

# Reclaiming Community Legal Centres

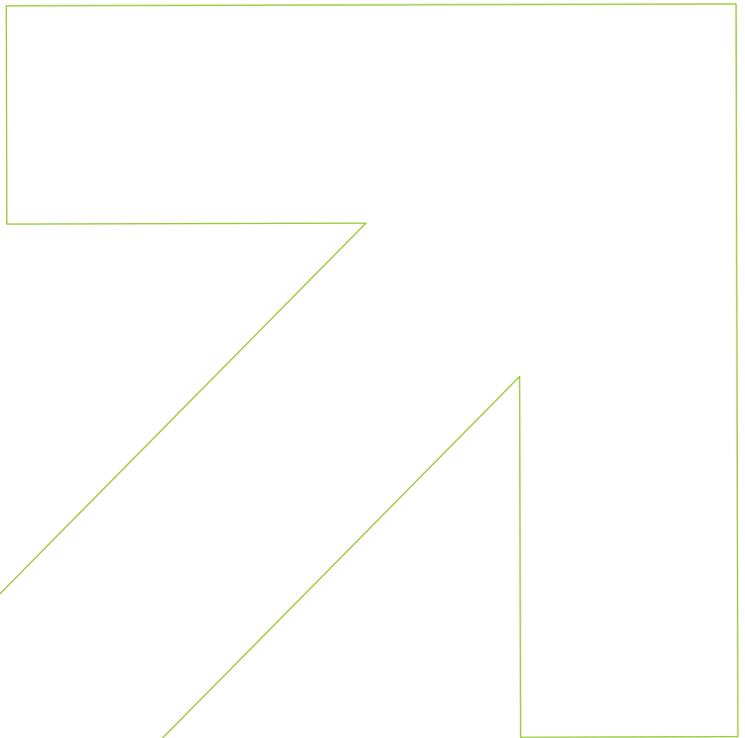
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Maximising our potential so we can help our clients realise theirs

**Nicole Rich**

Victoria Law Foundation Community Legal Centre Fellowship 2007-2008  
Final Report

**April 2009**





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Maximising our potential so we can help  
our clients realise theirs**

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ISBN 978-0-9804788-2-2

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Nicole Rich from the Consumer Action Law Centre was the Victoria Law Foundation Community Legal Centre Fellow for 2007-08.

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## List of acronyms

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CED	Community Economic Development
CLC	Community Legal Centre (Australia)
CCLSP	Commonwealth Community Legal Services Program (Australia)
CFR	Code of Federal Regulations (US)
EDO Vic	Environment Defenders Office (Victoria) Ltd
FCLCV	Federation of Community Legal Centres (Vic) Inc (Victoria, Australia)
HRLRC	Human Rights Law Resource Centre (Victoria, Australia)
ICLC	Inner City Law Center (Los Angeles, California, US)
IOLTA	Interest on Lawyers' Trust Accounts (US)
LAC	Legal Aid Commission (of a state or territory of Australia)
LACNSW	Legal Aid Commission of New South Wales (now also referred to as Legal Aid NSW)
LAFLA	Legal Aid Foundation of Los Angeles
LSC	Legal Services Corporation (US)
NACLC	National Association of Community Legal Centres (Australia)
NLADA	National Legal Aid and Defender Association (US)
NSW	New South Wales

PIAC	Public Interest Advocacy Centre (NSW, Australia)
PILCH NSW	Public Interest Law Clearing House (NSW, Australia)
PILCH Vic	Public Interest Law Clearing House (Vic) Inc (Victoria, Australia)
PILI	Public Interest Law Institute (US, Europe)
QAILS	Queensland Association of Independent Legal Services Inc
QPILCH	Queensland Public Interest Law Clearing House Inc (Queensland, Australia)
UCLA	University of California, Los Angeles
UK	United Kingdom
US	United States of America
U.S.C.	United States Code
VLA	Victoria Legal Aid
WCLP	Western Center on Law and Poverty (Los Angeles, California, US)

# 1. Report information

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## 1.1 Project background

This Report is the final report of a project undertaken under the Victoria Law Foundation Community Legal Centre Fellowship for 2007-08, produced as a result of the fellowship grant from the Foundation.

The Report examines the reasons and justifications for Australian Community Legal Centres (CLCs) to undertake policy and law reform work and reports on some different advocacy strategies and techniques in use in the US that might be relevant to this work by CLCs in Victoria and elsewhere in Australia.

## 1.2 Methodology

The author was based in Los Angeles, California in the US for the majority of the time in which this project was undertaken. The project materials derive from two principal sources: a literature review of relevant materials; and interviews with staff of various public interest organisations in California, including legal centres and consumer organisations, as well as with some public interest law academics at the University of California, Los Angeles (**UCLA**) School of Law.

The literature review was of mainly US and Australian materials on relevant issues such as: Australian CLCs; the use of law to help disadvantaged clients, in the public interest or on behalf of a cause; and campaigning techniques. Some guidance in research was also taken from courses in the UCLA School of Law David J. Epstein Program in Public Interest Law and Policy.

The interviews were conducted by the author in person, apart from one interview with a staff member based in Washington DC, which was conducted over the telephone. The interviews followed a semi-structured format, with questions prepared in advance but the author allowing the conversation to progress naturally. Interviews generally took from one to two hours to complete. A list of sample questions is provided at Appendix A, although only some of these questions were asked in any given interview, depending on the nature of the organisation and the role of the

interviewee in that organisation. Sometimes specific questions about that organisation's particular activities were also included.

### 1.3 Acknowledgments

I would like to thank all of the people in the US who generously gave their time to speak with me about this project:

Cher McIntyre	Consumer Action
Audrey Perrott	Consumer Action
Linda Sherry	Consumer Action
Mikael Wagner	Consumer Action
Meagen Bohne	Consumers Union
Gail Hillebrand	Consumers Union
Michael McCauley	Consumers Union
Doug Heller	Consumer Watchdog (formerly the Foundation for Taxpayer and Consumer Rights)
Pamela Pressley	Consumer Watchdog
Harvey Rosenfield	Consumer Watchdog
Brett Terrell	Inner City Law Center
Ben Beach	Legal Aid Foundation of Los Angeles
Lili Sotelo	Legal Aid Foundation of Los Angeles
Ruth Williams	National Council of Jewish Women Los Angeles
Hernan Vera	Public Counsel
Mindy Spatt	TURN
Mark Toney	TURN
All the staff	TURN
Professor Richard Abel	UCLA School of Law
Professor Scott Cummings	UCLA School of Law
Professor Gary Blasi	UCLA School of Law
Andrea Luquetta	Western Center on Law and Poverty
Greg Spiegel	Western Center on Law and Poverty

Special thanks are given to Cathy Mayorkas, Director of Public Interest Programs at the UCLA School of Law David J. Epstein Program in Public Interest Law and Policy, for her support and to Sangeeta Pal, Public Services Projects Coordinator at the UCLA School Hugh & Hazel Darling Law Library for her assistance.

I also thank Kathy Hope, Amy Kilpatrick, Hugh de Kretser, Catriona Lowe and Denis Nelthorpe for their ongoing help and encouragement as members of the Advisory Group for the project, and staff and volunteers at the Consumer Action Law Centre for their support and practical assistance. Last but not least, thanks must go to Tarni Perkal and Tabitha Lovett of the Victoria Law Foundation for their support and patience during the fellowship.

## 1.4 Feedback

This Report intends to contribute to ongoing discussion regarding the role of, and best practice in, the CLC sector in Australia. Comments on this Report are very welcome.

Please send any views or contributions to:

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## 1.5 Report structure

Section 2 contains an executive summary of the Report.

Section 3 examines the reasons and justifications for CLCs to engage in policy and law reform work.

Section 4 discusses three sets of strategies that CLCs can use in undertaking policy and law reform work, drawing on developments in the US. It also briefly considers funding issues related to undertaking this work and the role of evaluation in policy and law reform work.

Appendix A contains the lists of sample questions used in the semi-structured interviews for this project.

Appendix B contains a one page “quick guide” to this Report.

## **2. Executive summary**

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### **The three broad functions of CLCs**

Australian Community Legal Centres (**CLCs**) engage in three different broad types of activity or function. The first is individual legal assistance, which can take the form of information, advice or ongoing casework support; this might also be called direct service work. The second is community legal education. The third might generally be termed policy and law reform work. This Report relates to this “third” function of CLCs, that of policy and law reform work – similar to a general concept of advocacy work.

In theory, the different functions of CLCs are well-recognised and accepted. In practice, however, the ability of CLCs to engage in work other than direct individual service work has been under pressure for a number of years. This pressure comes from inter-related issues of resource constraints, increasing reliance on government funding, reduced government funding for other forms of legal aid and lack of expertise in policy and advocacy techniques.

Many CLCs still engage in regular policy and law reform activity, as well as community legal education, in addition to providing direct legal assistance to individuals. Some do not. However, it is imperative that all CLCs be committed to engaging in the full range of CLC activities if our clients – disadvantaged Australians – and their communities are to get the best service possible from their CLCs.

This Report is in many ways an attempt to revitalise the commitment of all CLCs to engaging in more than simply direct service work, as important as such service work remains for our individual clients, and even in the face of significant pressures to give up policy and law reform work in favour of providing a greater amount of direct legal assistance. It also attempts to give some guidance to CLCs about different ways in which they might engage in policy and law reform work, drawing on strategies and techniques being used by public interest groups in the US.

## Should CLCs engage in policy and law reform work?

CLCs provide direct legal services to their clients, people who tend to be disadvantaged Australians and, generally, people who could not afford to pay for a lawyer in the private sector. The heavy emphasis on direct legal services to individuals is also consistent with the fact that there is a high level of legal need in the Australian community.

CLCs generally do not have sufficient funding to address all of the individual legal need that they encounter. The large amount of legal need in their communities leads CLCs to try to provide as much individual legal assistance as they can within their limited resources, and consequently puts pressure on the ability, and willingness, of CLCs to devote precious resources to other activities, such as community legal education or policy and law reform work. With limited funding, most CLCs are also unable to employ additional staff members dedicated to policy and law reform work, thus it must be done by the very staff who are in direct demand to undertake the individual service work.

These pressures have been increasing over many years now, as unmet legal need increases and funding for other forms of legal aid has dropped. Further, increased reliance by CLCs on government funding comes with risks, due to government expectations about what activities will be undertaken and how many individual clients will be assisted with that funding; requirements for a large level of direct service work can squeeze out capacity for other activity. Recent data on Victorian CLC activity shows that over the four years to 2006/07, the volume of individual client service activity has steadily increased but there has been a large drop in the number of policy and law reform projects completed.

