social dimensions of legal aid. In Australia almost without exception governments, policy makers and the interest groups generally conceptualise legal aid as the modern version of the in forma pauperis procedures, updated to achieve equal access to justice for the poor (see Barralet 1995; see also Cappelletti 1972). One result has been to overlook the institutional role of legal aid in the relationship between governments and the private legal profession, and via that relationship, the legal profession and society, in the 20th century common law world. This relationship has been envisaged for heuristic purposes (Paterson 1993: p. 301-2; see also 1996) as a “bargain” or a ‘contract” negotiated between early 20th century governments in the common law societies and the private legal profession. The purpose of the “contract” was to regulate the legal profession and its work. Governments agreed to allow the legal profession to self-regulate, and mandated or acquiesced in reservations on entry and work to ensure the semi-exclusive status of its work, and protect the incomes of legal practitioners. The law societies and the bar associations agreed (ibid: p. 307-10) to a service ethic, to discipline legal practitioners to ensure competence and protect consumers, and to deliver a social justice dividend, in the form of assuming responsibility for the provision of legal aid to poorer citizens.

Until the 1960s the regulation of the legal profession in Australia closely followed the early 20th century model (Weisbrot 1990: p.1-4). Since then the legal profession, its work and relationships with governments and the society have encountered various trajectories of change. The number of law schools has more than doubled, producing huge increases in the
numbers of law graduates. Women now comprise a majority of law students, and women lawyers are a growing presence in legal practice. Levels of internal competition have increased significantly, amidst growing concerns competition has de-professionalised legal work and damaged collegiality. Established sources of work in conveyancing and personal plight litigation have declined. Solicitors’ firms are increasingly bifurcated by size, incomes and types of work. New or expanded fields of work emerging from economic de-regulation and the “financialisation” of public policy (Dore 2000: pp. 2-6) have favoured solicitors and firms servicing government and business. The growth of large solicitors’ firms and new public and private sector sites of legal work has expanded employment and career opportunities for salaried practitioners, with increasing numbers working in bureaucratised environments. In the wider context professional work and values in other fields such as the public service, health and education have also been subjected to new and confronting transformative pressures (see Hanlon 1997 & 1999).

In the 1980s law reform commissions, consumer organisations and the Trade Practices Commission (TPC) began to subject the regulation and work of the legal profession to critical scrutiny. A groundswell of popular and interest group concerns about problems in access to justice emerged, including concerns about the cost of legal services (see SSCLCA 1993(a) & (b); see also NLAAC 1990: pp. 182-3). The trajectories of change continued into the 1990s. In 1993 an independent committee of inquiry recommended (Hilmer et. al 1993) competition policies be applied to all economic sectors to eliminate anti-competitive conduct and develop an open market for goods and services, including professional services. The TPC (1993 & 1994) made comparable recommendations, including the application of trade practices legislation to legal professional work. In 1994 the Access to Justice Advisory Committee (pp. 94-128) proposed changes to legal professional work, charges and accountability, and recommended competition policies should spearhead reform of the market for legal services.

In 1995 access-to-justice strategies replaced legal aid as the central driver of Commonwealth policies to improve popular access to law (AGD 1995; see also AJAC 1994). Council of Australian Governments officials recommended the Standing Committee of Attorneys-General (SCAG) implement changes to remove anti-competitive aspects of the regulation of legal professional work. Governments and the National Competition Council (NCC) reviewed State and Territory legislation regulating lawyers to comply with the Competition Principles Agreement. Over 1995 to 2000 SCAG agreed to national practising certificates, approved practise by registered foreign lawyers, and developed model legislation for corporate and multi-disciplinary legal practices. In 2001 SCAG identified key areas for reform, and, in consultation with the Law Council, circulated a paper in 2002 canvassing options for model national laws governing the legal profession and its work. In May 2003 SCAG circulated a second paper containing draft legislation for a national regulatory scheme, and the consultation process towards the final version of a new regulatory model continues. The legal profession and its work also remain on Productivity Commission (see PC & ANU 2000), NCC (see Deighton-Smith et. al. 2001) and Australian Consumer and Competition Commission agendas.

These changes to the internalities of the legal profession and its work, consumerism, the access to justice phenomenon and the project to re-regulate legal professional work have produced a new and more fluid version of the ‘bargain’ governing the relationship between governments and the legal profession, and, through that relationship, the legal profession and society. In this 21st century version of the ‘bargain’ the incentive for the legal profession to involve its private practitioners in legal aid and the delivery of legal aid services has been
diminished. Previously investment in legal aid returned tangible rewards to the legal profession. Accepting special responsibility for legal aid was part of the price demanded by governments for ensuring professional autonomy and protecting markets for legal work. Today professional autonomy is contested, by the state, consumerism, the bureaucratisation of professional work and the corporatisation of many solicitors’ firms. State protection of markets for legal professional work has been relaxed. The legal profession has found it difficult to protect its markets in the face of vanishing boundaries between legal services and other regulatory-type services required by business, governments and consumers. In short, the legal profession has fewer incentives to deliver the social justice dividend expected by governments and the society in the form of participation in legal aid delivery. Instead, the new version of the ‘bargain’ in combination with the changes in legal aid markets that have reduced opportunities for legal aid work and increased the opportunity cost of representing legally aided clients motivates private practitioners towards pro bono work, or other means of delivering the social justice dividend.

5.0 The impact on persons eligible for legal aid

The other question that concerns the AGD is the impact of changes to labour markets for legal aid on persons eligible for legal aid in Commonwealth law matters. In particular, the AGD is concerned if disengagement from legal aid work has disadvantaged such persons in accessing legal representation from solicitors and firms.

To answer this question we have applied two measures of disadvantage. The first measure is if persons eligible for legal aid in Commonwealth law matters have been disadvantaged in accessing legal representation from solicitors and firms. We examine the evidence to assess if disengagement from legal aid work has adversely affected supply in labour markets for legal aid. The second measure is changes in the quality of service delivery. We consider if the evidence reporting disengagement from legal aid work demonstrates that the quality of legal representation provided by solicitors and firms to persons approved legal aid in Commonwealth law matters has been adversely affected.

Aggregate change is one measure of changes in supply in labour markets. Neither the interest group evidence nor the Griffith, JRC and Springvale research tells us how many private practitioners and firms have ceased to do legal aid work, or how many continue to represent legally aided persons. The indicative evidence is that significant numbers ceased to be active in labour markets for legal aid over 1990 to 2003. The Griffith researchers were convinced (p. 79) that since 1993 a “significant number” of family law solicitors in Queensland had “consciously opted to discontinue offering legally aided services”. The Springvale researchers (p. 5) reported that over 50 per cent of respondents (n = 47) “stated that cumulative cuts to legal aid had led to a reduction, and in some cases a total cessation of legal aided work in their practise”. In the JRC research a majority of firms were also reported as decreasing the amount of legally aided family law work, leading researchers to conclude “successive changes to legal aid funding have had an adverse impact on the supply side of the legal aid market in family law” (Hunter 2000: p. 248).

Comparable findings are evident in the results of the two NLA surveys. In the first survey almost 70 per cent of solicitors reported firms performing less legally aided family law work in 1999 than in 1994. The proportion of family law solicitors performing legal aid work also fell. In 1994/95 91 per cent (n = 239) of all family law solicitors in respondent firms performed legal aid work. In 1996/97 the participation rate fell to 83 per cent (n = 251), and
in 1999 only 72 per cent (n = 225) of family law solicitors performed legal aid work, almost 20 per cent fewer than in 1994/95 (Fleming 2002: pp. 2-4). In the second NLA survey (2002: p. 0) in 2001 28 per cent of respondents (n = 36) reported a decrease in the amount of legal aid work performed in 2000/01 as compared to 1999/2000. Twenty two per cent (n = 28) of respondent firms reported performing no legal aid work at all in 1999-2001.

More recent evidence also indicates fewer solicitors and firms active in labour markets for legal aid. Table 5 below summarises the number of firms paid by legal aid commissions in referred Commonwealth and mixed Commonwealth State law matters over 1994/1995 to 2002/03. The data shows that the aggregate number of firms receiving payment for legal aid work has fallen over the period. In 2002/03 3,085 firms were paid in Commonwealth and mixed Commonwealth State law legal aid matters, a fall of approximately 31 per cent from the numbers of firms paid by legal aid commissions in 1994/95.

Table 5: No. of Firms Paid by Legal Aid Commissions by State by Financial Year
(Commonwealth law and mixed Commonwealth and State Law matters)

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<td>186</td>
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<td>National Total</td>
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<td>3121</td>
<td>3048</td>
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<td>3085</td>
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</table>

Source: LASSIE database administered by the Commonwealth Attorney-General’s Department
Notes: 1. LASSIE is an unofficial statistical record and subject to alteration as errors are discovered, or new data added. Table 5 reports the relevant LASSIE data as recorded in February 2004.

The evidence indicating a fall in the aggregate size of labour markets for legal aid is consistent with our analysis of the factors contributing to private practitioners disengaging from legal aid work. We would expect that reduced expenditure on legal aid, and the downward trend in approvals of legal aid requiring legal representation in the 1990s to have prompted exit from labour markets. We would also expect the significant opportunity costs incurred in legal aid work to have encouraged private practitioners to cease to represent persons eligible for legal aid in family law and criminal law matters. An aggregate decline in labour markets for legal aid is also consistent with diminished social incentives for the private legal profession to support legal aid, and engage in legal aid work.

