2. Do not be complacent about current levels of funding or the current acceptance of CLCs — cuts can be made very easily.
3. Work with others to fight the forces of conservatism.
4. Acknowledge that the political and economic environment is difficult and complicated, and that the issues and challenges in the 1990s are different, harder and more complex than 20 years ago. Consequently, spend time discussing these issues.

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Legal aid in the early 1990s
A broad view of a bleak picture

David Kemp

A bad time for legal aid

The prospects for achieving adequate public legal services in Australia in the 1990s are bleak. It is already clear that the major legal aid providers are unable to offer adequate levels of legal assistance and the picture does not improve if one looks at the system of law and government as a whole. Since the early 1980s, federal and State governments have acted to substantially change the distributive and majority social well-being focus of the post-war welfare state. This has been accompanied by the emergence of economic rationalist policies and the influence of its adherents in economic and social policy-making. For these and other reasons, governments and their advisers in the early 1990s are far less willing than they were 20 years ago to actively intervene in society to achieve greater equality and social protection.

This impacts on legal aid for three reasons. The first is the obvious one. The so-called 'market orientation' of economic rationalism places a greater obligation on individuals to take the initiative to act to protect their own interests. The law and the legal system are the major non-economic regulators of social interests. Therefore, the importance of access to legal services as instruments for protecting, asserting or enforcing those social interests increases.

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The second reason is less obvious. Legal aid has always existed on the fringes of the Australian social welfare state; it has been a struggle to suggest that access to legal services is part of the measure of social well-being. Thus, legal aid is hardly in the race when governments have already begun to redistribute access to those established fields of state welfare provision in education, health, income support, etc.

The third reason these trends impact on legal aid is that legal aid is only part of the much wider issue of the unequal distribution of the potential to obtain legal services. The remedy for this inequality is, in part, the greater availability of legal aid. But for the majority of individuals, the remedies can only be found in government action to provide a wider range of public legal services and to reform the legal services industry. None of these is likely from the federal government in its present mood and is even less likely to be promoted by the current generation of senior government advisers.

The role of governments in social democratic capitalist societies is to strike what is, perhaps inevitably, a clumsy balance between the interests of state, private and corporate wealth and power on the one hand and the humanitarian and social justice objectives on the other. Such objectives are part and parcel of the political liberalism which has up until now been one of the driving forces of Australian political society. In that context, this is not only a bad time for legal aid, it is also a bad time for the whole public sector. What follows are some observations about the implications of this bad period for legal aid and public legal services policy in the early 1990s.

Trends in economic and social policy

It is beyond question that the application of economic rationalist policies is a major threat to majority social well-being. Those interested in legal aid, however, must take care that the economic rationalists do not become another 'legal aid warrior',[1] another symbol of conservatism to be opposed by legal aid radicals and progressives with the same rhetoric applied to the conservatives in the legal profession in the 1970s and 1980s.

It is simplistic to attach all the blame to the economic rationalists for the reorientation of the social welfare state which has accompanied economic restructuring. Like many other liberal capitalist welfare states, Australian governments have to confront the serious problems of paying their way. This is not an apology for the economic rationalists. Their single-minded solutions are at best a product of a disciplinary and historical myopia; at worst a crudely disguised attempt to redistribute wealth and concentrate power in a manner contrary to the social well-being of the majority of individuals. Nevertheless, there is a genuine need to seriously reconsider, and in some cases revise, the funding and management of public services.

In any event, economic rationalism will not last. It may last for five or six years but, like all dogma, it will in the end prove to be incapable of reconciling the wonderful contradictions of human economic and social behaviour.[2]

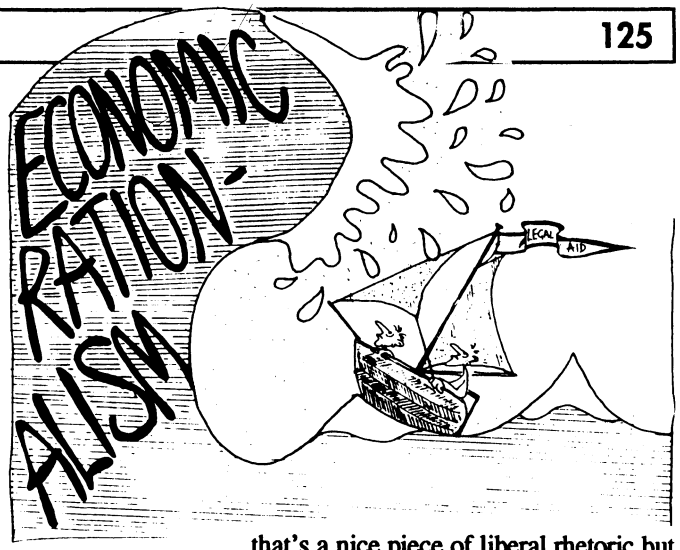
Even if the need to oppose economic rationalism were not so pressing, legal aid and public services policy would still need to be reconsidered. This can