Despite these obstacles, this Report strongly maintains that CLCs must engage in more than individual service work, as crucial as this direct legal assistance is to disadvantaged Australians, on three principal grounds:

- doing so forms a critical part of the unique history and nature of Australian CLCs and must continue if CLCs are to remain relevant as a distinct institutional form for the provision of legal services to the disadvantaged;
- it is simply more effective to engage in a mix of activities if we want to maximise the benefits we provide to our clients; and
- arguably, strong moral commitments should impel CLCs to engage in this broader work.

## The unique role of CLCs

In Australia, CLCs and government legal aid are different institutional forms for the provision of legal assistance to the poor and disadvantaged.

What is commonly referred to in Australia as “legal aid” is the legal assistance provided to the poor and disadvantaged by government legal aid lawyers and private legal practitioners. A corps of salaried lawyers directly employed by government provides legal assistance, particularly information, advice and casework, while members of the private legal profession undertake casework funded by grants of legal aid. This form of legal aid accounts for the bulk of legal aid spending by both federal and state governments.

The generally accepted ideology underpinning support for legal aid in Australia tends to be framed in terms of “access to justice”. Legal aid is considered to be important in upholding the “rule of law”, in the sense that if all citizens are not able to access the legal system effectively the legal system cannot be said to be working equitably and its operation is diminished. While this may well be an admirable goal in itself, it is essentially a *procedural* justification for legal aid. This is quite different to a conception of legal aid that would see support for the underlying *substantive* interests of the people who receive legal aid, namely the interests of the poor and disadvantaged.

By contrast, CLCs arose in Australia separately to government legal aid and constitute a distinct institutional format for the provision of legal assistance to the disadvantaged. CLCs have their origins not in notions of a professional responsibility to provide legal assistance to the poor or in ideas of charity, but in a background of activism and lawyer radicalism that saw access to legal assistance as a right.

CLCs developed a model of providing legal assistance that was rooted in community development and collective approaches and included extensive volunteer participation in CLC management and legal services delivery. CLCs also focused on solving the problems of the disadvantaged in their communities not simply on the individualised, case-by-case approach typical to legal practice, but by addressing problems collectively, particularly through social reform efforts and community development work. This approach reflects a different ideology to the procedural notion of “access to justice” underlying support for government legal aid, one

based on a more substantive vision of a better society for the poor and disadvantaged, which is still relevant today given ongoing levels of disadvantage in Australia.

The start of a formal Commonwealth government CLC funding program was followed by state government funding to CLCs in most states. While government recognition and funding gave CLCs some financial stability and acknowledgment of their important role, it was also something of a double-edged sword, being based on the 'value for money' aspect of CLCs and thus increasing pressure on CLCs to do more direct service work. Over time, government became more directive about what services it was purchasing and CLCs could undertake and also began to make its own decisions about where new CLCs should be located to provide legal services.

The Federal Government funded 11 new CLC services in this way between 1998 and 2000, and all of these were in rural and remote locations with few existing legal services and a limited number of volunteers to draw on. It is questionable whether they had any scope to grow beyond small services dedicated to simply providing individual information, advice and limited casework. The default solution to a lack of legal services, particularly in regional areas, has been to establish community legal services rather than other forms of legal service provision, merely because community legal services are cheapest. This has had an undermining effect on the notion of CLCs as valuable because they provide a unique way of delivering legal services to the disadvantaged. State-level developments raise similar issues.

If CLCs provide principally direct individual legal services, particularly information, advice and casework, to poor and disadvantaged members of the community, they begin to look less unique compared to government legal aid, apart from their lower cost. The rationale for the continued existence and operation of CLCs cannot be to provide government with a means of under-funding legal aid to the disadvantaged. Without a commitment to a unique mode of service delivery that extends beyond what government or the private legal profession can offer, CLCs could become 'casework on the cheap'. If this is the future of CLCs, our clients might in many cases be better served by adequately resourced government legal aid offices, which would include properly paid staff and decent office conditions. The traditional features of CLCs that remain distinctive are their commitments to community participation, volunteer involvement and, particularly, a collective approach that includes a broad

range of policy and law reform activities. These must be what drive CLC work into the foreseeable future, if CLCs are to remain relevant to, and unique in, their communities.

The US experience provides a useful example of what an emaciated Australian CLC program might begin to look like. US Federal Government funding for civil legal aid is arguably a 'casework on the cheap' model. There is no corps of government salaried civil legal aid lawyers and civil legal aid delivered through a national network of independent legal service programs based in local areas is now severely under-funded. The Federal Government program originally intended the funded legal service programs to engage in a full range of activities, including policy and law reform advocacy. However, over time US Federal Government funding has been reduced and more and more restrictions have been placed on the activities that funded programs may engage in, such that now legal service programs cannot undertake the very strategies most likely to address the causes of poverty and deter future abuses.

### Effectiveness of policy and law reform work

An ongoing commitment to CLCs' unique vision of a mix of activities – including community education work and, especially, policy and law reform activities – is also important because it is more effective than only undertaking individual service work. This is particularly the case in pursuing a more substantive vision of justice for the poor and disadvantaged, rather than merely a procedural goal of equal access to the law.

Individual legal assistance alone cannot address the underlying causes of various legal problems that disadvantaged people present to legal services with. Further, continuing to undertake individual casework without a broader change focus can have negative, not just neutral, consequences, if CLCs simply assist an unjust system to process the cases which are put before it.

CLCs may not have created major transformations in our social structures towards eliminating poverty and disadvantage from the community, but CLCs' law reform and policy work has had a significant impact in various areas of public policy and the law, to the great benefit of poor and disadvantaged members of our community, as demonstrated in a recent report by Curran examining the impact of Victorian CLCs' law reform work. CLCs have achieved outcomes such as amendments to legislation, the

enactment of new legislation, prompting government regulators to take action, convincing business and government to change their practices, and cementing ongoing consultative roles with governments and businesses. CLCs are also often the sole agency identifying and advocating on issues experienced by their clients. It is therefore directly due to CLC persistence in advocating on those issues that awareness of a problem has increased and reform has ultimately been effected.

In the US, there has been extensive, considered and complex debate over what are the most effective and appropriate ways in which to provide legal services to the poor. This debate has now settled somewhat, including on general agreement that legal services for the poor must incorporate an element of social reform work in addition to individual casework if they are to make progress in improving the lives of the poor and disadvantaged. None of the interviewees visited for this Report considered that simply providing individualised legal services to the poor and disadvantaged is sufficient to have a real impact on their lives.

### Moral imperatives

In the US, Professor Tremblay has argued that there is a moral obligation for legal services to undertake a mix of activities, not only individual service work.

Given the scarcity in public interest legal services, there must be some form of 'triage' in deciding to whom to provide legal services. Part of this triage process involves making an assessment at the macroallocation level about the nature of the work a legal practice will undertake. Tremblay views poverty law practice as having a substantive goal – 'the achievement of power for the program's constituents' and thus rejects absolutely the notion that legal services aim to meet procedural goals of access to justice and equality of representation only. He also argues that the constituents whom legal services programs serve include not only clients, or even persons now living within the community who could ask for help, but also persons who could ask for help in the future.

The ethical choice thus becomes clearer – a legal service trying to achieve power for its constituents now and into the future must, as a moral imperative, balance its commitment to the alleviation of present needs with a similar commitment to altering the political landscape of the poverty community. This demands a combination or balance of different practice types, including individual case representation but also law reform and

mobilisation lawyering. There is a large risk that individual service work will come to dominate in an integrated practice, due to the strength of the 'rescue mission', that is, the intense human impulse to assist those currently in distress. However, this outcome would be morally wrong, as it would preference some constituent needs over others.

Not all writers have agreed with Tremblay's arguments and his conception of different practice types does not correspond neatly with the Australian context. However, Tremblay's conception of poverty law practice should at least prompt Australian CLCs to think more deeply about their obligations in serving client communities.

### Strategies for policy and law reform work

CLCs have been undertaking policy and law reform work from their beginnings in the early 1970s and are familiar with many of the strategies and techniques used to engage in change-focused activities.

In addition, the Federation of Community Legal Centres (Vic) Inc (**FCLCV**) has made available an online toolkit of resources on a range of matters, including engaging in media and law reform work and community legal education, the Fitzroy Legal Service has developed an online Activist Rights website that provides comprehensive legal advice to activists and protestors and the NSW Public Interest Advocacy Centre (**PIAC**) runs regular workshops on advocacy skills for community workers.

Several interesting developments in the US are less familiar in the Victorian and Australian context and could perhaps be adapted for use by CLCs. The three broad areas examined are:

- techniques closely linked to individual casework such as focused case representation;
- strategic campaign planning; and
- law and organising.

Funding for policy and law reform activities and evaluation of these activities is also canvassed briefly.

Other topics that might also benefit from further examination elsewhere include the sophisticated use of the Internet and online advocacy tools by some organisations in their campaigning and organising work, the work undertaken by US law students as part of clinical legal education programs

focusing on areas of public interest law, and the role of attorneys' fees and intervenor fees statutes in facilitating public interest casework.

## Leveraging individual casework

### Focused casework

The most obvious form of leveraging individual casework for broader goals is to undertake casework that assists both the individual client and challenges a problem that affects a larger number of people. Bellow has advocated for focused legal-political action through:

- sufficiently limiting the number of day-to-day cases, so the lawyers have the time to coordinate and compare the way they handle cases;
- selecting “target” institutions/defendants whose illegal practices affect a significant number of the program’s clients;
- representing large numbers of clients who have been victims of these practices, using not only referrals but soliciting clients as well;
- contacting the target institutions directly to seek change in the policies and practices documented in handling the cases; and
- initiating or joining coalitions with other community groups seeking similar changes.

Australian CLCs recognise and often act on links between their casework and working to address a broader concern. However, what Bellow is advocating is the implementation of these suggestions as a *systemic* approach to the way a centre handles casework, not simply for centres occasionally to take up additional action if they happen to discover they are being faced with a number of similar cases. Tremblay understands this approach as one under which a case *could not* be accepted unless it promised some larger impact on, or connected in a meaningful way to, some broader concern identified as a priority in the office.

Australian CLCs might not apply this approach to 100 per cent of their casework intake, but an approach that determined that at least a significant percentage of the centre’s casework had to meet focused case representation goals would certainly seem feasible. Adopting such an approach would ensure a CLC used even small casework resources in a way that also facilitated policy and law reform work.

A number of US case studies also illustrate different methods of focusing individual casework for greater impact, including Public Counsel's co-counselling methods, Inner City Law Center's (**ICLC**) tenant organising methods and the Legal Aid Foundation of Los Angeles' (**LAFLA**) community economic development legal work.