We would also expect that changes in the legal services industry have resulted in fewer practitioners in labour markets for legal aid. Table 6 below summarises the ABS data on employment by size of solicitors’ firms in 1992/93 and 1998/99. In firms with total employment of less than 20 legal practitioners and other staff employment fell by slightly over 11 per cent, or 3,689 persons over the period. The evidence indicates that historically these smaller firms engaged in legal aid work, and that sole practitioners and solicitors in
small partnerships and, to a lesser extent, mid-sized firms, remain the backbone of labour markets for legal aid. The ABS data does not allow us to disaggregate employment in solicitors’ firms into legal practitioners and others. Nevertheless it is likely that the fall in employment in smaller firms has contributed to the fall in the numbers of private practitioners in labour markets for legal aid over 1990 to 2003.


<table>
<thead>
<tr>
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<tbody>
<tr>
<td>No.</td>
<td>Per cent</td>
<td>No.</td>
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<tr>
<td>0-19</td>
<td>33,473</td>
<td>53.0</td>
</tr>
<tr>
<td>20-49</td>
<td>10,161</td>
<td>16.1</td>
</tr>
<tr>
<td>50-99</td>
<td>5,778</td>
<td>9.2</td>
</tr>
<tr>
<td>100+</td>
<td>13,696</td>
<td>21.7</td>
</tr>
<tr>
<td>Total</td>
<td>63,108</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Source: ABS Legal and Accounting Services, Australia 1992/3 (cat, no. 8678.0) and Legal Services Industry (cat. No. 8667.0).

Notes: a. The most recent survey conducted in 2001-02 classifies practices according to the number of principals/partners so the figures cannot be compared with these earlier ones.

We would also expect that the growth in demand and income for commercial and other types of legal work described in Table 4 has contributed to the fall in numbers of private practitioners in labour markets for legal aid. The ABS data suggests that partners and employed solicitors have been the major beneficiaries of these opportunities for highly remunerated legal work. These solicitors were unlikely to have ever been significant in labour markets for legal aid. Access to legal work paying in excess of $300.00 per hour is likely to have greatly diminished any residual incentives to represent legally aided persons. The opportunity cost is prohibitively high, and pro bono work or other forms of community service more cost-effective, and rewarding. In larger firms the availability of high fees for other legal work has also increased the opportunity costs incurred in doing family law and criminal law work, other than corporate crime. Representing significant numbers of criminal law or family law clients is likely to jeopardise the prospects of firms earning operating profits on par with industry peers, and partners and employed solicitors achieving income expectations. Table 6 above shows that in firms employing 100 or more persons employment increased by almost 8 per cent, or 6,227 employees over 1992/93 to 1998/99. This is unlikely to have significantly affected labour markets for legal aid. Save that it indicates that the growth areas in legal professional work have continued to trend away from legal aid work, and the family law and criminal law work that has underpinned labour markets for legal aid.

On the other hand labour markets for legal aid have not collapsed. Private practitioners have continued to represent persons approved legal aid. On average over 1991-1999, legal aid commissions referred 82,027 cases in Commonwealth and State matters to private practitioners. The fact that criminal law and family law practitioners continue to represent legally aided clients is also evident from the research, even if only indirectly. In the JRC

26 The cross-national evidence also suggests that larger firms play little part in labour markets for legal aid. In England and Wales, for instance, in 1999 a majority of large solicitors’ firms reported no fees income from legal aid (Sidaway 1999: p. 124). Other Law Society research (Cole 1999) showed solicitors in 26 + partner firms spent only 3.1 per cent of their time on legal aid work. Many larger law firms in The Netherlands have also ceased to accept legal aid cases (Levenkamp 2000). Research in New Zealand (Maxwell et. al. 1997) also shows large firms as less likely to represent legally aided clients, although “any pattern of movement of movement away from larger firms [was] relatively gradual rather than sudden”.

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research, for instance, a minority of solicitors reported an increase or no changes in the number of legally aided persons represented in family law matters over 1998-99. Although increased caseloads were invariably explained as a result of other firms abandoning legal aid work, and were not anticipated to continue (Hunter 2000: pp. 247-8).

In the first NLA survey 58 per cent of firms also reported (Fleming 2002: p. 4) increases or no change in legally aided family law work in 1995/96 as compared to 1994/95, although the amount of legal aid work performed trended downwards over 1996/97 to 1999 (ibid). However reduced participation can be explained as much by a failure to attract new recruits to legal aid work, as by solicitors ceasing to represent legally aided family law litigants. The numbers of solicitors reported as performing legally aided family law work did not change significantly over 1994-99, falling by less than 6 per cent (n = 14) between 1994/95 and 1999. The numbers of solicitors performing legal aid work fell as a proportion of all family law solicitors in respondent firms, from almost 91 per cent (n = 239) in 1994/95 to only 72 per cent (n = 225) in 1999. This decline is largely explained by the fact that over the period the total numbers of family law solicitors in respondent firms increased by 18 per cent (n = 311). The evidence of the first NLA survey is not so much that engagement in legal aid work decreased over 1994-99, but that the numbers of solicitors representing legally aided family law clients in respondent firms did not increase (ibid: p. 8).

We acknowledge that the Griffith, Springvale and JRC reports and the first NLA survey are reporting experiences of at least five years ago. Moreover the Griffith and JRC researchers suggested that disengagement from legal aid work might be accelerating amongst criminal law and family practitioners. The former believed (pp. 79 & 85) that there was “reason to think that the flight” from legal aid work in Queensland was “about to change into a stampede”. The JRC researchers surmised that the 1996/97 changes to Commonwealth policy might have been “some kind of tipping point, speeding up the rate of exit from legal aid work” (Hunter 2000: p. 248). The first NLA survey results also showed disengagement from legal aid increasing over 1996/97 to 1999 (Fleming 2002: pp. 8-9).

The evidence does not allow us to say if the rate of exit from legal aid work did increase in the late 1990s. Nor do we know the numbers of private practitioners active in legal aid markets over 2000 to 2003. Recent evidence from the ABS does indicate that significant numbers of private practitioners remain active in labour markets for legal aid. The most recent Legal Services Industry survey (ABS 2003: p. 22 & 31) reports 2,700 or 25 per cent of solicitors and barrister’s practices engaged in legal aid work. Other recent ABS data also indicates suggests significant levels of activity by private practitioners in legal aid markets. Table 7 below contains data from the ABS 1998/99 and 2001/02 Legal Services Industry surveys comparing pro bono work for barristers and solicitors. Unfortunately the data is not presented for legal aid work alone. The data shows that the number of barristers and solicitors providing legal services without fee, and the number of hours expended in unpaid legal work, declined between the two surveys. In contrast, work performed at a reduced fee, including legal aid, increased.
### Table 7: Pro Bono Work for Barristers and Solicitors, 1998/99 – 2001/02

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<tr>
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<th>Barristers</th>
<th>Solicitors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Providing legal services without a fee</td>
<td>no. 2506</td>
<td>2211</td>
</tr>
<tr>
<td></td>
<td>hrs 217.6</td>
<td>174.3</td>
</tr>
<tr>
<td>Providing services at reduced fee (inc. legal aid)</td>
<td>no. 1686</td>
<td>2234</td>
</tr>
<tr>
<td></td>
<td>hrs 221.8</td>
<td>410.7</td>
</tr>
<tr>
<td>Involvement in free community legal ed or law reform</td>
<td>no. 864</td>
<td>948</td>
</tr>
<tr>
<td></td>
<td>hrs 49.6</td>
<td>29</td>
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<td>5393</td>
</tr>
<tr>
<td></td>
<td>hrs 489</td>
<td>614</td>
</tr>
</tbody>
</table>

**Source:** ABS Survey of the Legal Services Industry

Irrespective of the actual numbers of private practitioners that have ceased legal aid work since the early 1990s the impact of fewer practitioners and firms in labour markets for legal aid is unclear. Figure 7 below summarises changes over 1991/92 to 2001/02 in the number of applications approved legal aid in Commonwealth and State matters undertaken in-house and referred to private practitioners. The data shows a marked fall between 1991/92 and 1992/93 in referrals to private practitioners, and a general downward trend over 1992/93 to 1996/97, a trend that increased in 1997/98 and 1998/99. Yet in each of these seven years over 60 per cent of applications approved legal aid were referred to private practitioners. Moreover since 1999/2000 the number of cases referred to private practitioners has increased. In 2000/01 referrals to private practitioners returned to almost 1993/94 levels, or slightly more than 70 per cent of all applications for legal aid requiring representation by a legal practitioner approved by legal aid commissions.
Figure 7: Share of applications approved undertaken in-house and referred, Australia

Source: LASSIE database administered by the Commonwealth Attorney-General’s Department

Notes: 1. LASSIE is an unofficial statistical record and subject to alteration as errors are discovered, or new data added. Figure 7 summarises LASSIE data as recorded in October 2003.

As with the other evidence of aggregate changes in supply the significance of the data in Figure 7 is inconclusive. We cannot say if the fall over 1991/92 to 1999/00 in the number of referred cases is a product of disengagement from legal aid work. Nor can we say if recent increases in referred cases signals a strengthening of labour markets for legal aid. We do not have access to information explaining why some matters approved legal aid are undertaken in-house, and others referred to private practitioners. Disaggregating the data suggests legal aid commissions have different preferences for in-house and referred work. For example, in 2001/02 over half of applications in WA and NT were processed in-house, over double the share in Victoria and Queensland. Moreover Figure 7 only reports change in the number of cases undertaken in-house, or referred. The data does not show if the numbers of private practitioners undertaking referred cases, or the numbers of referred cases undertaken by individual private practitioners and firms, increased or decreased over the period. Nor does data demonstrate that legal aid commissions have not experienced problems in supply attributable to private practitioners disengaging from legal aid work. As we discuss below, there is semi-anecdotal evidence reporting firms in rural areas no longer representing legally aided persons.