be illustrated with two examples. There is no doubt that the negotiation of Commonwealth-State legal aid funding agreements was a necessary and desirable change. The so-called 'numbers system' was a hopeless way of managing expenditure and of gathering data about trends in legal aid. Similarly, the Office of Legal Aid and Family Services (OLAFS) interest in the workloads of community legal centres is justifiable in terms of developing more effective community legal services policy. Clearly, neither of these measures is beyond criticism, but changes have been and are required and the only sensible changes are policy-driven. The problem is that, given the lack of pro-active policy involvement of the Commonwealth from the mid-1970s, there is a dearth of a policy base from which to participate in the now centrally-driven desire for change. Thus, those interested in legal aid must move from the liberal political discourse about relative distribution of legal aid funds within the legal services industry into the full-blown arena of public policy.

Economic rationalism presents liberal legal aid and public legal services policy with new and serious problems to solve. There is a fundamentally antithetical relationship between economic rationalist values and the humanitarian and social values of political liberalism on which the legal aid policies were formulated in the 1960s, 1970s and 1980s. The reason for this is that economic rationalism:

> . . . assumes all social relations, social norms, and traditions, all culture and remembered inheritance, and all the institutions of education, of the family, of work, of political participation, and indeed, the social formation of ordinary individual identity — that all this is malleable plastic that will obediently find expression merely as individual calculations of utility coordinated through a market. And, what is more, through a market that will then handle it all 'efficiently and effectively' within whatever structures of 'reduced complexity' an 'overloaded system' will allow . . .[3]

This reveals major problems for legal aid in the competitive policy arena at the national level. The first is simply that of the antithetical relationship. The various shades of political liberalism which supply much of the ideological foundation of the access-to-justice and procedural-justice values of the Anglo-Australian legal system are in direct conflict with the economic liberalism of the monetary reductionists. Put very simply, justice of itself does not compute.



The second problem is that, as Pusey argues, economic rationalism 'can coexist and find accommodations with almost anyone, including orthodox Marxists, *except liberals*'[4] (emphasis added). The third problem is that much of the rhetoric of the legal aid debates since the late 1960s is not the product of significant ideological conflict. The Law Council of Australia, the legal aid commissions and the community legal centres agree on the basic principles of access to justice. The arguments have really been about the distribution of power within the legal services industry. This internal discourse is not very much use when it comes to opposing economic rationalism.

There are no magic or instant solutions to these problems. In fact, there is no single or lasting solution at all. Unlike the precepts of justice and the stability of established common law or statutory rules, the boundaries of influence of social policy are necessarily flexible, adaptive and responsive. This is precisely what legal aid and public legal services policy has to become. This does not mean ditching any commitment to liberal ideals of access to justice in legal aid but the foundations of legal aid policy need to be strengthened for effective participation in the political contests for funds and policy ascendancy. This can be done by developing coherence and consistency in the justifications for legal aid and, on that basis, articulating the case for reducing inequalities in the potential to obtain legal services.

The National Legal Aid Advisory Committee (NLAAC) National Principles of Legal Aid provide a straightforward illustration of incoherence in existing legal aid thinking. They assert that governments 'in Australia have a duty to ensure that sufficient funds are provided for . . . the fair and effective application of the law [and] the efficient administration of the Federal, State and Territory legal systems'.[5]

This proposition was accepted without much debate by the legal aid community. But how does it stand up to analysis when someone says, 'yes, that's a nice piece of liberal rhetoric but the market is the best discriminator in deciding who really needs legal services'. How do you respond other than with expressions of moral outrage?

You are hard pressed to establish that Australian governments have a legal or constitutional obligation to provide legal services to the poor, or to anyone at all for that matter. Even if you can have a moral right to services, there are problems with arguing that governments have a moral obligation to provide legal aid. Perhaps the only convincing case that you are left with is Luban's simple but convincing argument that in the case of the poor at least it is simply unfair that they be denied access to legal services.[6]

But that still leaves the problem of the non-poor, who still have insufficient potential to obtain legal services. Where do you find the stronger arguments for government intervention in their case? Do Luban's arguments about implicit rights deriving from the political legitimacy of the US Federal Government work in Australia?[7] Or, if you go to the social justice arguments, which one do you take? Utilitarianism, Rawls' theories of justice, republicanism or contractarianism? Which one does legal aid fit, or do you have to adapt one or more of the arguments for the particular case?