## Representing organisations and groups

Representing organisational clients as well as individuals has the potential to increase the impact of service work, as the direct benefits of this service work are received by an entity representing the interests of more than one person.

US legal services programs do not necessarily engage in a lot of casework on behalf of organisational clients but there are some good examples of such work, including LAFLA's and Public Counsel's community economic development work. Another legal centre in Los Angeles, Western Center on Law and Poverty (**WCLP**), does not undertake any direct service work for individuals at all, instead undertaking impact litigation on behalf of organisations and groups of people, as well as class actions.

Australian CLCs do not currently tend to represent groups or organisations as clients, with some important exceptions. The WCLP model, in which legal work is targeted exclusively towards organisational clients and individuals whose cases raise broader "impact" issues, is somewhat familiar with the PIAC model in NSW, but there is no equivalent of PIAC in other states, including Victoria.

CLCs could be developing programs or setting aside capacity to represent organisational clients which have aims consistent with the overall goal of CLCs, particularly aims relating to assisting the poor and disadvantaged. In fact, the latent ability of CLCs to take on legal work on behalf of organisational clients is a feature that does (or should) distinguish CLCs from government legal aid, particularly today when government legal aid offices are engaging in more, and often substantial, community legal education activities and also some law reform activity.

The Public Interest Law Clearing Houses (**PILCHs**) in Victoria, NSW and Queensland are an exception to the general CLC trend of undertaking work for individuals but not groups or organisations. The PILCHs receive requests for legal assistance and, after assessment against their eligibility

criteria, refer eligible requests to member legal services providers who provide legal help on a *pro bono* or reduced fee basis. These requests are accepted from both individuals and groups or organisations, with organisational clients being a significant source of work.

However, unlike the *pro bono* law firm Public Counsel in Los Angeles, the PILCHs do not generally themselves represent or otherwise provide direct legal services to clients, instead referring cases to member *pro bono* legal service providers. PILCH NSW remains a project of PIAC, which provides its own legal services to clients including organisational clients, but the PILCHs do not do so. This method of legal service provision – referring to *pro bono* providers rather than retaining “in-house” at CLCs – enables a large number of matters to benefit from legal assistance when they would otherwise go unrepresented, but necessarily takes the work outside the CLC sector. It also dissipates the potential broader impact of representing organisational (or individual) clients by channelling their legal matters into an individualised mode of dispute resolution using private providers. PILCH Vic has recently established a new specialised in-house legal service for not-for-profit organisations which may eventually lead to a greater retention of expertise within the CLC sector in representing organisational clients. However, the new service proposes to continue referring legal matters out to *pro bono* providers. Such services may well be of substantial benefit to not-for-profit organisations but are of a very different character to legal services provided by a CLC that understands and accepts the role of its legal support in strategically progressing its organisational client’s broader aims, as embodied by LAFLA’s accountable development work.

This difference can perhaps be seen in the example of the network of Environmental Defenders Offices (**EDOs**) in each state and territory in Australia. The EDOs explicitly aim to, and do, represent groups and community organisations as well as individuals. EDO Vic clearly notes that its role as a CLC in working with organisations and groups can be distinguished from that of private legal practitioners because its legal services are provided within a community development framework. This framework leads it to retain work in-house so as to build up expertise in assisting both larger and smaller organisations and groups, and ensures a focus on broader goals than simply narrow legal questions or tasks. Such legal service provision is also different to government legal aid which, like services provided by the private profession, focuses on resolving or completing discrete legal issues or tasks. Further, government legal aid

would be unlikely to be provided in strategic support of broader, perhaps political, aims of an organisation or group.

There is potential for more CLCs to reserve casework capacity for the provision of services to organisational clients in support of those clients' attempts to achieve broader aims. The principal current examples in Australia of CLC work for organisational clients come from specialist CLCs, but the US examples come from generalist legal service programs that have chosen to focus work in particular legal areas, demonstrating that local community or neighbourhood legal services can also play an important role in helping local community organisations achieve strategic goals for their community. In Victoria, this potential for local CLCs to help with local concerns is indicated in examples such as the Gippsland Community Legal Service's action on behalf of a group of Tambo Bluff landowners and residents.

Services such as the PILCHs or the specialist PILCH Vic not-for-profit legal service might also be able to assist in retaining some of this work within the CLC sector, including by developing greater in-house capacity themselves or facilitating referrals to CLCs of certain types of legal work for organisations. The use of co-counselling arrangements might also provide a way to ensure ongoing CLC involvement in these types of matters while harnessing *pro bono* goodwill and resources, such as occurred in Gippsland Community Legal Service's Tambo Bluff action and in the Human Rights Law Resource Centre's (**HRLRC**) recent, and successful, legal action on behalf of an Indigenous woman prisoner challenging federal legislation denying all prisoners the right to vote in federal elections, which involved not just the HRLRC but a team of private lawyers and academics.

### Information and record keeping

A CLC can begin to contribute to policy and law reform activity even in basic ways, for example by using the knowledge and skills they derive from their direct service work to target more systemic problems. The most fundamental first step that any legal service can take is to keep good records of every matter they undertake, including the exact nature of the legal issues being raised in casework and the identity of opposing parties. This allows useful information and data to be collected not only for research or policy projects, but to help the legal service in choosing which legal matters to prioritise, including whether to target particular opposing parties, and in identifying problem practices that might be targeted through, for example, using a dedicated staff member for these cases or obtaining

additional legal help such as pro bono support for a larger test case. In other words, good information and record-keeping is an important first step in moving towards a more focused casework approach.

Collecting better information and records of their advice and casework practice is often not a priority for CLC workers who are already overstretched in actually delivering direct services to clients, let alone recording details of these services. Further, the Community Legal Services Information System (**CLSIS**) database that federally-funded CLCs must use is not designed with needs in mind such as identifying systemic issues or prioritising casework for a focused casework approach.

The power of good information and record keeping can already been seen in the strength of the case study. CLCs have traditionally used case studies to powerful effect, and Richan's US lobbying text notes that cases in point are the most powerful form of evidence to support policy advocacy. However, despite its demonstrated effectiveness, case study information is not collated by CLCs in a systematic manner. In relative terms, the resources needed to record accurate and useful information about the direct service work being undertaken by a CLC, including case studies, are small, with a large return in terms of useful data for focused casework and other policy and law reform activity. An effort to determine useful types of information for these purposes and record them would be beneficial across the entire CLC sector.

### **Strategic campaigning**

A strong sense of the importance of strategic campaigning flowed from the advocacy work of US public interest organisations examined for this project.

The inherent value in, and benefits of, planning for policy and law reform work in a strategic way are well-recognised in Australia in (and beyond) the CLC sector. Despite this recognition in theory, in practice the truth is that Australian CLCs often tend not to apply a strategic approach to planning specific policy and law reform activities, although they do undertake strategic planning in relation to matters such as their overall management or the appropriate service delivery mix they should engage in. Strategic campaigning involves planning for proactive policy and law reform activities focused on achieving aims identified in advance. By contrast, much CLC advocacy work is not undertaken as part of a campaign but instead leans towards ad hoc or reactive activities.

Strategic campaign planning does not therefore appear to be a strong feature of CLC policy and law reform work. Possibly the same resource and time pressures that militate against good information and record keeping also limit the time CLC workers have to plan and co-ordinate actions, as opposed to responding to immediate demands for assistance or action. CLCs also possibly lack the necessary knowledge and skills to engage in it.

Not all US groups necessarily engage in good strategic planning of their policy and law reform work, particularly legal services programs. However, other US organisations with a deliberate core focus on policy and law reform work used strategic campaigns as a matter of course. For example, the Consumers Union explicitly divides its policy and advocacy work into particular campaigns, with dedicated campaign websites and campaign names chosen to be easy to remember and to explain the subject-matter of the campaign, and many of its staff working on specific campaigns rather than using their policy, advocacy and organising skills across different areas. The much smaller Californian group, Consumer Watchdog, engages in policy and advocacy work as well as legal work, and again divides this advocacy work into specific campaign areas, although it has largely moved away from the promotion of campaign-specific websites.

A range of existing materials provide very useful guidance to public interest organisations interested in planning and undertaking strategic campaigns. For CLCs, a first port of call might be the Public Interest Law Institute's (PILI) 2001 handbook *Pursuing The Public Interest*, as this handbook is focussed specifically on assisting legal organisations. The handbook has specific chapters on both strategic litigation and campaigning in the public interest. There has also been a growth in free Internet-based tools to assist in the planning, undertaking and evaluation of strategic campaigns. This accessibility makes them well-suited for use by CLCs wanting to trial a newer, more strategic approach to their policy and law reform work without having to invest a large amount of up-front resources. One US group has developed an online planning tool called the *Advocacy Progress Planner* that can be used for any advocacy and policy change campaign. Two experienced former Greenpeace campaigners have also established helpful websites that provide a good introduction to planning and undertaking strategic campaigns. A wide variety of other free tools available on the web provide more assistance with specific aspects of strategic campaigning, from tools that assist with media and communications advice such as the SPIN project's basic tutorials, to the

Survey Monkey website which allows groups to design and undertake surveys and analyse the survey information collected. Australian campaigning resources include the Change Agency's website.

Another tool of interest to some CLCs might be the seminal guide to direct action organising produced by the US Midwest Academy, *Organizing for Social Change*. The Midwest Academy teaches community organising and its manual thus contains advice that stretches beyond the typical work of an Australian CLC, but it includes excellent basic advice to help focus a strategic campaign. However, the focus of this manual is on direct action organising and the advice it contains is therefore explicitly framed in terms of mobilising the power of the people affected by a problem, and building their own power and organisational capacity to achieve change. There is a clear distinction made between this sort of activity and direct service work to help individuals with their problems, which is the bread and butter of CLC legal work.

Beyond its general advice on strategic campaigning, the Midwest Academy manual's advice may have more practical relevance to CLCs in terms of the insights its direct action approach provides when contrasted with other approaches to addressing problems that are more familiar to today's CLCs. Australian CLCs could perhaps reflect more deeply on the way in which the common CLC approaches to addressing client needs - through direct service work and advocacy - interact with other important considerations such as building the power of disadvantaged communities, and whether service work and advocacy may sometimes undermine such power even as they achieve victories for our constituents.

## Law and organising

One newer approach that tries to steer through some of these considerations is "law and organising", which was the subject of widespread discussion in the US. "Law and organising" is shorthand for a broad vision or model of legal practice that has emerged in the US over the last two to three decades in particular and represents the delivery of legal services in service to or support of an organising approach to solving problems and creating change, rather than legal services provided as the solution to a client's problem (the direct service approach) or that speak for a client's or client or constituent group's interests (the advocacy approach). There seems to be no one way of undertaking a law and organising approach to legal services, rather, examples of different practical methods and strategies employed by various legal organisations that demonstrate a

commitment to using law in support of an organising effort and to build constituent power.