The best that we can say of the data in Figure 7 is that it indicates that the aggregate changes in supply in labour markets for legal aid over 1990 to 2003 resulting from private practitioners disengaging from legal aid work has not significantly affected the supply of legal services available to legal aid commissions. At least, that is, for the purposes of satisfying demand by persons approved legal aid in matters requiring representation by legal practitioners. Consequently the data suggests that disengagement from legal aid work has not obviously
disadvantaged persons approved legal aid in Commonwealth and State law matters in obtaining access to solicitors and firms for the purposes of legal representation.

Aggregate change is not the only indicator of changes in supply. Persons eligible for legal aid may also have been disadvantaged by changes in the composition of labour markets for legal aid. In a mixed model system practitioners and firms are an essential first point of contact. Solicitors are often the first to inform people with legal problems of eligibility for legal aid, and are an important source of initial advice. Solicitors also prepare, or assist in preparing, applications for approval of legal aid, often, in effect, representing the applicant in transactions with legal aid commissions. For these purposes disadvantage is not only assessed by aggregate change, but by evidence of which practitioners and which firms have disengaged from legal aid work, and which remain active in labour markets for legal aid. Similarly the evidence indicating that disengagement from legal aid work has not disadvantaged persons approved legal aid over 1990 to 2003 tells us about the past. Within the evidence of aggregate changes in supply there may be evidence reporting latent or possible changes affecting which practitioners and which firms engage in legal aid work, which may adversely affect the access of persons approved legal aid to solicitors and firms. Accordingly we also need to assess if the evidence demonstrates any relevant changes in the composition of labour markets for legal aid that may disadvantage persons eligible for legal aid in Commonwealth law matters in the longer-term.

One relevant measure in the changes of the composition of supply is changes in the size and distribution of firms in labour markets. We do not know with certainty the composition of labour markets for legal aid in Australia by size of firm, although there is no reason to challenge the available evidence and the anecdotal orthodoxy that legal aid work is the province of smaller firms. This is consistent with the cross-national experience. In England and Wales, for instance, in 1999, 35 per cent of sole practitioners, 48 per cent of small practices and 41 per cent of medium-sized solicitors’ firms earned 20 per cent of fees income from legal aid work (Sidaway 1999: p. 125). Other Law Society research (Cole 1999) showed sole practitioners and small partnerships and solicitors in small practices spending “around 30% of their time on legally aided cases”. Sole practitioners and small partnerships are also prominent in civil legal aid work in Scotland (SLAB 2001: p. 28). In The Netherlands legal aid work is now concentrated in smaller firms (Levenkamp 2000), and in New Zealand research in 1997 (Maxwell et. al.) reported “a tendency for legal aid practitioners to be more likely to be in relatively smaller firms compared to four years ago, perhaps in part as a result of pressure from other firms to undertake more highly paid work”.

Various sources of evidence discussed in the paper clearly indicate a fall in the number of smaller firms active in labour markets for legal aid. One reason is obviously underpayment for legal aid work. The indicative evidence of fees charged by private practitioners in family law matters and the data in Table 4 showing an increase in income from family law work over 1992/93 to 2000-01 suggests a healthy market for non-legally aided family law work. Some smaller firms faced significant opportunity costs in representing legally aided family law clients, and have responded by disengaging from legal aid work. We would expect that there are greater numbers of mid-sized smaller firms in this category. The fall in demand and income for criminal law work portrayed in Table 4 indicates opportunity cost may be less of a factor explaining disengagement by smaller firms doing criminal law work. These firms may be more likely to have continued to represent legally aid clients, or else to have withdrawn from labour markets for legal aid to diversify into other areas of legal work, as discussed below.
Another reason for fewer smaller firms doing legal aid work is the changes in demand and income in markets for legal services. At least initially the majority of smaller firms probably lacked the scale, expertise and location to compete with larger firms in markets for commercial and other highly remunerated legal work. Smaller firms that could do so were likely to be mid-sized firms, with existing commercial work practices, and less likely to do legal aid work, and family or criminal law work. Over the 1990s we would expect that some smaller firms that previously did legal aid and other family law and criminal law work have geared their practices towards growing and better-remunerated fields of legal work. In part, in direct response to the new opportunities in legal services markets. In part, because the income expectations of solicitors in smaller firms have been increased by knowledge of the higher incomes and career opportunities evident in larger firms. In part, because the evidence indicates the increased complexity of legal work has increased the cost of running legal business (LCA 2003: p. 21). As one legal aid commission official has described this phenomenon, “some of the lawyers who previously did criminal and family law work (including legal aid work) leaving that are (sic) of practice and moving into commercial law, and country lawyers moving to Perth” (Huxtable 2002).

The evidence also clearly shows that significant numbers of smaller firms remain in markets for legal aid. Table 5 above, for instance, shows that in 2002/03, 3,085 firms were paid for legal aid work in Commonwealth and mixed law matters. We not know how many smaller firms continue to do legal aid work, or how many are sole practitioners, small partnerships or mid-sized firms. Collecting such data is obviously a priority for future research.

There is no definitive evidence of the location of the solicitors’ firms that have disengaged from legal aid work. The indicative evidence is that disengagement is widespread, and includes city, suburban and rural firms. The Griffith researchers, for instance, found that whilst Brisbane CBD and other high overhead firms were probably amongst the first to abandon legal aid work other evidence suggested “abandonment amongst even suburban and rural practitioners”. Similar evidence is present in the second NLA survey in which 21 per cent of respondent firms in urban areas and over 40 per cent of firms in rural areas reported a decrease in the amount of legal aid work between 1999/2000 and 2000/2001.

Evidence provided to the AGD last year suggests that most legal aid commissions are encountering problems in supply in rural areas. Solicitors’ firms in Bourke in north western NSW are reported to have ceased to do legal aid work. In the central western towns of Warren, Broken Hill and Dubbo only “few firms & in some cases only one firm of solicitors” now represent legally aided persons (AGD 2003 (b)). Similar problems exist in towns on the NSW central and north coast, and “in almost all the South Coast towns and in Wagga and Riverina generally” (ibid). Persons seeking access to legal aid in some rural and regional areas in Victoria are also reported as encountering problems in accessing solicitors’ services (Parliament of Victoria: Law Reform Committee 2001: pp.81-6 & 260-1). Access is also reported to be “a critical problem in regional Western Australia and ... is in fact collapsing in some regions (at least in the Great Southern) due to the withdrawal of private lawyers doing legal aid work” (Huxtable 2002).

The other relevant measure in the changes of the composition of supply in labour markets is changes in the demography of suppliers. Ideally in this context we would expect to see

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27 In all these respects there are interesting parallels with the late 1950s and the 1960s (see Mendelsohn & Lippman 1979).
28 But evidently not in Tasmania or the Northern Territory.
evidence of the age, gender, years of experience and ethnicity of the private practitioners that have disengaged from legal aid work, and those that remain in labour markets for legal aid, and how the demography of the population changed over 1990 to 2003. In England and Wales, for instance, Law Society research in 1999 (Cole 1999) showed that gender is a significant factor in identifying solicitors who do legal aid work. Male solicitors, and all solicitors aged over 55, who were likely to be male, were amongst the practitioners less likely to represented in legal aid clients. Other research suggests that women solicitors are over-represent legal aid work in England and Wales (Cole 1999; see also Chambers & Harwood 1989: p. 41). There is no comparable research or data describing the demography of labour markets for legal aid in Australia. We do not know, for instance, the numbers of women solicitors doing legal aid work, the age distribution of private practitioners who represent legally aided persons, or the age distribution of those that have disengaged from legal aid work.

Instead Australian researchers have concentrated their activities on investigating the claims in the interest group evidence that experienced solicitors and barristers are prominent amongst the family law and criminal law practitioners who no longer represent legally aided persons. Researchers have also explored the related claim, that less experienced or junior and new entrant solicitors and barristers are prominent amongst the private practitioners representing legally aided family law litigants and criminal accused. Similar claims are apparent in the cross-national evidence. In Scotland solicitors have claimed that (SLAB 2001: p. 28) new entrant or junior practitioners with lower charge out rates are now performing civil legal aid work. In Canada private practitioners responding to a Bar Association survey in 2000 reported (p. 60) “it is mainly lawyers with little experience who are handling family law legal aid cases”, and that junior counsel were “taking on serious cases that would best be handled by more senior counsel” (pp. 63-64).

Investigation of these claims has produced equivocal results. Some of the research contains evidence and findings that support the claim that experienced practitioners have been prominent in disengagement from legal aid work. The Griffith researchers found evidence (pp. 79-81) that experienced practitioners in Queensland were refusing legally aided family law work, or scaling back, that is, representing fewer numbers of legally aided clients. The first NLA survey also shows a reduction in the numbers of experienced family law solicitors doing legally aided work. In 1999 only 66 per cent (n = 99) of solicitors with 10 + years of experience were reported as engaged in legal aid work, as compared to almost 90 per cent (n = 110) in 1994/95. Only 70 per cent (n = 49) of all family law solicitors with 5-10 years were reported as representing legally aided clients, as compared to 95 per cent (n = 54) in 1994/95. Disengagement from legal aid work was proportionately greater amongst solicitors with 5 + years of experience, as contrasted, for instance, to solicitors with 2-5 years of experience, the numbers of such solicitors who performed legally aided family law work falling by less than 3 per cent over the period, from 86 per cent (n = 38) of whom in 1994/95 to 83.6 per cent (n = 46) in 1999 (Fleming 2002: p. 4).