The use of the term 'legal aid' as a generic to describe free or assisted legal services is another simple but important illustration of the limitations of the existing justifications for legal aid. Legal services may take the form of legal advice, non-contentious legal representation or legal representation before courts or tribunals. There are strong justifications for free and universal legal advice: governments make the law, legal obligation imposed by the law is non-consensual and in a law-administered welfare state the law is a major instrument of social and economic regulation.

Similarly, there are justifications for the provision of legal representation. In criminal law and family law, for instance, the state not only prescribes the applicable substantive law but also imposes a mandatory dispute resolution procedure. On the other hand, in civil matters, the individual has at least a notional choice to resolve a dispute without being required to participate in litigation.

The point being made is that there are big gaps in our legal aid policies. Until these start to be filled, even by small steps, this will remain a problem.

Another point to be made on the impact of economic rationalist values on legal aid and public services policy is that the antithetical relationship which I have described above also affects the values and interests of the private legal profession. It affects its values because a significant part of the internal professional culture of lawyers is closely linked to the values of political liberalism. It affects its interests because the power base of the legal profession is very much undergoing change. Among the indicators are the low profitability of many smaller legal practices; the incursions of non-legal experts into fields of 'legal work'; the impact of the increasing feminisation of law study, if not segments of legal practice; the 'decline of professionalism'; and the indifference of the economic rationalists to the traditional power of established social institutions. In the 1990s, unlike the 1970s and 1980s, there are likely to be closer links between those in the wider legal services industry; pressure for reforms to the organisation of legal services may come from unexpected quarters.

Some current issues in the administration of legal aid

The important question to ask is who is going to develop the ideas which provide the framework for making legal aid policy choices? Practically, this task should at least be centrally supervised if not centrally driven. It can be achieved by a properly staffed research unit or by contracting out specific tasks, as the Commonwealth Legal Aid Commission and the Commonwealth Legal Aid Council did so successfully in the 1970s and early 1980s. Unfortunately, there are few signs of OLAFS moving in that direction although it must be congratulated on its publication of the *Quarterly Legal Aid Statistical Bulletins*.

Over a 20-year period, successive federal governments have gradually removed the policy and staffing teeth of the four statutory advisory bodies (the Commonwealth Legal Aid Commission, the Commonwealth Legal Aid Council, the National Legal Aid Representative Council and the National Legal Aid Advisory Commission). Nevertheless, research and policy development are fundamental to improving the availability and effectiveness of legal aid as part of public legal services strategies.

The Commonwealth-State legal aid funding agreements were a timely and desirable development. However, it seems to me that the criticisms made by NLAAC of the funding formula have stood the test of time. It is interesting to note that in its submission to the Senate Cost of Justice Inquiry, the Attorney-General's Department itself questioned the applicability of the AWE and CPI indices to the measurement of movements in the cost of legal services.[8] This financial year, the Commonwealth has made an additional allocation of funds to the legal aid commissions under the agreements, but more is required and the funding formulas need to be revised.

Perhaps we accept too readily that the Commonwealth is the major player in legal aid, believing that the 'golden period' of an interventionist federal government and Attorney-General in the 1970s is the model for legal aid. The reality is that the golden period probably lasted for less than two years. If you look at the history of the funding and administration of legal aid in Australia, it has been primarily a State matter. The Poor Prisoners Defence and Poor Persons Procedure legislation and the early law society schemes are examples. Even at the time of the grand plans for post-war social reconstruction in the mid-1940s, the national government did not pick up on the radical proposals for legal aid in New South Wales (*Legal Assistance Act* 1943).

Finally, the adversarial attitude held by radicals and progressives in the legal aid field towards the private legal profession must change. The prospects of remedying the unequal distribution of legal services are tied up with the organisation of the private legal profession and its acquiescence to proposals for reform in the legal services industry. The current interest of the private legal profession in *pro bono* work must be encouraged and effectively linked into schemes of legal assistance.

We must also be prepared to consider changes to the institutions of the legal aid system. For instance, if legal aid commissions are to act simply as providers of legal assistance for the poor and litigation lenders for the non-poor, there is at least a case for asking whether this could equally be provided directly by the private legal profession. The same can be said of community legal centres. There is a great need for accessible legal advice agencies at the local level and it may or may not be the case that they should always be community legal centres. I think we have to be prepared to look beyond what are necessary and proper concerns of the legal aid interests groups to how we can best reduce inequality in the potential to obtain legal services.

The possibility of using the 'health model' in advancing the cause of legal aid was canvassed in the panel discussion which followed the OLAFS Legal Aid and Legal Access Conference in February 1992. That would be a mistake. While there are strong parallels between access to medical services and public legal services, governments are in fact retreating vigorously from the health care field area. Even a cursory understanding of the interrelationship between the private medical profession and the costs structure of the health services industry means that the analogy must be approached carefully.[9]

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