Law and organising is not an approach that should be adopted by all CLCs or for all legal problems that CLC clients may face, but it does hold out some very real potential for fresh attempts to tackle particular types of problems affecting poor or disadvantaged communities.

Law and organising places an emphasis on community organising and empowerment over legal strategies. Litigation in particular is singled out as being unhelpful for several reasons, including that it can teach people that lawyers produce change, not that people have the ability to produce change through their own collective actions. Instead, litigation should be undertaken only to facilitate other community organisational goals, such as defending the organisation and its members or helping to garner publicity, legitimacy or fundraising support for its other efforts.

In the US case studies examined in this Report, the ICLC's methods for dealing with housing habitability cases explicitly involve organising tenants in the affected building and facilitating their leadership in the matter, allowing for problems to be tackled building by building rather than tenant by tenant. LAFLA's accountable development legal work, while very different from ICLC's habitability cases, also indicates a law and organising approach in the way in which LAFLA recognises its role as the legal resource in a broader campaign led by its local community organisation client.

The US law and organising approach has also been associated with distinct practice areas such as workers' rights, environmental justice and community development. For example, lawyers have tried to mobilise low-income clients to challenge the disproportionate placement of environmental hazards in their neighbourhoods rather than simply launch litigation against development proposals. Community development lawyers have moved away from pure transactional legal assistance to community organisations to supporting broader economic justice movements by assisting community organisations to negotiate, draft, and secure the passage of living wage ordinances, research and draft local first-source hiring agreements and help coalitions of union representatives, grassroots organisers and community residents negotiate worker buy-outs of manufacturing companies and structure employee-owned businesses.

Law and organising in the worker rights context draws on a tradition of labour organising but expands into non-unionised industries, especially ones in which many of the workers are undocumented immigrants and/or employed on a part-time or contingency basis and thus particularly vulnerable to exploitation. For example, one project used law as a “draw” to bring new members into the organisation, as a “measure of injustice” helping workers to understand the difference between legal ideals and their lived reality, and as part of a broader organising campaign such as starting legal action not simply to win the case for the individual plaintiffs but to highlight structural problems or put pressure on an employer or industry. In another context, the law and organising approach built up institutional structures and alliances and cultivated leaders, who will go on to challenge unfair practices in other contexts.

The approach should not be romanticised. There can be large tensions involved in running a legal clinic within an organising effort and large challenges in running a law and organising campaign, including the hostility of legal institutions to the use of legal tactics coordinated with collective action, the physical and emotional pressure of the work and difficulties posed by the way in which law individualises disputes even under a collective campaign. Further, following an approach that seeks to have clients make the decisions requires greater resources and means lawyers and other staff must resist taking over decision-making. Client decisions can also be uncomfortable ones, for example client mobilisation may be against the same targets that provide funding for direct service provision. One US legal centre has written of its experience in losing funding due to client protests, although the end result was that the goal of the clients’ action was achieved, the clients took responsibility for the centre’s program and funding was later returned.

The emergence of this approach is also to at least some extent a result of particular American conditions, including funding restrictions on the work that federally-funded legal services programs can undertake, more conservative federal courts less receptive to traditional public interest litigation, the availability of competitive funding grants for innovative approaches to solving problems and ideological factors such as scepticism about the effectiveness of legal strategies to achieve social change and concerns that legal action and lawyers undermine other social activism.

“Law and organising” is not a familiar concept in Australia and one of the reasons for this is probably that both CLC and general public interest legal practice in Australia look quite different to their US counterparts. It is

therefore unclear what an Australian version of a law and organising approach might entail. However, there does seem room to experiment with different methods to integrate law and collective action in Australia with a view to achieving law reform and other social change. The EDO Vic's overt focus on working with small, voluntary community groups to help them address local environmental concerns might be one place to start exploring Australian possibilities, together with CLCs' traditional understanding of their role in facilitating collective and community participation in the legal system.

The law and organising approach will not be appropriate to working on every issue or for every CLC, but at present different forms of combining law with an organising effort have not been explored to a great degree in Australia. As it is necessarily speculative work, and has an even longer-term focus than other policy and law reform activity, CLCs that experiment with such an approach must be willing to risk not succeeding. However, the time seems ripe for some experimental pilot projects in Australia. In this regard, there is also room for funders, especially philanthropic foundations, to take more risks in being willing to fund innovative but speculative approaches to law reform and policy work by CLCs that incorporate collective mobilisation.

### **Funding issues**

This Report argues strongly that CLCs should engage in policy and law reform work even in the face of significant funding pressures, but it is also realistic about the difficulties of doing so with limited funding.

It is easier to engage in policy and law reform work when specific staff positions exist within CLCs to coordinate and facilitate this work, and specific funding to CLCs for policy and law reform work can also facilitate the undertaking of this work.

On the other hand, such funding must first be sought, and too often CLCs do not manage to take the steps to seek and obtain funding to enable them to complete policy and law reform work for which they have identified a need. Further, even with current limited funding levels CLCs should be able to engage in some policy and law reform work even if this is limited to leveraging individual casework, which can be done without investing much in the way of additional resources or diverting large resources from direct service provision. Some CLCs already do this more successfully than others, despite not having dedicated policy or law reform staff members.

Otherwise, the threat of becoming “casework on the cheap” is realised. CLCs and the CLC sector more broadly should perhaps consider whether we should continue to accept funding and operate if we are not given some funding capacity to undertake policy and law reform work in addition to casework.

However, undoubtedly an increase in funding would assist CLCs to do more, including more advocacy work on systemic issues. There is also a need to broaden out the sources of funding for CLCs and develop a wider CLC funding mix. Professor Abel has noted that there are problems associated with all sorts of funding sources, whether government, private philanthropic, private law firm or self-funded. A mix of funding spreads the risk and restrictions associated with any one source of funding. This might include innovations relating to conditional fee work, limitations on adverse costs orders, independent government funding through public purpose trust funds and/or increased availability of cy pres awards (cy pres awards being court ordered or approved distribution of funds from a class action damages or settlement fund remaining undistributed after identifiable members of the successful class have been compensated, to compensate the class “as near as possible”).

There also seems to be scope for progressive organisations in Australia to develop more expertise in the policy areas of taxation and government spending, as too often we fight for an increase in government funding for our specialised area out of a limited pool of funds for social services and social justice-related concerns more generally, while not fighting to expand this pool by reducing regressive government tax and spending initiatives elsewhere.

## Evaluation

Monitoring and evaluating the policy and law reform activities that CLCs undertake is crucial to assessing whether CLC policy and law reform work is or is not, in fact, successful in bringing about change for the benefit of our constituents. This is the ultimate reason for engaging in such work, thus we should be concerned with developing and using methods for evaluating the success of our advocacy activities.

For example, much CLC policy and law reform work is focused on achieving legislative reform but it is not enough to see a law proposed if the details of the legislation do not fully address the problems identified,

nor is it sufficient to see such legislation enacted if it is not then implemented and enforced.

An evaluation component must be built into any planned advocacy work to ensure it is monitored and any gains are implemented. Lawyers tend to view matters as legal cases meaning they have a discrete end, whereas in reality no campaigns for change ever finish, with any gains left unmonitored vulnerable to being lost.

In relation to specific funding for policy and law reform work, funding for independent evaluation and monitoring needs to be included in the funding request, while in relation to policy and advocacy work generally it is worthwhile diverting some funding from additional casework or other services being delivered by the organisation to undertake evaluation of work's effectiveness. Further, concrete and measurable goals for any advocacy work need to be set to ensure effectiveness can be evaluated.

The development of tools to monitor and evaluate advocacy work is an ongoing project in the US. Some of the more sophisticated work on evaluation in the US is being progressed by organisations focused on assisting with advocacy and advocacy evaluation, as opposed to undertaking advocacy themselves. Australian advocacy organisations, including CLCs, will probably require similar support from funders and other support organisations to incorporate better monitoring and evaluation practices into their work.

Ultimately, however, it will be worthwhile doing so if it leads to more effective policy and law reform work by CLCs, maximising our potential to achieve real, long-term and lasting improvements in the lives of our constituents.

## 3. Policy and law reform work by Community Legal Centres

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### 3.1 Introduction - the three broad functions of CLCs

This Report relates to the “third” function of Australian Community Legal Centres (**CLCs**), that of policy and law reform work.

It has been widely noted over many years that CLCs engage in three different broad types of activity or function. The first is generally stated to be individual legal assistance, which can take the form of information, advice or ongoing casework support; this might also be called direct service work. The second is community legal education. The third might generally be termed policy and law reform work.<sup>1</sup>

For example, in 1992 Bruce, van Moorst and Panagiotidis wrote:

The legal needs of our communities are best served by the successful integration of three functions: providing legal assistance, providing legal education and information, and promoting reform of laws and procedures which inhibit justice.<sup>2</sup>

Similarly, van Moorst noted elsewhere in the same journal volume that Victorian CLCs needed to maintain their commitment to these essential three functions, ‘remedial, preventative and change’, as anything less ‘would relegate CLCs to the role of providing casework on the cheap’.<sup>3</sup>

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<sup>1</sup> The FCLCV calls these three functions the ‘Smart Service Mix’: see FCLCV, ‘Law Reform and CLE’, *Community Law website*, [http://www.communitylaw.org.au/fedclc/cb\\_pages/law\\_reform\\_cle\\_law\\_reform.php](http://www.communitylaw.org.au/fedclc/cb_pages/law_reform_cle_law_reform.php); see also, eg, NACLC, ‘What is a CLC?’, *NACLC website* <http://www.naclc.org.au/topics/2000.html>; Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, June 2004, 205; Donna Stuart and Gordon Renouf, ‘Law Reform: Strategies for Community Groups’ (1992) 17:5 *Alternative Law Journal* 240; Jeff Giddings and Mary Anne Noone, ‘Australian community legal centres move into the twenty-first century’ (2004) 11:3 *International Journal of the Legal Profession* 257.

<sup>2</sup> Sue Bruce, Elsje van Moorst & Sophia Panagiotidis, ‘Community legal education: Access to justice’, (1992) 17:6 *Alternative Law Journal* 278.

<sup>3</sup> Elsje van Moorst, ‘Community legal centres: National Overview 1992: Victoria’, (1992) 17:6 *Alternative Law Journal* 290, 290.