Some of the research also supports claims of juniorisation in labour markets for legal aid. The Griffith research identified (p. 82) a “consistent trend, evident in the responses of all those involved in legal aid work, is that there has been a ‘juniorisation’ of legal aid work”. Interviewees reported (ibid) that legally aided family law work in Queensland was “increasingly being done by” junior or less experienced practitioners, and that delegation to junior and inexperienced solicitors for legally aided family and criminal law matters had increased. The Springvale research (p. 6) also noted “more than one respondent indicated that
unrealistic limits on aid meant that it was no longer viable for senior practitioners to take on aided matters, which were increasingly referred to junior practitioners”.

However, not all the evidence supports the claims of a loss of experience amongst private practitioners doing legal aid work. Even the Griffith researchers reported (p. 83) “some evidence of experienced practitioners hanging on to legal aid work” in family law cases, some believing such work was cost-effective, whilst others serviced markets that included significant numbers of persons eligible for legal aid. Yet other practitioners in Queensland reported (p. 80) continuing to represent children in legally aided family law proceedings, for prestige reasons, and because they believed that as child representation work “is effectively done pro bono, it discharges a sense of obligation to the community”.

The JRC research did find (Hunter 2000: p. 115) that on average solicitors in legally aided family law matters had fewer years in practice (10.7) than solicitors representing self-funded family law clients (16.7 years), and the former were also less likely to be accredited family law specialists. Nevertheless the JRC research found (ibid: p. 116) that solicitors engaged in legally aided family law work “could not be classified as inexperienced practitioners”. The mean years of experience was 13.3 years, and “legal aid lawyers in both public and private sectors were relatively more specialised in family law than the solicitors dealing with self-funded clients” (ibid). The first NLA survey also shows experienced family law solicitors continuing to represent legally aided clients. In 1994 and in 1999 at least 60 per cent of all family law solicitors in the 254 respondent firms with 5+ years of experience were reported as engaged in legal aid work (Fleming 2002: p.4).

Nor does all the Australian research support interest group claims that that less experienced or junior and new entrant solicitors and barristers are prominent amongst the private practitioners representing legally aided persons. In the first NLA survey solicitors with less than two years experience comprised almost 16 per cent (n = 37) of solicitors performing legally aided family law work in 1994/95, falling to only 12 per cent (n = 31) in 1999. On average over the period such solicitors comprised 14.5 per cent of all family law solicitors in respondent firms, in other words, the numbers of solicitors with less than two years experience neither increased nor decreased.

Interviewees in the JRC research did report (Hunter 2000: p. 116) experienced solicitors delegating legal aid work to junior family law solicitors. Inquiries into the distribution of legal aid work within the sample of firms revealed few actual instances of delegation. Proportionately few firms had work allocation “policies that might directly or indirectly result in legal aid work being undertaken by more junior solicitors”. The minority of firms that had such policies did not “specifically mention this as a recent trend” (ibid: p. 117). Instead interviewees tended to see (ibid: p. 118) legal aid work as a “ready made market for junior solicitors until such time as they could attract their own referrals and build up their own personal self-funding practices”. This led the JRC researchers to surmise (ibid) that using legally aided family law work as “a training ground for junior solicitors, while partners take on the more lucrative and/or complex property matters“, may be “a natural and fairly stable phenomenon, rather than a recent trend”.

We cannot resolve the differences in the evidence reporting change in the experience levels of private practitioners doing legal aid work. Nor is it productive to debate the particular differences in the Australian research. None pretends to present a definitive picture of changes in the years of experience of the population of private practitioners active in labour
markets for legal aid. Moreover the scope and focus of the research projects are different, and, in many respects, the sources of evidence and the findings are incomparable. The NLA survey, for instance, only explored one measure of juniorisation, changes in the years of experience of family law solicitors doing legal aid work, and, unlike the Griffith and JRC research, did not explore related measures, such as changes in delegation of legal aid work to less experienced practitioners. The NLA survey and the JRC and Springvale research only investigated changes in legal aid work amongst family law solicitors, unlike the Griffith researchers, who investigated changes in both family law and criminal law work, amongst both barristers and solicitors.

These issues clearly warrant further investigation. It would be foolish, for instance, to dismiss the anecdotal orthodoxy that there are fewer experienced or older, and greater numbers of less experienced or younger, family law and criminal law practitioners doing legal aid work. This may be so in particular jurisdiction, but it remains moot if it is uniform across markets for legal aid work. We would also expect that further investigation will sustain the findings (pp. 84-6) of the Griffith researchers that significant levels of juniorisation exist at the Bar. The ABS data (2003:p.30) suggests that years of experience are a significant indicator of barristers’ incomes. The story in the case of solicitors is, as the available evidence suggests, will be more complex. Further investigations of issues of experience and inexperience amongst solicitors should include case studies of legal aid work in firms, along the lines of the JRC research.

Nevertheless reference to the cross-national experience suggests that the JRC research and the first NLA survey may be highlighting some important questions. The JRC research also found that amongst solicitors in the firms studied workplace status, that is, whether a solicitor was a partner or an employee, was not a significant factor in identifying which practitioners did legal aid work (Hunter 2000: p. 117). Law Society research in 1999 reached similar conclusions. Sole practitioners and partners were as likely if not more likely than employed solicitors to perform legal aid work, at least in England and Wales, where like Australia, small and medium-sized firms predominate in labour markets for legal aid (Cole 1999: p.4). The research also showed, as discussed above, that size of the firm was the principal indicator of which solicitors performed legal aid work, a factor that exceeded the significance of years of experience, age and gender (Cole 1999).

The cross-national evidence also gives cause to question the claim that experienced practitioners are a vanishing species in legal aid work. Law Society research showed that in England and Wales in 1999 (ibid) middle-aged solicitors aged 35-54 years were most likely to perform legal aid work. Solicitors aged under 35 years (ibid) were “less likely to carry a legal aid caseload”, although prominent in some types of legal aid work. In New Zealand research in 1997 showed (Maxwell et. al.: pp. 18-21) private practitioners doing legal aid work to be a relatively experienced and “fairly stable group of practitioners”, the majority being “relatively senior” and expecting “to continue to work in this area”. Practitioners who ceased legal aid work since 1993 had “for the most part, made alternative career choices: for example, they are overseas or have moved to another type of legal work”.

There is similar evidence elsewhere. In The Netherlands private practitioners representing legally aided clients are likely to be older lawyers (Levenkamp 2000) who act “out of tradition or idealism”, and are anticipated to continue in legal aid work until retirement. Older practitioners also appear to be prominent in the United States, according to Earl Johnson (2000), who attributes this to the fact that salaried legal aid lawyers comprise “the top ½ of 1
percent of lawyers in the country on the ‘altruistic motivation’ scale and you can’t be surprised if they still hang around when their salaries lose purchasing power”.

Like the JRC research and the first NLA survey the cross-national evidence suggests there may be other questions arising out of the evidence of juniorisation. In particular, the possibility that too few junior or new entrant practitioners are active in labour markets for legal aid. In The Netherlands in 2000, for instance, the Ministry of Justice increased hourly rates paid to private practitioners for legal aid work in part to redress the problem of “a very low number of young people doing legal aid cases” (Levenkamp 2000). In England the LSC has established (2002: p. 2) a scheme to “support the next generation of legal aid solicitors” in response to shortages in new entrants seeking training contracts with legal aid firms, and the number of solicitors’ firms offering such contracts. In Scotland research into changes in civil legal aid work did not investigate changes in age or experience. However, the researchers noted that “firms providing civil legal aid probably had fewer opportunities than solicitors in larger firms to delegate work to junior or less experienced solicitors” as many operated as “sole practitioners, or in outlets with a small number of qualified staff”, whilst observing that claims of juniorisation carried “some logic” (SLAB 2001: p. 28).

Of course the cross-national experience does not establish that Australian legal aid workforces are older, or ageing. There is evidence that only 5 per cent of solicitors in Victoria aged under 30 are based in rural and regional areas (Parliament of Victoria 2001: p. 265). In principle economic analysis of the opportunity costs and the effect of changes in demand and income in the market for legal services also indicates that solicitors engaged in legal aid work may be older. The opportunity costs of legal aid work are generally likely to be less for older practitioners. Older solicitors are less likely than younger and new entrant solicitors to have enjoyed the same opportunities to take advantage of the growth in employment and income and career prospects in larger and medium-sized firms. Conversely the economic costs to younger solicitors and new entrants of legal aid work are likely to be greater, in a climate in which real alternatives exists for other and better-remunerated legal professional work.

We would expect there might also be a values factor. We discussed earlier the values of social service professionalism, and the fact that private practitioners historically have had non-financial reasons for involvement in legal aid work. The direction of the changes to legal professionalism and legal professional work since the early 1990s suggests that younger and new entrant practitioners may be less likely than older practitioners to direct their social justice interests towards legal aid, and perhaps more likely towards pro bono or other forms of free legal services. Once again further research is required to establish if older legal aid workforces are evident in Australia.