Recently, the Federal Attorney-General's Department's review of the Commonwealth Community Legal Services Program (**CCLSP**), its funding program for CLCs across Australia, noted that:

The activities funded under the Commonwealth Community Legal Services Program comprise: information, advice, casework, community legal education, and law reform and legal policy. Within the Commonwealth Community Legal Services Program framework, community legal centres determine the type and mix of service delivery that best meets the needs of their client communities.<sup>4</sup>

At least in theory, then, the different functions of CLCs seem well-recognised and accepted. In practice, however, the ability of CLCs to engage in work other than direct individual service work has been under pressure for a number of years, as foreshadowed in the comment by van Moorst noted above. This pressure comes from inter-related issues of resource constraints, increasing reliance on government funding, reduced government funding for other forms of legal aid and lack of expertise in policy and advocacy techniques.

Despite these pressures, many CLCs still engage in regular policy and law reform activity, as well as community legal education, in addition to providing direct legal assistance to individuals. Some do not. However, it is imperative that all CLCs be committed to engaging in the full range of CLC activities if our clients – disadvantaged Australians – and their communities are to get the best service possible from their CLCs.

The phrase 'policy and law reform work' is not necessarily clear as to exactly what sort of work it entails. It has been used here because it reflects the terminology commonly seen in writings on Australian CLCs and in this Report is a useful short-hand to describe any change-focused activities that are or could be engaged in by CLCs. In some senses, this may give it a broader meaning than some might ascribe to it, as change-focused activities is a broader concept than simply attempts to change the law on the books. However, this broader understanding of the third function of CLCs seems appropriate given the scope of work for change that has been undertaken by CLCs in the past under the banner of their 'policy and law reform' function, as is described elsewhere in the Report. It

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<sup>4</sup> Attorney-General's Department, *Review of the Commonwealth Community Legal Services Program*, March 2008, 12.

is therefore perhaps helpful to understand CLCs' 'policy and law reform work' as similar to a general concept of advocacy work.<sup>5</sup>

Further, it is acknowledged that activities such as community development work and strategic litigation are also engaged in by CLCs. Some writers have listed these as separate types of activity, but this Report takes them to fall within the three broad types of activity or function noted above. Of course, they may straddle more than one category. For example, strategic litigation provides direct legal casework assistance to the client or clients but also has a broader law reform goal. Community development in the CLC context provides legal education to the community while attempting to reduce individual legal problems and help the community to engage in policy and law reform advocacy on their own behalf.

This Report is in many ways an attempt to revitalise the commitment of all CLCs to engaging in more than simply direct service work, as important as such service work remains for our individual clients. It offers encouragement to continue engaging in broader policy and law reform work, even in the face of pressures to give it up in favour of providing a greater amount of direct legal assistance.

On a more practical level, in the next chapter this Report attempts to give some guidance to CLCs about different ways in which they might engage in policy and law reform work, drawing on strategies and techniques being used by public interest groups in the US. In doing so, it touches briefly on the gnarly question of funding for such activities. It also briefly discusses the importance of evaluation for monitoring the effectiveness of efforts at policy and law reform work.

### **3.2 Should CLCs engage in policy and law reform work?**

This Report answers the above question with a resounding yes. However, it acknowledges that doing so is in no way easy for many CLCs today.

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<sup>5</sup> See, eg, Australian Council of Social Service, *A charity by any other name...Submission to the Board of Taxation on the draft Charities Bill, 2003*, September 2003, 8; Jenny Onyx, Bronwen Dalton, Rose Melville, John Casey and Robin Banks, *Implications of government funding of advocacy for nonprofit independence and exploration of alternative advocacy funding models*, Paper presented to Social Policy Research Conference 2007, available at [www.communitylaw.org.au/cb\\_pages/images/Onyx%20re%20Public%20Interest%20funding.pdf](http://www.communitylaw.org.au/cb_pages/images/Onyx%20re%20Public%20Interest%20funding.pdf), 1-2.

Direct legal assistance to individuals in the form of information, advice and casework constitutes the bulk of activity that CLCs undertake.<sup>6</sup> This is entirely consistent with the fact that CLCs are organisations that, by their very nature and purpose, provide *legal* services to their clients, people who tend to be disadvantaged Australians and, generally, people who could not afford to pay for a lawyer in the private sector.<sup>7</sup>

The heavy emphasis on direct legal services to individuals is also consistent with the fact that there appears to be a high level of legal need in the Australian community.<sup>8</sup> For example, the NACLCLC submission to the recent CCLSP review stated:

the daily experience of CLC workers points to overwhelming unmet legal need. CLCs' experience is that they can only ever meet a fraction of the high unmet legal needs of their clients and communities. CLCs' strategic plans may involve setting priorities for service delivery, the day-to-day reality of much of CLCs' work (and time and resources) will often involve addressing and assisting the most demanding and needy clients in crises.<sup>9</sup>

CLCs generally do not have sufficient funding to address all of the individual legal need that they encounter, as described by NACLCLC above. The recent CCLSP review report compared CLC funding with funding provided under other comparable programs administered by the Attorney-General's Department and found that 'the comparison of funding levels confirms that community legal centres are generally poorly funded'.<sup>10</sup> Indeed, it noted that the Commonwealth had introduced no new recurrent CLC funding since 1999-2000, with CLC funding increases coming solely

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<sup>6</sup> For example, direct legal advice, information and casework made up 99.4% of all activities engaged in by CLCs receiving federal government funding in 2006-07: Attorney-General's Department, above n4, at 19.

<sup>7</sup> See, eg, as above at 20-21: the majority of clients of federally funded CLCs in 2006-07, 81%, earned less than \$26,000 per year, and a further 17% earned less than \$52,000 per year, with 58% of clients receiving some form of government income support.

<sup>8</sup> See, eg, Christine Coumarelos, Zhigang Wei & Albert Z. Zhou, *Justice made to measure: NSW legal needs survey in disadvantaged areas*, Law and Justice Foundation of NSW, 2006.

<sup>9</sup> NACLCLC, *Submission to the Attorney-General Hon. Philip Ruddock MP regarding the Internal Review of the Commonwealth Community Legal Services Program – CCLSP announced on 30 October 2006*, 30 March 2007, 18.

<sup>10</sup> Attorney-General's Department, above n4, at 45. See also, eg, Sebastian De Brennan, 'Community Legal Centres: Whingers or prophets?' (2005) 30:3 *Alternative Law Journal* 132.

from (inadequate) indexation.<sup>11</sup> The reality is thus that there are more potential clients seeking assistance from CLCs than each CLC is able to assist.<sup>12</sup>

This situation leads CLCs to have to undertake a “triage”-type role by assessing large numbers of people who come to them seeking assistance, and then making choices as to which persons they will or will not provide legal assistance to. In the US, this reality is recognised by the Legal Services Corporation (**LSC**), which states that its performance criteria (which it uses in assessing the performance of the Legal Services programs it funds) must be used keeping in mind that:

Nationally, funding limitations prevent Legal Services programs from meeting more than a fraction of the need for their services. As a consequence, such programs continually must make difficult choices among very important needs and possible activities...The combination of limited resources and comprehensive responsibility for an entire service area creates a duty to focus on the most pressing civil legal needs. This concept of focusing on *most pressing civil legal needs* is central to the Criteria as a way of addressing the choice and triage compelled by less than full funding [emphasis in original].<sup>13</sup>

The large amount of legal need in their communities leads CLCs to try to provide as much individual legal assistance as they can within their limited resources, and consequently puts pressure on the ability, and willingness, of CLCs to devote precious resources to other activities, such as community legal education or policy and law reform work.<sup>14</sup> This is

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<sup>11</sup> Attorney-General’s Department, above n4, at 52. Further, the new recurrent funding in 1998-99 and in 1999-2000 was principally to establish new services in regional areas, not to increase funding to existing CLCs: at 11; see also, eg, Giddings and Noone, above n1, at 272-3; Senate Legal and Constitutional References Committee, above n1, at 212. However, some state governments have increased funding to CLCs: see text at nn69-73 below.

<sup>12</sup> See also Senate Legal and Constitutional References Committee, above n1, at 206, 212-17, 227.

<sup>13</sup> LSC, *Performance Criteria*, 2007 ed., 3-4. Note, however, that the LSC principally funds only direct individual service work (in civil law matters), with several legislative restrictions limiting the sorts of activities that federally-funded US Legal Services programs may engage in, including lobbying, class actions, welfare reform activities and the representation of prisoners or non-US citizens (except in certain circumstances): see LSC, *Statutory Restrictions on LSC-funded Programs*, Fact Sheet, May 2007; *Legal Services Corporation Act* 42 U.S.C. s.2996f ; *Legal Services Corporation Regulations* 45 CFR Ch XVI Parts 1600-1644.

<sup>14</sup> See, eg, Bruce, van Moorst & Panagiotidis, above n2, at 279.

exacerbated by the fact that with limited funding, most CLCs are unable to employ additional staff members dedicated to policy and law reform work, thus it must be done by the very staff who are in direct demand to undertake the individual service work.<sup>15</sup>

Moreover, these pressures have been increasing over many years now, as unmet legal need increases and funding for other forms of legal aid has dropped,<sup>16</sup> meaning more and more people are seeking legal help from CLCs.<sup>17</sup> For example, the Senate Legal and Constitutional References Committee found in its final report on its inquiry into legal aid and access to justice in June 2004 that:

[I]ncreasingly it appears that CLCs are expected to pick up the shortcomings in the legal aid system where, for example, people have reached their legal aid "cap", where they have a legal matter for which legal aid is not available, or where they do not meet the means test despite being unable to afford a private solicitor. The demand appears to be overwhelming many CLCs.<sup>18</sup>

Further, the NACLC submission to the more recent CCLSP review noted:

As funding to legal aid decreases, legal aid bodies tighten their means & merits tests and restrict their guidelines to limit access to legal aid. It is clear that this is impacting on CLCs, who are being expected to pick up the tab.<sup>19</sup>

The Senate report referred to above also quoted from the FCLCV submission to its inquiry, which stated:

Centres report an overwhelming level of demand for legal services from people who are no longer eligible for legal aid, can not afford a private solicitor, or have exhausted legal aid funding prior to their matter being resolved. There is nowhere else for these people to go. The pressure on

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<sup>15</sup> FCLCV, *Application – Legal Services Board 2007/08 Grants Program*, March 2008, 10 (on file with author).

<sup>16</sup> See Senate Legal and Constitutional References Committee, above n1, at 4-5.

<sup>17</sup> See, eg, Giddings and Noone, above n1, at 260, 277; Mark Rix, 'Community Legal Centres and pro bono work: For the public good?' (2003) 28:5 *Alternative Law Journal* 238, 239.

<sup>18</sup> Senate Legal and Constitutional References Committee, above n1, at 209; see also at 210-11, 213.

<sup>19</sup> NACLC, above n9, at 38.

centres results in them undertaking work that they are not resourced to do, often to the detriment of legal education and policy work...<sup>20</sup>

An additional element that has strongly contributed to the overall strain on the capacity of CLCs to undertake activity other than direct service work is the increased reliance on government funding, in terms of this as a source of funding (as opposed to the issue of whether the level or amount of that funding is adequate). Several commentators have noted that increased reliance by CLCs on government funding comes with risks, due to government expectations about what activities will be undertaken and how many individual clients will be assisted with that funding; requirements for a large level of direct service work can squeeze out capacity for other activity.<sup>21</sup> This is discussed further in section 3.2.1 below.

Recent data on Victorian CLC activity seems to lend further support to these contentions. According to the FCLCV, over the four years to 2006/07, the volume of individual client service activity has steadily increased but there has been a large drop in the number of policy and law reform projects completed, indeed a 50% drop in 2006/07 compared to a high point in 2004/05.<sup>22</sup>

Despite all of these obstacles, however, this Report maintains that CLCs must ensure they engage in more than individual service work, again, as crucial as this direct legal assistance is to disadvantaged Australians. Drawing on Australian and US materials, three principal grounds emerge to support this contention. First, doing so forms a critical part of the unique history and nature of Australian CLCs and must continue if CLCs are to remain relevant as a distinct institutional form for the provision of legal services to the disadvantaged. Secondly, and perhaps even more compellingly, it is simply more effective to engage in a mix of activities if we want to maximise the benefits we provide to our clients, the disadvantaged in our communities. Thirdly, arguably strong moral commitments should impel CLCs to engage in this broader work. Each of these grounds is discussed below.

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<sup>20</sup> Senate Legal and Constitutional References Committee, above n1, at 209.

<sup>21</sup> See, eg, Mary Anne Noone, 'Mid-life Crisis: Australian Community Legal Centres' (1997) 22:1 *Alternative Law Journal* 25; Mark Rix, above n17; Giddings and Noone, above n1; Louis Schetzer, 'Community Legal Centres: Resilience and diversity in the face of a changing policy environment' (2006) 31:3 *Alternative Law Journal* 159.

<sup>22</sup> FCLCV, above n15, at 11.

### 3.2.1 The unique role of CLCs

In Australia, CLCs and government legal aid are different institutional forms for the provision of legal assistance to the poor and disadvantaged.

What is commonly referred to in Australia as “legal aid” is the legal assistance provided to the poor and disadvantaged by government legal aid lawyers and private legal practitioners, funded through the individual state and territory Legal Aid Commissions (**LACs**) which receive both federal government funding and funding from their respective state or territory government.<sup>23</sup> Under this legal aid system, a corps of salaried lawyers directly employed by government provides legal assistance, particularly information, advice and casework, while members of the private legal profession undertake casework funded by grants of legal aid.<sup>24</sup> It is this form of legal aid, government-staffed or referred out to private practitioners, which accounts for the bulk of legal aid spending by governments, both federal and state.<sup>25</sup>

Professor Weisbrot has noted that Australia’s legal aid scheme was originally intended to operate like the US LSC model was intended to operate, that is, with a body of lawyers providing legal services to the community through accessible means such as shopfront offices and engaging in activism in addition to individual service work.<sup>26</sup> However, the legal aid system that eventually took root in this country has a significant British “judicare”-type component, namely, much of the casework for the poor and disadvantaged is referred out to lawyers in private practice who are funded by grants from the LACs to undertake these legal aid cases.<sup>27</sup> Unlike the British judicare model, however, Australia’s legal aid system does also maintain a significant corps of salaried government lawyers, albeit undertaking mostly individual service work, particularly information

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<sup>23</sup> See, eg, Senate Legal and Constitutional References Committee, above n1, at 3-34; VLA, *Twelfth Statutory Annual Report 2006-07*, August 2007.

<sup>24</sup> See, eg, VLA, as above at 8, 16-24; Legal Aid NSW, *Annual Report 2006-2007*, 2007, 9-10, 27. LACs may also undertake other activities, such as community legal education and law reform submissions.

<sup>25</sup> See, eg, Commonwealth of Australia, *Portfolio Budget Statements 2008-09: Budget Related Paper No. 1.2: Attorney-General’s Portfolio*, 2008, 29; VLA, as above at 38; Legal Aid NSW, as above at 75-76.

<sup>26</sup> David Weisbrot, *Australian Lawyers*, 1989, 241; see generally 239-247 for a good summary of the history of the federal legal aid system.

<sup>27</sup> See, eg, VLA, above n23, at 8: ‘The private profession represented 68% of all clients who received a grant of legal assistance in Victoria in 2006-07.’ In NSW in 2006-07 it was 45.8%: Legal Aid NSW, above n24, at 27.

and advice, and with their clients subject to restrictive eligibility tests for legal aid assistance.<sup>28</sup>

At this point it is also worth noting the generally accepted ideology underpinning support for legal aid in Australia, which tends to be framed in terms of “access to justice”.<sup>29</sup> Legal aid is considered to be important in upholding the “rule of law”, in the sense that if all citizens are not able to access the legal system effectively, which tends to require professional legal assistance, the legal system cannot be said to be working equitably and its operation is diminished.<sup>30</sup> While this may well be an admirable goal in itself, it is essentially a *procedural* justification for legal aid, supporting legal assistance and representation for those who might not be able to obtain it otherwise so that they may participate properly in our legal system.<sup>31</sup> This is quite different to a conception of legal aid that would see support for the underlying *substantive* interests of the people who receive legal aid, namely the interests of the poor and disadvantaged.<sup>32</sup>

By contrast, CLCs arose in Australia separately to government legal aid and constitute a distinct institutional format for the provision of legal assistance to the disadvantaged. The first CLCs were being established around the same time as the federal government first established a

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<sup>28</sup> Weisbrot, above n26 at 241-245; VLA, above n23; Senate Legal and Constitutional References Committee, above n1, at 16-21.

<sup>29</sup> See, eg, Attorney-General’s Department, ‘Legal Aid Program’, *Australian Government: Attorney-General’s Department website*, [www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid\\_LegalAidProgram](http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid_LegalAidProgram): ‘The provision of legal aid is a core element in promoting access to justice. It is the main way for disadvantaged members of the community in need of legal assistance to obtain legal services’; Senate Legal and Constitutional References Committee, above n1, at xv: ‘More importantly, such a move signifies a cooperative approach to meeting the obligation that a civilized society owes to its citizens in providing access to justice, particularly to those who are already disadvantaged.’; Senate Legal and Constitutional References Committee, *Inquiry Into the Australian Legal Aid System (Third Report)*, Preface, available at [www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/1996-99/legal/report/a01.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/1996-99/legal/report/a01.htm): ‘On 29 May 1996 the Senate gave the Committee a reference to inquire into: The continued ability of all to have access to legal services and litigation in Australia; VLA, above n23, at 4,8-9.

<sup>30</sup> See, eg, John Basten, ‘Legal Aid and Community Legal Centres’ (1987) 61 *Australian Law Journal* 714, 715; Law Council of Australia, *Inquiry into Current Legal Aid and Access to Justice Arrangements: Submission to Australian Senate Legal & Constitutional References Committee*, September 2003, 4.

<sup>31</sup> See David R. Esquivel, ‘The Identity Crisis In Public Interest Law’, (1996) 46 *Duke Law Journal* 327; Cf Penny Martin, ‘*Defining and refining* the concept of practising in “the public interest”’ (2003) 28:1 *Alternative Law Journal* 3, 4.

<sup>32</sup> As above.

national legal aid scheme in 1973, with the Fitzroy Legal Service the first (non-Aboriginal) CLC to open its doors in 1972.<sup>33</sup> However, while the federal government did provide some earlier grants to individual CLCs,<sup>34</sup> it did not commence a formal CLC funding program until 1978.<sup>35</sup> CLCs survived mainly through volunteer contributions, with some limited financial assistance from other sources, such as local councils and philanthropic trusts.<sup>36</sup>

Noone has made the important point that CLCs have their origins not in notions of a professional responsibility to provide legal assistance to the poor or in ideas of charity, but in a background of activism and lawyer radicalism that saw access to legal assistance as a right.<sup>37</sup> For example, the impetus for the Fitzroy Legal Service was an alliance between a youth worker, anti-conscription lawyers and law students who saw that local youth getting into trouble with the police needed legal help.<sup>38</sup>

This particular background to and ethos behind the establishment of CLCs meant that they developed different ways of practising law and providing help to disadvantaged members of their communities. Indeed, CLCs were a conscious alternative to other, existing forms of legal practice.<sup>39</sup> A commitment to community participation in the running of the Fitzroy Legal Service was picked up by other new CLCs, and CLCs thus developed a model of providing legal assistance that was rooted in community development and collective approaches.<sup>40</sup>

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<sup>33</sup> Basten, above n30, at 714-15; Weisbrot, above n26 at 240, 246; Giddings and Noone, above n1, at 259. The first Aboriginal Legal Service opened at Redfern, NSW, in 1971: LACNSW, *Review of the NSW Community Legal Centres Funding Program: Final Report*, June 2006, 26.

<sup>34</sup> See, eg, Jenny Hocking, *Lionel Murphy: A Political Biography*, 1997, 175.

<sup>35</sup> Federal government funding in 1978 was \$175,000: Attorney-General's Department, above n4, at 11; see also Schetzer, above n21, at 159.

<sup>36</sup> Schetzer, above n21, at 159.

<sup>37</sup> Mary Anne Noone, 'The Activist Origins of Australian CLCs', in Christopher Arup and Kathy Laster (eds), *For the Public Good: Pro Bono and the Legal Profession in Australia*, 2001, at 133. See also Roselyn Melville, *"My Time is Not a Gift to Government": An Exploratory Study of NSW Community Legal Centre Volunteers*, Institute of Social Change and Critical Inquiry, University of Wollongong and Combined Community Legal Centres' Group (NSW) Inc., May 2002, 9-10 for a brief summary of the origins of CLCs.

<sup>38</sup> Noone, as above at 128; Basten, above n30, 724.

<sup>39</sup> Weisbrot, above n26 at 246.

<sup>40</sup> Noone, above n37, at 129-30; Weisbrot, above n26, at 246; Giddings and Noone, above n1, at 257-9; Schetzer, above n21, at 159. See also LACNSW, above n33, at 26-28 for a brief history of NSW CLCs.