The second measure of the impact of labour market change on persons eligible for legal aid in Commonwealth law matters is changes in the quality of service delivery. In this part of the paper our analysis is limited to the evidence reporting changes in the work practices and related behaviours of private practitioners. We do not consider changes in quality attributable to actions taken by legal aid commissions to conserve legal aid expenditure, actions that directly and indirectly reflect the funding policies of Federal and State and Territory governments. There is convincing evidence in the Third Report of the 1996/98 Senate inquiry into legal aid (SLCRC 1998: pp. 83-8) that cost capping, stage of matter payments and other measures to limit expenditure have often disadvantaged persons approved legal aid. Similar evidence is contained in the interest group and research-based evidence. The Griffith researchers, for instance, found that private practitioners in Queensland believed (p. 94)
persons eligible for legal aid had “fewer choices” compared to self-funding clients. Legal aid was not available in certain types of matters or legal proceedings, and funding restricted the capacity of practitioners to obtain forensic reports, or commission expert witnesses (ibid).29

The quality of service delivery is an issue because of the evidence of the opportunity costs incurred in representing legally aided persons, and underpayment by legal aid commissions for work performed by private practitioners in matters approved legal aid. As we have seen many private practitioners have responded to these economic costs by exiting the labour market. Others have remained in labour markets for legal aid, and continued to represent legally aided persons. Some practitioners and firms electing to incur the costs incurred in representing legally aided parties in family matters and criminal accused, and others, whose choice may be legal aid work, or less work, agreeing to represent legally aided persons knowing that the amounts paid by legal aid commissions are likely to be significantly less than the value of the work performed.

In the presence of these financial incentives we cannot say if private practitioners have reduced the quality of services to persons approved legal aid in Commonwealth law matters. There is no data that reports the quality of services provided to legally aided persons in 1990, or how that changed over the period. Rather than imposing quality standards, the “Australian legal aid system has tended to rely on the professionalism of solicitors doing legal aid work” (Hunter 2000: p. 307).

The JRC project is the only research that specifically compares the quality of services provided to legally aid and self-funded family law clients. The researchers found (Hunter 2000: p. 351) legally aided clients did “not appear to be disadvantaged in relation to the quality of legal services they receive”. In-house practitioners in legal aid commissions and solicitors appeared (ibid: p. 346) to “provide an equivalent quality service”. The evidence suggested (ibid: p. 353) there was not “currently a ‘quality’ problem with the services delivered to legally aided clients”. The JRC concluded (ibid: p. 352) that “major impact of low legal aid rates is not a decline in quality but exit from the field”.

Obviously market exit is a strategy that evidences that some if not many private practitioners have chosen. Responses to the Springvale survey, for instance, “reflected the concerns practitioners had about cutting corners on service delivery and indicating that they would choose not to take on a case unlikely to settle within the limit, rather than run the risk inherent in providing a reduced service” (pp. 13-14). One firm had ceased to represent legally aided family law clients as “you are forever looking at costs and keeping work to a minimum” (ibid).

We would also expect that the JRC findings describe the behaviour of some private practitioners who have continued to represent legally aided persons. Some solicitors and firms have decided to lump it or cop it sweet, that is, to provide the same range and quality of services to legally aided clients as would ordinarily be provided to a self-funding client in comparable matters, notwithstanding the economic costs incurred.30 Some practitioners

29 The Griffith and Springvale research also revealed other concerns about cost-driven changes to the quality of service provision. The former (pp. 96-7) reported complaints about mandatory conferencing in Commonwealth family law matters. The latter noting that an “alarmingly high number of respondents” (p. 14) believed cost caps placed greater, and sometimes inappropriate, pressure on legally aided persons to use alternative dispute resolution mechanisms.

30 An issue that we have not found it necessary to address is cross-subsidisation. A long-standing claim is that services provided to legally aided clients are cross-subsidised by fees paid by self-funding clients. In the Griffith report the researchers found no evidence that private practitioners charged self-funding clients a financial premium in order to offset losses incurred in legal aid work. Moreover they considered self-funding clients were unlikely to give informed consent to such a payment. In any event many
interviewed by the Griffith researchers also reported (p. 96) “devoting a similar amount of
time to a legal aid file as to a privately paying one, but acknowledged that there were other
costs (such as no Counsel at interims) that hampered their ability to treat all clients
alike”. Not disadvantaging legally aided persons in service delivery is also consistent with the
values and ethics governing legal professional work. As one respondent in the Springvale
research said, in representing a legally aided client solicitors are “professionally liable to do
the job properly or withdraw” (pp. 13-14). Similarly choosing to lump the economic costs
incurred in legal aid work is also consistent with the spirit of social service professionalism
that remains strong amongst many private practitioners. The Griffith researchers, for
instance, reported, “reasons for believing that some practitioners who do legal aid work are
behaving altruistically and deliberately incurring opportunity costs for a good cause”,
foregoing actual opportunities of better-remunerated work in favour of acting for legally aided
clients (pp. 120-5 & 131).

On the other hand we would also expect that some private practitioners have behaved
differently. Some have chosen to implement work practices that increase efficiency, to reduce
the impact of the economic costs incurred in legal aid work on the quality of service delivery.
In the JRC research, for instance, two solicitors reported (Hunter 2000: p. 96) adjusting “the
way they deal with legal aid cases, streamlining the work and attempting to deal with cases as
quickly as possible”. In the Springvale research one firm was reportedly (pp. 14 & 5)
considering “instituting new file management procedures on legal aid files to limit the amount
of time spent on them”. We would also expect practitioners choosing the efficiency option to
seek to improve the economies of scale of doing legal aid work. However the available data
does not allow us to investigate whether solicitors and firms have, for instance, sought to
increase the volume of legal aid work performed, or to specialise in particular types of legal
aid work.

The other option open to private practitioners who choose to represent legally aided persons is
to compromise service quality. As indicated earlier one response to underpayment for legal
aid work is to skimp on quality, taking shortcuts to minimise opportunity costs incurred in
representing legally aided persons. Much of the evidence suggests that private practitioners
are compromising on the quality of services provided to legally aided clients. Some solicitors
interviewed (p. 96) in the Griffith research “estimated that, as a result of fixed fees and
capping, they could charge a privately paying client between two to four times more than they
would receive for the same matter from legal aid, and that this was sometimes reflected in the
level of service they were able to provide”. Others reported (ibid) spending less time on legal
aid cases, delegating work to more junior and less costly practitioners, who might themselves
provide a reduced level of service to legally aided clients. As one practitioner put it, “you
tailor the work to the level of funding” (ibid).

Comparable evidence appears in the Springvale report. In family law matters the researchers
(pp. 14-15) reported “an alarming trend of practitioners running legally aided cases, not on the
basis of putting the best possible case, but primarily on economic grounds” which means
“those reliant on legal aid will receive a poorer class of service than self funded clients”. One
respondent reported (p. 5) legally aided family law clients were disadvantaged as inadequate
remuneration dictated “quantity and not quality representation”. Another reported (ibid)
reduced “service to clients including inability to spend much time with client taking

interviewees reported the “extremely competitive” market for legal services, particularly in family law, meant that solicitors and
consumers were price sensitive, the former needing to remain cost competitive, and the latter unwilling to pay more than market
prices for legal services (pp. 124-6).
instructions and explaining court procedures” and an “inability to prepare sufficient affidavit material to support client’s case”. Twenty per cent of respondent solicitors and firms admitted that more restrictive eligibility criteria to advising clients to settle on a previously unacceptable basis, in the face of dwindling legal aid illustrates the pressure brought to bear on indigent litigants” (p. 8).

Comparable concerns about diminished quality of service are also evident in Canada. Several respondents to the Bar Association survey in 2000 (p. 63-4) reported reducing legal aid caseloads in order to maintain service quality in response to “cutbacks in legal aid”. One rural family lawyer commenting (p.63) that if “I don’t limit the amount of legal aid, the result is that I have to cut the quality of service in order to do enough volume to cover the overhead”. Forty per cent of survey respondents believed the quality of service delivery to legally aided clients was already compromised, citing problems in access to experts, private lawyers boost legal aid caseloads to increase income, a decline in the quality of process documentation and less thorough preparatory research (pp. 62-63).

6.0 Responding to changing legal aid labour markets

The AGD commissioned this paper as part of a project investigating changes in labour markets for legal aid. In particular, the evidence reporting that since the early 1990s many private practitioners in Australia had disengaged from legal aid work. The AGD had two objectives in mind. It believed the paper would assist in assessing the significance of the evidence for the purposes of the 2004-08 Commonwealth-State legal aid agreements. The AGD also sought an independent analysis of the evidence. It anticipated that independent analysis would assist the Legal Aid Renegotiations Team in better understanding if solicitors and solicitors’ firms disengaging from legal aid work had disadvantaged persons eligible for legal aid in Commonwealth law matters, and, if so, why and how such persons had been disadvantaged.

The interest group and research-based evidence demonstrates that solicitors have disengaged from legal aid work. In 2003 fewer solicitors were engaged in legal aid work than in 1990, and some solicitors and firms who previously represented legally aided persons had withdrawn from labour markets for legal aid. The same is almost certainly true of legal aid work at the Bar, although we have not explored labour market change amongst barristers in any detail in the paper.