Some of the features of CLCs that have been noted as distinguishing them from other providers of legal services were their offering of free help to all who approached them, their greater accessibility through opening hours outside normal business hours, particularly evenings, their informal approach which included their physical office-space and the clothes the staff wore, and the participation of non-lawyers as equals in solving the clients' problems.<sup>41</sup> The extensive participation of volunteers in CLC management and legal services delivery is also one of the more important distinctive features of CLCs.<sup>42</sup>

As with volunteer participation, another important distinguishing feature of CLCs was also clearly rooted in the community and collective approach to solving legal problems. This was the focus brought by CLCs to solving the problems of the disadvantaged in their communities not simply on the individualised, case-by-case approach typical to legal practice, but by addressing problems collectively, particularly through social reform efforts and community development work.<sup>43</sup> For example, John Basten (as he then was)<sup>44</sup> describes several examples of CLC work that deliberately extended beyond individual casework to activities such as collective action, test cases, and government consultation and law reform submissions.<sup>45</sup> Giddings and Noone also provide a number of case studies of CLC work that demonstrate CLCs have engaged in a large range of activities other than direct service work, including impact litigation, policy reports and media campaigns, in order to assist their clients.<sup>46</sup>

This approach reflects a different ideology to the procedural notion of "access to justice" underlying support for government legal aid. Instead, support for legal aid as delivered by CLCs was based on a more substantive vision, described by Giddings and Noone:

The ethos of the time was for legal aid to *produce structural change and achieve real justice for the poor*. The traditional practices of the legal profession were seen as part of the problem of limiting access to justice. The work done by community legal centres was different from that performed by the private profession. Not only was it delivered differently but *new areas of law were given attention*...Probably the most unusual

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<sup>41</sup> Noone, above n37, at 129-30; Giddings and Noone, above n1, at 259.

<sup>42</sup> See, eg, Giddings and Noone, as above at 266-7; Attorney-General's Department, above n4, at 25, 28-30; NACLC, above n9, at 6; Melville, above n37.

<sup>43</sup> Noone, above n37, at 129; Giddings and Noone, above n1, at 258.

<sup>44</sup> Now Justice Basten of the Supreme Court of NSW Court of Appeal.

<sup>45</sup> Basten, above n30, at 719-721.

<sup>46</sup> Giddings and Noone, above n1, at 267-272.

features of the early CLCs were *the commitment to making legal information accessible and reforming unjust laws*. [my emphasis]<sup>47</sup>

They also comment, drawing from Chesterman's work on the Fitzroy Legal Service, that:

The way...early CLCs operated represented an implicit critique of the profession, both in the types of cases handled and in the refusal to concentrate solely on casework as a means of achieving reform.<sup>48</sup>

This is a vision of working towards a substantively better society for the poor and disadvantaged, not merely equal access to the justice system.<sup>49</sup> It is surely still relevant today, given Australia continues to harbour unwelcome levels of disadvantage within the community.<sup>50</sup> CLCs can play a very practical role in achieving better laws and policy for their client constituencies, as the Senate Legal and Constitutional References Committee recognised:

[T]he Committee is...concerned that community legal centres should not be prevented from providing advocacy policy services. Non-profit organisations that advocate law reform on the basis of their experience are an invaluable source of information for government to make informed and balanced policy decisions. Additionally, community legal centres are closest to areas of community need and their input into policy development is essential to formulate balanced policy and check that its implementation achieves the policy aims.<sup>51</sup>

As foreshadowed earlier, however, an increasing reliance on government funding has put pressure on the unique way in which CLCs undertake their work. The start of a formal Commonwealth government funding program was followed by state government funding to CLCs in most states.<sup>52</sup> While government recognition and funding was in many ways a positive, giving CLCs some financial stability and acknowledgment of their important role,

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<sup>47</sup> Giddings and Noone, above n1, at 259; see also Noone, above n37, at 130.

<sup>48</sup> Giddings and Noone, above n1, at 260.

<sup>49</sup> See also Andrea Durbach, *Underpinning Justice: Policy and Law Reform*, Paper to NSW CLC conference, 29 June, 2000.

<sup>50</sup> See, eg, Senate Standing Committee on Community Affairs, *A hand up not a hand out: Renewing the fight against poverty - Report on poverty and financial hardship*, March 2004.

<sup>51</sup> Senate Legal and Constitutional References Committee, above n1, at 220.

<sup>52</sup> For example, Victorian government funding to CLCs began in 1981: Schetzer, above n21, at 159. For a full table showing Commonwealth and State funding in 2006–07 see: Attorney-General's Department, above n4, at 43.

Giddings and Noone describe well the double-edged sword that such funding represented:

The formal inclusion of CLCs in the legal aid framework can be construed positively as recognition of the importance of the unique approach taken by centres. But whilst paying lip service to centres' special features, governments noted, early on, the 'value for money' aspect of centres. As government funding to CLCs increased, pressure also increased on centres to do more traditional legal work. The tension between traditional casework and broader preventative and social change work pervaded policy discussions once CLCs received government funding.<sup>53</sup>

Schetzer's article examining how changing government policy, particularly surrounding funding, has affected CLCs, also clearly describes the concerns that formalised government funding would lead to a loss of CLCs' independence in determining how to address community legal needs, with expectations to undertake more casework pushing out community legal education and systemic advocacy.<sup>54</sup> Particularly from 1996, when the Federal Government began exerting more control over the way in which its CLC funding was used, government emphasis switched from funding centres to purchasing services. This switch to a purchaser/provider model of funding meant the Federal Government could become more directive about what services CLCs could undertake.<sup>55</sup> In essence, this model portrayed government as paying CLCs to provide government services to the community, not as funding CLCs to provide their own, community-based and independently determined mix of services to their communities.<sup>56</sup> Given the government was determining what services it wished to purchase, it could choose to purchase principally individual advice and casework. Noone, writing in 1997, pointed out:

[I]f the services that the Government wishes to purchase from CLCs are traditional legal services, than the financial viability of CLCs in their current form is threatened...increasingly, CLCs will have to fight to maintain their

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<sup>53</sup> Giddings and Noone, above n1, at 260.

<sup>54</sup> Schetzer, above n21, at 159. See also Bruce, van Moorst & Panagiotidis, above n2, at 279-80.

<sup>55</sup> Schetzer, as above at 160-61; Noone, above n21, at 27-8; Rix, above n17, 239-40; Giddings and Noone, above n1, at 273.

<sup>56</sup> See, eg, Rix, above n17, at 239; Mark Rix and Scott Burrows, 'The Foundations of Legal Citizenship: Community law, access to justice and the community legal sector' (2005) 30:3 *Alternative Law Journal* 126, 129.

unique approach to providing legal services to the poor and disadvantaged.<sup>57</sup>

This trend can also be seen in the way new CLCs began to be established and funded. As described above, CLCs were organisations traditionally committed to community development and participation. In fact, this is still noted as one of the features that distinguishes CLCs from other legal aid providers.<sup>58</sup> Noone asserts that CLCs were originally required to demonstrate local support and involvement through operating as a volunteer service before they could attract government funding.<sup>59</sup> However, with the move to the purchaser/provider model of funding, governments began to make their own decisions about where legal services were needed, thus where they wished to purchase services and new CLCs should be located to provide them.<sup>60</sup> Often these funding allocations were determined through a competitive tendering process, in other words, the cheapest provider of the legal services was sought, not necessarily the one that most embodied traditional CLC principles such as community and volunteer participation and a social reform focus.<sup>61</sup>

The Federal Government funded 11 new CLC services in this way between 1998 and 2000, and all of these were in rural and remote locations with few existing legal services (either private or government legal aid) and a limited number of volunteers to draw on.<sup>62</sup> Further, with the limited amount of funding provided to these new regional services, it is questionable whether they had any scope to grow beyond small services dedicated to simply providing individual information, advice and limited casework.<sup>63</sup> For example, the 2004-06 review of NSW CLCs found that the more recently established regional, rural and remote CLCs could not incorporate volunteers into their service delivery model like traditional CLCs.<sup>64</sup> In the

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<sup>57</sup> Noone, above n21, at 28.

<sup>58</sup> See Attorney-General's Department, above n4, at 25-6; NACLC, above n9, 15-6.

<sup>59</sup> Noone, above n21, at 28.

<sup>60</sup> Noone, as above; Schetzer, above n21, at 161; Rix, above n17, at 239.

<sup>61</sup> Noone, as above; Schetzer, as above; Giddings and Noone, above n1, at 263-4. This has also occurred at the state government level, particularly following the South Australian review of CLCs in 1997: Giddings and Noone, above n1, at 262; see also Schetzer, above n21, at 161, for discussion of the Victorian review. For more information about the state-based reviews generally, see Attorney-General's Department, above n4, at 13-14, 111-25.

<sup>62</sup> Schetzer, above n21, at 161; Giddings and Noone, above n1, at 272-3.

<sup>63</sup> See, eg, Giddings and Noone, as above at 261, 272; Senate Legal and Constitutional References Committee, above n1, at 118.

<sup>64</sup> LACNSW, above n33, at 140.

recent CCLSP review, the NSW State Program Manager<sup>65</sup> commented specifically on the situation of some of the smaller, regional CLCs established by the Federal Government since 1996:

[T]he capacity of some community legal centres to provide services commensurate with the population and identified legal need is seriously compromised by inadequate resources. These include the five community legal centres that were established by the Australian Government in 1996 under the then Government's 'justice statement' [all regional CLCs]

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According to the New South Wales State Program Manager these community legal centres have managed to be quite productive in terms of outputs within their resource constraints as they have developed strong links within the communities that they service, especially in outreach to small rural and remote communities. While they attract significant interest from volunteer students, *current funding levels limit their capacity to supervise volunteers in any significant numbers.*

More generally, according to the New South Wales State Program Manager, *the potential effectiveness of community legal centres can be undermined by a range of factors which are linked directly to inadequate resources.* These include management instability, difficulty in attracting suitably qualified staff, *difficulties in undertaking outreach and community legal education because of capacity limitations* and relocation/accommodation uncertainty caused by an inability to pay rent at commercial rental market rates [my emphasis].<sup>66</sup>

The 'value for money' aspect of CLCs, rather than the value of CLCs' unique approach to legal services provision, clearly appears to have driven this process.<sup>67</sup> The default solution to a lack of legal services, particularly

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<sup>65</sup> The State Program Managers are responsible for the day to day management of the CCLSP in their respective jurisdictions, under agreements between the Federal Government and the Legal Aid Commissions in New South Wales, Victoria, Queensland, Western Australia and Tasmania, and the Attorney General's Department in South Australia: Attorney-General's Department, above n4, at 100.

<sup>66</sup> Attorney-General's Department, above n4, at 48-9; see also at 29-30: 'The lack of availability of volunteers mostly impacts regional, rural and remote community legal centres, which have difficulties incorporating volunteer assistance into their service delivery models.'