A range of factors have contributed to disengagement from legal aid work, including reduced expenditure on legal aid, a downwards trend in legal aid approvals throughout the 1990s, and diminished social incentives for the legal profession to represent persons eligible for legal aid. Foremost amongst the contributing factors is the low price paid for legal aid work. Payments by legal aid commissions in family law and criminal law matters have fallen significantly below amounts charged by solicitors to self-funding clients for comparable legal work. The evidence convincingly indicates that many family law solicitors incur real and significant opportunity costs in representing legally aided parties. Opportunity costs incurred in legally aided criminal law work may be less, at least for some solicitors and firms. Changes in the legal services industry have compounded the impact of underpayment by legal aid commissions. Solicitors and firms that have access to markets for commercial and business-type law and other growth areas of highly paid legal work have few, if any, financial incentives to engage in legal aid work.
Explaining the impact of disengagement from legal aid work on persons eligible for legal aid in Commonwealth law matters is more complex. Whilst the evidence demonstrates a fall in the numbers of private practitioners active in labour markets for legal aid it is not obvious that supply was adversely affected. Over 1990 to 2003 on average over 60 per cent of applications approved legal representation by legal aid commissions were referred to private practitioners. As we explain in the paper, this evidence has important qualifications. It shows that persons approved legal aid in Commonwealth law matters were not disadvantaged in accessing legal representation from solicitors and firms, not that legal aid commissions did not encounter problems in supply. Nevertheless in the short term we do not expect any dramatic fall overall in the supply of solicitors and firms willing to represent persons approved legal aid in Commonwealth law matters.

Similarly there is no simple explanation of the impact of underpayment for legal aid work on the quality of services provided to persons approved legal aid in Commonwealth law matters. The evidence demonstrates concerns that payments by legal aid commissions have fallen below levels that enable private practitioners to provide services of an appropriate quality, and to discharge contractual and ethical duties of competent representation. Some if not many private practitioners who previously represented legally aided persons have responded by exiting labour markets for legal aid. On the other hand significant numbers of solicitors and firms continue to represent legally aided persons.

Those remaining in legal aid markets face incentives to reduce service levels in legally aided matters. The evidence shows that not all solicitors and firms have responded in ways that may have disadvantaged persons eligible for legal aid in Commonwealth law matters. The JRC research shows that at least some solicitors and firms have continued to provide an equivalent quality of service to legally aided family law clients. It also suggests that this has been the response of most family law practitioners. Other evidence indicates that some solicitors and firms have taken steps to streamline service delivery in legally aided matters, in order to maintain appropriate levels of quality services. These behaviours are contrary to what might be expected. Private practitioners are economic actors. We would expect private practitioners representing legally aided persons to have reduced service and quality levels, to minimise opportunity costs incurred in legal aid work. In fact, it appears that social professionalism and high standards of professional work have intervened, and countered the financial incentives to reduce quality. High standards of social professionalism are probably a feature of mixed delivery models of legal aid (Fleming 2004: pp. 15-17).

The evidence suggests that significant numbers of solicitors and firms are in this category, providing legally aided persons with services of an appropriate quality, consonant with contractual and ethical duties of competent representation. Whether such behaviour is a sustainable response is a different issue. The costs incurred in legal aid work may eventually become unacceptably high for the solicitors and firms that have sought to maintain quality. If so, we would expect these firms to respond by exit from legal aid markets, instead of reducing quality and service levels provided to legally aided persons.

On the other hand the evidence also clearly indicates that some private practitioners are likely to be skimping or taking short cuts in delivering services to persons approved legal aid. For some solicitors and firms reducing service levels may be a condition of remaining in labour markets for legal aid. In this category of firms we would expect that different levels of services are provided to legally aided persons than to self-funded family law and criminal law clients. Without definite benchmarks of appropriate levels and standards of service delivery
in self-funded and legally aided criminal law and family law matters we cannot say if the result has been to reduce quality. In some firms we would expect to see a reduction in the quality of service delivered to legally aided persons. In other firms we would expect to see that quality has been compromised, in genuine and well-intentioned attempts by solicitors to balance their professional obligations to legally aided persons, and the financial realities of the costs incurred in legal aid work.

Persons eligible for legal aid in Commonwealth law matters may also be disadvantaged in the medium to longer-term in accessing services from solicitors and firms. The evidence does not only report disengagement from legal aid work. It also indicates changes to the size and composition of labour markets for legal aid. Labour markets appear to be shrinking in size. Solicitors in larger firms are now even less likely to represent persons eligible for legal aid. Legal aid work has remained the province of solicitors in smaller firms. Employment of legal practitioners and others in smaller firms has declined. The number of sole practitioners, small partnerships and mid-sized firms accepting referrals from legal aid commissions also appears to have declined, partly because of the low price paid for legal aid work. In family law work, partly because of a healthy demand for legal representation from self-funding family law clients, and, in criminal law work, perhaps partly because of an overall decline in the market. We would expect that mid-sized firms have been the major beneficiaries of the growth in income from family law work, and hence prominent amongst smaller firms that have disengaged from legal aid work.

The evidence also indicates some smaller firms have sought to enter new markets, and attract commercial and business-type law and other growth areas of highly paid legal work. The likely effect is that fewer firms are engaged in family law and criminal law work; consequently, fewer solicitors are active in labour markets for legal aid. Once again we would expect this phenomenon to be more noticeable amongst mid-sized firms. We would also expect that some solicitors ceasing employment in smaller firms have moved to larger firms, or taken advantage of salaries and career prospects outside the legal services industry. The evidence also indicates that there may be latent problems in supply, and that some legal aid commissions have already experienced difficulties in accessing solicitors' services in rural and regional areas.

The evidence also indicates changes to the composition of labour markets. It is likely more experienced barristers have disengaged from legal aid work, giving rise to issues about the quality of legal representation available to parties and accused approved legal aid in Commonwealth law matters. The effect of market change on solicitors doing legal aid work is less clear. More research is required. If juniorisation is as widespread as some of the evidence indicates there are similarly issues about the quality of services available to persons approved legal aid in Commonwealth law matters. There are also labour market issues, in particular, the retention of new entrant or less experienced solicitors in the face of real opportunities for better-remunerated work and career opportunities available elsewhere in markets for legal professional work. If instead Australia like other societies has an older legal aid work force, with too few new entrants or younger practitioners, there are different issues, including in the medium to longer-term problems of replacement and recruitment in legal aid workforces.

We now turn to the third question posed by the AGD. How might the Commonwealth respond to these issues, and other problems identified in the paper? In answering this question we have concentrated on responses directed to managing labour market change. We
have steered clear of the wider challenges facing the Australian mixed model. There is clearly a mismatch in the expectations of the major interest groups and the policies of the Federal Government governing legal aid expenditure, and eligibility for legal aid services. The Law Council (2003 (b): pp. 22-3), NLA (2003: pp. 5-10), legal aid commission (see LAQ: pp. 11-19) and other submissions (see NACLC 2003: pp. 8-10) to the Senate inquiry into legal aid present a strong case that expenditure is inadequate, financing a capacity for service delivery that is demonstrably less than levels of demand for publicly funded legal services said to be evident in the community. NLA (2003: pp. 7-8) and the legal aid commissions (LACNSW 2003: pp. 22-4) also contend that division of expenditure into Commonwealth and State law matters is inefficient, and the funding and accountability requirements and performance standards in purchaser/provider models in current Commonwealth-State legal aid agreements are deficient.

In our preliminary discussions with the AGD we pointed out that increasing Commonwealth expenditure was likely to be a crude and inadequate policy response. Enabling legal aid commissions to pay private practitioners more for legal aid work was alone unlikely to be an adequate response to changes in labour markets for legal aid. At a minimum the AGD also needed to review its capacities to respond to problems and issues affecting persons eligible for legal aid in Commonwealth law matters. Save for a brief period ending in the early 1980s legal aid management in its various guises in the AGD has rarely been properly resourced to manage the Commonwealth role in the mixed model. It was clear the AGD needs to blend any response to changes in labour markets for legal aid into existing integrated policy approaches to Commonwealth responsibilities “to ensure that Australians have access to the justice system” (Williams 1999 (b) & 2001). Commonwealth access to justice policy includes legal aid policies, such as the legal needs of women in regional, rural and remote areas and in the Community Legal Services Program (Williams 2000 & 2001).

That said a strong and convincing case exists for an increase in Commonwealth expenditure, a major component of which should be applied to addressing problems and issues associated with changes in labour markets for legal aid. This case is particularly strong in the case of family law matters. If that decision is taken, the next questions are, how should that increase occur? Any funding increase must be part of a process, and not a single, one off event. It may be necessary, for instance, to supplement State and Territory funding in current Commonwealth-State legal aid agreements to enable legal aid commissions to contribute effectively to any AGD response. It will certainly be necessary to incorporate a degree of flexibility in the 2004-08 inter-governmental agreements, to allow for funding of any AGD responses to the problems and issues highlighted in the paper.

The first step in the process should be to increase Commonwealth expenditure in labour markets for legal aid. One option is to liberalise eligibility criteria, increasing the numbers of persons approved legal aid, without increasing the amounts paid to private practitioners. The assumption being that the resulting increase in demand for legal services by legal aid commissions is likely to be satisfied within existing labour markets for legal aid. The opportunity to increase caseloads would allow solicitors to achieve greater economies of scale in representing legally aided persons, and encourage firms to continue to do legal aid work. Without quality assurance measures this option is unlikely to address any problems in the quality of service delivery, and, in the short-term, the introduction of effective quality assurance measures is likely to prove impracticable. Increasing Commonwealth expenditure without directly increasing the amounts paid for legal aid work is also unlikely to diversify supply, or counter the trend for private practitioners to exit labour markets for legal aid.
The other option is to enable legal aid commissions to increase payments to private practitioners representing persons approved legal aid in Commonwealth law matters. The AGD needs to consider two questions if this option is adopted. The evidence reviewed in this paper presents a strong case for an immediate increase in payments for legal aid work in family law matters. The case is less clear in criminal law matters, which are of less concern to the AGD. The case rests in part on the evidence that private practitioners are underpaid for legal aid work, and that underpayment is likely to have been a feature of labour markets for legal aid since the early 1990s. Importantly it also relies on equally significant evidence. Underpayment for legal aid work is likely to have encouraged solicitors to provide a reduced quality of service to persons approved legal aid in Commonwealth family law matters. The evidence also indicates changes in the size and composition of labour markets that left unredressed will disadvantage persons eligible for legal aid in Commonwealth law matters in the longer-term. An immediate increase in payments for legal aid work is an important first step in conserving and protecting labour markets for legal aid. It would also send a positive signal to the private legal profession. Its support is important, both for implementing the proposals described below, and in adapting service delivery in what is likely to be a continuing climate of change within the Australian mixed model.

What should be the amount of any immediate increase in payments for legal aid work in Commonwealth law matters? The analysis in the paper has increased the information available to the AGD about the amounts charged to self-funding clients by firms and solicitors. In particular, reviewing the evidence has demonstrated differences in amounts charged by larger and smaller firms, sole practitioners, small partnerships and mid-sized firms, partners and employed solicitors, and firms in city and suburban areas, and in rural and regional areas.

Ready access to this evidence also complicates the task of suggesting the amount of any immediate increase in payments to private practitioners. The Federal Government and the Department of Finance may be unwilling to increase hourly rates for family law work in Commonwealth law matters to $199.00 per hour, the amount reported in the 2001 NLA survey for employed solicitors, when the FMRC Legal data shows a charge out rate in 2002 of $155.00 per hour for employed solicitors in mid-sized CBD firms. Obviously one solution is that any increase should differentiate between employment status, and size and location of firms. Such an increase would be administratively difficult and costly for legal aid commissions, and unlikely to find favour with private practitioners.

In any event incorporating a shift from uniform payments in any immediate increase in payments to private practitioners would be premature. Significant gaps remain in the reliable data that is available about costs incurred in legal aid work. Principally with respect to issues such as acceptable levels of return on investment and work in solicitors’ firms, differences between firms and types of legal work and charges and incomes of barristers doing family law and criminal law work. The paper also raises other questions. Should, for instance, the norm that legal aid work is paid at 80 per cent of rates ordinarily charged to self-

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31 This is not to say there is no room for an immediate departure from uniform fee scales. Some legal aid commissions appear to face problems in supply in regional cities and towns. The report of the parliamentary committee that reviewed legal services in rural and regional Victoria suggested (2001: p. 266) assessing whether Commonwealth Department of Health Aged Care strategies (see AGDHA 2002(a) & (b)) to increase the numbers of medical professionals in rural areas would translate to legal practitioners. Problems in supply in labour markets for legal aid (cf. CDHAC 2000) are unlikely to attract such expenditure. On the other hand it would be a simple matter to selectively fund legal aid commissions to pay market rates in rural and regional areas, if that was the price of ensuring persons eligible for legal aid in Commonwealth law matters could access solicitors’ services.
funding clients be retained? Should fixed fees, whether nationally or regionally uniform, apply to legal aid work, when the thrust of the Federal costs review recommendations advocate contract-based professional fees? These and related questions cannot, and need not, be answered before any immediate increase in payments for legal aid work, and can await further investigation within the policy and research frameworks proposed below.

Any immediate increase in amounts paid to private practitioners must address the evident differences in payments for legal aid work and fees charged to self-funding clients. The disparity in the nominal value of hourly rates in legal aid commission fee scales and amounts actually paid in cases approved legal aid on a stages of matter basis is the major factor contributing to the opportunity costs incurred by solicitors in legally aided family law work. One solution is to increase the hourly rates paid by legal aid commissions whilst simultaneously liberalising provision for payments to private practitioners in stages of matter fee scales.

As discussed above the evidence of hourly and charge out rates presents a range of fees charged by firms and solicitors. Our preferred solution is to increase the base hourly rate paid by legal aid commissions for work performed by private practitioners to the rate fixed by the Family Law Act scale, in 2004, $153.70 per hour. Adopting the scale rate would be an administratively convenient short-term solution. It would also serve to counter arguments that increasing payments for legal aid work was unreasonably benefiting private practitioners.

Increasing payments in stages of matter fee scales is less straightforward. These scales are a product of funding restrictions. An immediate increase in payments cannot be achieved simply by an upward re-jigging of a systematically applied costs formula. There is convincing evidence that the amounts received by private practitioners in legal aid work paid on a stage of matter basis is frequently in the order of 50 per cent less than amounts paid by self-funding family law clients for comparable work. It would appear not to be unreasonable to increase stage of matter fee scales accordingly, increasing, for instance, existing allowances of four hours in a particular stage of matter by 50 per cent, to six hours. Alternatively, commissions may choose to reform stage of matter fee scales. Making greater use, for instance, of broad banding and other methods increasing flexibility in payments for legal aid work, and reducing transaction costs, for both legal aid commissions, and private practitioners.

The cost-caps currently applied in Commonwealth family law matters should also be increased. In its submission to the Senate legal aid inquiry Legal Aid Queensland (LAQ) (2003: p. 0) suggested an increase to $15,000.00 in family law matters, and $20,000.00 in child representation matters. We are unable to comment on the latter. The paper does contain ample evidence that an immediate increase of the cost-cap in family law matters to $20,000.00 is justified. Such an increase is unlikely to attract significantly greater numbers of family law practitioners to legal aid work. It is likely to enable greater numbers of parties eligible for legal aid in Commonwealth law matters to obtain legal representation in more complex family law proceedings, including trials.

Transaction costs are the other factor contributing to opportunity costs incurred by private practitioners. Most legal aid commissions have already introduced some changes to reduce transaction costs. LAQ, for instance, has developed an on-line applications system, and Victoria Legal Aid has also streamlined the applications process. An AGD response should acknowledge and encourage legal aid commissions in minimizing transaction costs incurred
in representing legally aided persons. Transaction costs and other interfaces with legal aid providers are important factors in decisions by private practitioners to engage in legal aid work.

The terms of the new 2004-08 Commonwealth-State agreements should reflect any expenditure increases. Obviously care must be taken to ensure that increased payments to legal aid commissions are sufficient for the task. New cost-caps in family law matters, for instance, would increase the cost of approvals of legal representation. Unless overall funding is increased correspondingly legal aid commissions will be capable “of funding fewer applications” in Commonwealth funded family law matters, as NLA points out (2003: p. 14) in its submission to the Senate legal aid inquiry. Legal aid commissions may also require funding to pay one-off additional expenses associated with any immediate increase in payments to private practitioners, such as revising fee scales. Provision for appropriately indexing payments to private practitioners for legal aid work should also be included in the 2004-08 Commonwealth-State agreements.

The second question for the AGD is the amounts to be paid in the medium to longer-term for legal aid work in Commonwealth law matters. Determining the answer to this question involves the second phase in the process of any response to the problems and issues in supply identified in this paper. The Federal Government should desirably use part of any increased Commonwealth expenditure to establish new mechanisms to enable the AGD to better understand and manage labour markets for legal aid in the mixed model. Establishing such mechanisms is important, not only to ensure private practitioners are appropriately paid for legal aid work, but also that persons eligible for legal aid in Commonwealth law matters have access to quality legal representation in the medium and longer-term. What machinery to oversight and better manage labour markets for legal aid is required?

The optimum solution would be to establish an agency akin to the Australian Institute of Health and Welfare (AIHW), the agency charged with improving “the health and well-being of Australians” by informing “community discussion and decision making through national leadership in developing and providing health and welfare statistics and information” (c2003 (a): p.1). This solution is clearly impracticable. The latest AIHW figures (c2003 (b): p.1) estimate total health expenditure at $66.6bn, whereas total expenditure on legal aid is less than $300m. Establishing a new legal aid agency to collect statistics and information would also be contrary to long-term trends in Federal public administration (see NLAAC 1990: p. 108), even a downsized version of the AIHW, appropriate to levels of Commonwealth expenditure on legal aid.

The solution proposed by the Victorian Government is that the Commonwealth should fund NLA to “address the national operational and strategic needs of the sector”, including deficiencies in co-ordination and integration of services, labour market issues and collecting and analysing meaningful data on the legal aid system (2003: pp. 13-14). Whilst this proposal has merits it does not sufficiently acknowledge the role of the AGD in the mixed model. Governments have a key role in the provision of legal aid (NLAAC 1990: pp. 54-6), particularly the Commonwealth, which has responsibilities (LCA: 2003 (b): p. 8) “to maintain a national leadership and management role in the national legal aid system”. Funding NLA to perform management functions may also repeat the experience of the 1980s, when the “Commonwealth progressively delegated de facto responsibility for managing the national scheme to the State and Territory legal aid commissions, and their directors or CEOs”
(Fleming 2000: p. 364), with long-term adverse effects on the capacity of the AGD to manage Commonwealth expenditure and legal aid policy.

Instead solutions already exist within the AGD. One such solution is to enable the AGD to oversee and perform a national role in the management, conservation and development of labour markets for legal aid. The AGD should be funded to assess the provision, use, cost and effectiveness of legal aid and other public legal services. Increased funding should be sufficient to permit recruitment of appropriately skilled staff, including labour market economists and social scientists. It should also enable the AGD to expand existing data collection capacities, and establish new capacities to collect and analyse statistics and information relating to the operation and composition of labour markets, and changes in supply, demand and the cost of legal aid work over time. The AGD should also assist legal aid commissions to increase data collection and reporting, and to commission researchers, including consultants such as NATSEM and FMRC Legal. It should liaise with the ABS and others to encourage rationalisation of legal aid and legal services information activity across national and State and Territory agencies. The amount required to enable the AGD to perform such functions should be estimated in consultation with other agencies, in particular, the AIHW.

The other existing basis for solutions to improve the management of labour markets for legal aid is the purchaser/provider approach. Purchaser/provider mechanisms were introduced into Commonwealth-State agreements in 1997, amidst the controversial changes to Commonwealth legal aid funding (Fleming 2004: 31-3). The approach is still viewed with disfavour by some interest groups. Application of purchaser/provider approaches has certainly had negative outcomes (ibid: pp. 33-6), as well as positive outcomes (ibid: pp. 28-30). In the Commonwealth-State agreements purchaser/provider approaches have been used primarily to improve financial accountability, and control and limit expenditure on persons eligible for legal aid in Commonwealth law matters. Applied creatively purchaser/provider approaches can also be deployed to achieve flexibility and choice in policy and service delivery strategies, and target outcomes to meet identified needs. Importantly in the present context purchaser-provider approaches also provide opportunities for funding and policy agencies such as the AGD and legal aid commissions to intervene in occupational markets (ibid: pp. 27-8).

These proposals to improve the capacity of the AGD to respond to changes in labour markets affecting persons eligible for legal aid in Commonwealth law matters may not be accepted. Since 1980 governments have been reluctant to invest in research and development in the mixed model, although the new profile of the Commonwealth in legal aid since 1996 has reversed this trend, with the AGD making significant use of commissioned applied research, especially in family law. Even if the proposals are accepted, it is likely to be mid-2005 before the AGD is properly equipped to implement an effective programme to oversight and intervene in labour markets for legal aid.

Whichever is the outcome there are two actions open to the AGD that would improve its capacity to develop appropriate policy responses to labour market changes. These are the actions that we suggested in the discussion that preceded this paper. The first is that the AGD could commission several case studies of legal aid work in representative solicitors’ firms. Well-designed case studies are an effective tool in exploring changes in legal aid work (Hunter 2000: p. 00). The other action is to obtain disaggregated data reporting changes in the numbers and size of solicitors’ firms referred legal aid work in the States and Territories. The
Griffith researchers suspected (p. 34) that “legal aid authorities were largely flying in the dark” in relation to issues such as price and quality of legal aid services and motivations to do legal aid work. These two actions would quickly and inexpensively enable the AGD to better understand issues, such as:

- The size, location and distribution of firms doing legal aid work
- The age, gender and experience of private practitioners doing legal aid work
- The volumes and types of legal aid work performed
- That private practitioners and firms that have ceased legal aid work
- The size, location and distribution of firms remaining in labour markets for legal aid

It remains to say that responding to the problems and issues raised by private practitioners disengaging from legal aid work poses challenges for the Federal Government and the AGD. Legal aid is not a vote winner, particularly when eligibility for legal aid in Commonwealth law matters is restricted to a disparate group of low-income persons. Many in the wider community including ministers and officials active in Canberra policy markets also suspect legal aid primarily serves the interests of the private legal profession. Increasing Commonwealth expenditure at least in part to pay private practitioners more for legal aid work is not necessarily a winning argument. In any event it is difficult to imagine how the AGD can quarantine any increase in payments to private practitioners to legal aid work in Commonwealth law matters. Such an increase will inevitably flow into legal aid work in State law matters, and lead to demands by legal aid commissions and State and Territory governments for compensatory Commonwealth funding.

It is also likely that increasing payments for legal aid work in Commonwealth law matters will generate other flow on effects. Whilst this paper has concentrated on exploring changes in labour markets over 1990 to 2003 those changes occurred in the shadow of evidence questioning the effectiveness and scope of the legal aid system, or documenting other problems in popular access to justice, including the courts. If the Federal Government decides to act to redress the problem of private practitioners disengaging from legal aid work it exposes itself to the criticism that it may be ignoring other problems facing the Australian mixed model, or citizens struggling to protect their legal rights and interests.

Moreover the object of any increase in Commonwealth expenditure is to redress the disadvantages currently associated with an approval of legal aid in Commonwealth law matters. In particular, to enable persons approved legal aid in family law matters to access legal representation of comparable quality to the services provided to self-funding clients by solicitors and firms. If that object is achieved it will increase demand for approvals of legal aid by persons eligible for legal aid in Commonwealth law matters, particularly family law matters. Once increased quarantining demand will be difficult. Demand is likely to increase for approvals of legal aid in State law matters, particularly if payments for legal aid work are similarly increased. Greater access to quality legal representation in family law and criminal law matters is likely to increase demand in law matters for which legal aid is not currently approved. Growth in demand is likely to generate interest group pressure for additional Commonwealth expenditure within the mixed model.
7.0 Conclusion

Analysing the evidence of changes to labour markets for legal aid since 1990 has added to the existing body of knowledge about why Australian private practitioners have disengaged from legal aid work, and its significance for persons eligible for legal aid in Commonwealth law matters. The paper shows that whilst underpayment by legal aid commissions has been the major issue other factors have contributed. The growth in demand and income in the Australian legal services industry since the early 1990s has been important. Market demand for commercial and business-type legal services and other legal work in strong demand has expanded income and career opportunities for many solicitors, particularly in larger firms. It has also encouraged some smaller firms towards commercial and business-type legal work, exiting markets for family law and criminal law work. Directly and indirectly the strong market for legal professional work has increased income expectations amongst private practitioners, including family law practitioners, encouraging some to exit labour markets for legal aid. Similarly changes to legal professional work, its regulation and the relationship between the private legal profession and governments in the 1990s have reduced the social incentives for private practitioners to engage in legal aid work. For many pro bono or other styles of social contribution have become far more attractive. In 2003 labour markets for legal aid were smaller than in 1990, it is likely that few larger firms remained, and that legal aid work was increasingly concentrated in smaller firms.

Redressing the problems caused by underpayment is clearly a pressing issue for the Federal Government and the AGD, both to restore financial incentives for private practitioners to remain in labour markets for legal aid, and to improve the access of persons eligible for legal aid in Commonwealth law matters to quality legal representation from solicitors and firms, particularly in family law matters. As is timely action to establish mechanisms to expand the capacities of the AGD to conserve, protect and monitor the operation of labour markets for legal aid.

Our analysis also suggests that disengagement from legal aid work is an iceberg issue. Beneath the story of private practitioners ceasing to represent persons eligible for legal aid are changes to the dynamics of the mixed model. We tend to envisage mixed model legal aid schemes as formulaic institutions, conforming to a template or design, and internally passive amidst the constantly changing politics of legal aid. This overlooks the evidence that these schemes did not emerge from pre-engineered policy response. Genuinely “planned and integrated” mixed model legal aid schemes are “few and far between” (Paterson 1991: p. 137). In Australia and Canada the adoption of a mixed model solution to providing legal aid was a product of a political compromise between governments and law societies and bar associations (Zemans 1985: p. 297-8; Fleming 2004: pp. 13-18; see also Lynch 1996).

As we mentioned throughout the paper the assumptions and politics that shaped the post-war legal aid schemes have changed dramatically. The new politics of law evident in market capitalist societies since the late 1970s have diminished the resonance of the social democratic ideals that shaped modern legal professionalism and encouraged support for legal aid (Fleming 2004: pp. 00). In the 1990s these changes to the dynamics of the mixed model and Judicare schemes in the countries referred to in the paper were compounded by downward trends in legal aid expenditure and amounts paid to private practitioners, and strong if not sometimes booming demand in mainstream markets for legal professional work. In England
and Wales, for instance, recent research suggests that changes to the dynamics of the Judicare system has so reduced the incentives for private practitioners to represent legally aided persons that it may prove to be incapable of sustaining supply of legal aid services (Moorhead 2003: pp. 1-3).

None of the available evidence suggests that Australia is facing such a crisis. Nevertheless the dynamics of the Australian mixed model have clearly changed. Further explorations into the causes and implications of changes in labour markets for legal aid are likely to demonstrate the desirability of diversifying supply. As in England and Wales (ibid: pp. 39-43) ensuring an adequate supply of private practitioners able to provide quality legal representation services is likely to require the AGD and legal aid commissions to intervene in labour markets. Possibly, financially supporting or seed funding private practices that undertake legal aid work (ibid).

Ensuring supply in the future may also require changes to the componentry of the mixed model. It is likely, as the JRC researchers (p. 0) foresaw, that it will be necessary to increase the number of salaried legal practitioners, employed in legal aid commissions and community legal centres, or new sites of service delivery. In the longer-term we would expect further deregulation of legal professional work, creating new categories of legal services providers, along the lines of service delivery in the health care model, increasing the diversity of the Australian mixed model, and reducing the dependence of legal aid providers on the supply of private practitioners.
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