<sup>67</sup> See, eg, the comments in 2004 by a representative of the federal Attorney-General's Department about the plans to expand the Regional Law Hotline, indicating no appreciation of any difference in the services provided by CLCs as against LACs (other than cost), and showing that 'value for money' cuts both ways: '[W]e want to expand the coverage of Regional Law Hotline...To do that we are expanding the role of the legal aid commissions in providing the legal advice component of the Regional Law Hotline and

in regional areas, has been to establish community legal services rather than other forms of legal service provision, merely because community legal services are cheapest. This (together with the other forces described earlier) has undoubtedly had an undermining effect on the notion of CLCs as valuable because they provide a unique way of delivering legal services to the disadvantaged. Giddings and Noone sum up the problem strongly:

There has been no research conducted on whether [unmet need for legal services in rural, remote and regional areas] are best met by CLCs, regional LAC offices or some other alternative. CLCs operate most effectively when there is a pool of volunteers and private legal practitioners to refer casework to. In most rural and remote areas there are few legal practitioners. The capacity of regional CLCs to conduct law reform or community legal education may be severely compromised if they are the only legal services provider in town. *The model of a CLC may not be the most appropriate to service these areas, even if it is the cheapest.*

Certain values are ascribed to CLCs. They are described as independent, community-based, multi-disciplinary, accessible, activist and solution-oriented...CLCs appreciate the links between their casework, community legal education, law reform, community development and lobbying...*One of the challenges for CLCs is how can small CLCs...fulfil these aspirations* [my emphasis].<sup>68</sup>

Similar trends, although less pronounced, can be seen at the state government level even while there has been greater support, with some states increasing their funding to CLCs in recent years in the wake of the Federal Government's legal aid funding cuts,<sup>69</sup> especially Queensland,<sup>70</sup> Victoria<sup>71</sup> and Western Australia.<sup>72</sup> A large proportion of this funding has,

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phasing out the involvement of the community legal services... The hotline infrastructure will not change... It is when people need information about other areas of law or legal advice itself that they are referred to a legal advice provider. That is the role that some of the community legal centres have been playing. That will now be just the legal aid commissions... It is the same funding but a more efficient use of the funding...': Senate Legal and Constitutional References Committee, above n1, at 120-21.

<sup>68</sup> Giddings and Noone, above n1, at 276.

<sup>69</sup> Attorney-General's Department, above n4, Attachment A at 109-110.

<sup>70</sup> See, eg, Giddings and Noone, above n1, at 271; QAILS, *Annual Report 2006-2007*, December 2007, 63-66: in particular, in 2001-02 a state funding increase of \$2 million over four years was allocated, and in 2007-08 over \$1 million per year in additional recurrent funding was allocated, using funds from the Queensland Legal Practitioners Interest on Trust Account Fund.

<sup>71</sup> See, eg, VLA, above n23, at 13, 29: Victorian CLC funding increased from \$2,971,000 in 1996-97 to \$12,598,534 in 2006-07, and approximately 62% of this 2006-07 funding came from the Victorian government; see also Schetzer, above n21, at 162.

like the Commonwealth's funding, been allocated for new services and initiatives, although some significant funding has also been allocated to existing CLCs.<sup>73</sup> Further, Schetzer has argued that, at least in the case of Victoria, while the importance of community building has been re-emphasised in decisions about where to locate new CLC services, it is the Victorian Government that has made these location decisions.<sup>74</sup> This has, however, been disputed by Noble, who points out that local communities made the case to the Victorian Government for some of those new CLC services, and can thus still play a role in determining where new CLCs should be funded.<sup>75</sup>

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<sup>72</sup> See, eg, Giddings and Noone, above n1, at 271; Attorney General Jim McGinty, *Major funding boost for community legal advice*, Media Release, Thursday 2 October 2003; Legal Aid Western Australia, *Annual Report 2003-2004*, 2004, 15: the state government allocated an additional \$1.125 million per year in recurrent CLC funding in 03-04, a large increase on its previous funding of \$31,000 per year.

<sup>73</sup> For example: In Victoria, see, eg: in 03-04 there was a \$350,000 increase in CLC funding – half of this new funding, \$175,000, was allocated to establish a new CLC in Whittlesea, and a further \$75,000 was allocated to the existing, but not yet government-funded, Homeless Persons' Legal Clinic, but the remainder was allocated to existing CLCs: VLA, *Ninth Statutory Annual Report 2003-04*, 2004, 50; Office of the Attorney-General, *\$350,000 Boost For Community Legal Centres*, Media Release, Friday 16 May 2003; in 05-06 a large injection of new funding was allocated to establish four new services in Boronia (Outer East Melbourne), Melton (Outer West Melbourne), Cranbourne (Outer Southeast Melbourne) and the Loddon Campaspe region (based in Bendigo in regional Victoria), although a smaller amount of new funding went to existing CLCs and for indexation increases: VLA, *Eleventh Statutory Annual Report 2005-06*, 2006, 30; in 06-07 much additional funding was for new services or initiatives or for one-off funding, but some was for indexation increases: VLA, above n23, at 29-30; In Queensland, see, eg: in 01-02 new funding of \$2 million over four years was announced, while an additional \$360,000 was made available but only for new initiatives: Attorney-General & Justice Minister The Hon Rod Welford, *Landmark Agreement for Community Legal Centres*, Media Release, Wednesday 11 July 2001; in 07-08 \$1.1 million in new funding was announced, with almost \$700,000 for additional staffing at existing CLCs and the remaining funds allocated to include new services and initiatives in the recurrent funding program: Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland The Hon Kerry Shine, *\$13.6M more to help Queenslanders access legal services*, Media Release, Tuesday, 5 June 2007; QAILS, above n70, at 65-66; In NSW, see the comment from the final report of the NSW CLC review: 'Over time, governments also moved away from providing general increases to the CLSP program, towards specifying what new funds should be used for (eg new generalist Centres in RRR areas, outreach programs to particular client groups, specialist projects or Centres, and the Social and Community Services Employees' (SACSE) Award top-up linked to award changes)': LACNSW, above n33, at 162.

<sup>74</sup> Schetzer, above n21, at 162.

<sup>75</sup> Peter Noble, 'Community Legal Centres: Communities make the case' (2007) 32:1 *Alternative Law Journal* 43.

In addition, it is arguable that, as in the case of the new Commonwealth services, the funding for new state services has been limited, making it difficult for them to engage in a broader range of activities beyond individual information, advice and limited casework, particularly as the focus has, again, been on funding services rather than centres. Examining Victoria, for example, a new Whittlesea community legal service was established in 2003-04 with \$175,000 per year for four years to employ three workers,<sup>76</sup> and is a service based in a larger community organisation.<sup>77</sup> In 2004 the Victorian Attorney-General commented happily on the work of the new service, but in doing so highlighted its full caseload and its limited additional community legal education activities:

Even though the centre has been almost fully-booked since it opened in June, it has also managed a series of education activities in schools, given a talk to a local Iraqi women's group and will open the night drop-in service later this month.<sup>78</sup>

Three of the four new Victorian services funded in 2005-06, at Boronia, Melton and Cranbourne, all in outer-suburban Melbourne growth areas, were funded as 'branch offices' of existing CLCs, providing much needed direct legal services to disadvantaged people in those areas but not necessarily allowing for much additional activity on behalf of those communities.<sup>79</sup> However, the fourth new service funded that year, Loddon Campaspe Community Legal Centre, based in Bendigo as a program of a larger community organisation, has consciously strived to undertake a

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<sup>76</sup> However, the Whittlesea CLC received funding boosts, in addition to indexation increases, in 05-06 and 06-07: VLA, *Eleventh Statutory Annual Report 2005-06*, above n73, at 30; VLA, above n23, at 30.

<sup>77</sup> Whittlesea Community Legal Service, 'Free & impartial legal Services', *Whittlesea Community Connections Inc website*, [www.whittleseacommunityconnections.org.au/page8.html](http://www.whittleseacommunityconnections.org.au/page8.html). It is noted that basing community legal services within a larger community organisation that provides other services is not necessarily a negative, in fact, it can have major benefits by facilitating an integrated and holistic approach to serving client needs: cf Martin Clutterbuck, 'A Multidisciplinary Approach to Community Law' (2007) 32:3 *Alternative Law Journal* 165.

<sup>78</sup> Office of the Attorney-General, *Hulls Opens Whittlesea's New Community Legal Centre*, Media Release, 6 August 2004. The service admirably maintains a commitment to law reform despite its limited staffing, however, does not appear to have engaged in much law reform activity in practice: see *Whittlesea Community Connections Inc website*, above n77 and related webpages; Whittlesea Community Legal Service 'About Us', *Community Law website*, [www.communitylaw.org.au/whittlesea/](http://www.communitylaw.org.au/whittlesea/) and related webpages.

<sup>79</sup> Office of the Attorney-General, *Four More Community Legal Centres For Victoria*, Media Release, Tuesday 6 September 2005.

range of policy and law reform work in addition to its direct legal service provision.<sup>80</sup>

These state-level developments do seem to raise the same issues posed by Giddings and Noone in their strongly worded comments earlier.<sup>81</sup> Namely, the manner in which government funding for new CLC services has been allocated in recent times may be compromising the capacity of CLCs to continue their distinct vision for legal services provision to the disadvantaged. Such trends pose an acute challenge to CLCs. If CLCs provide principally direct individual legal services, particularly information, advice and casework, to poor and disadvantaged members of the community, they begin to look less unique compared to government legal aid,<sup>82</sup> apart from their lower cost. Indeed, it has been explicitly noted that over time the relationship between CLCs and LACs moved from a complementarity of services to greater competition because they began to compete more directly for legal aid funds, they became potential rivals in competitive tender processes for new regional services and their modes of service delivery coalesced.<sup>83</sup>

The rationale for the continued existence and operation of CLCs surely cannot be to provide government with a means of under-funding legal aid to the disadvantaged. Yet, without a commitment to a unique mode of service delivery that extends beyond what government or the private legal profession can offer, it is argued that CLCs will fulfil van Moorst's prophecy that CLCs could become 'casework on the cheap'.<sup>84</sup> If this is the future of CLCs, our clients might in many cases be better served by adequately resourced government legal aid offices, which would include properly paid staff and decent office conditions.<sup>85</sup>

The traditional features of CLCs that remain distinctive are their commitments to community participation, volunteer involvement and, particularly, a collective approach that includes a broad range of policy and

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<sup>80</sup> Loddon Campaspe Community Legal Centre, 'About Us', *Community Law website*, [www.communitylaw.org.au/loddoncampaspe/](http://www.communitylaw.org.au/loddoncampaspe/) and related webpages.

<sup>81</sup> See text at n68 above.

<sup>82</sup> Or even, to some degree, compared to *pro bono* legal services.

<sup>83</sup> Giddings and Noone, above n1, at 265-6; Schetzer, above n21, at 162; see also Basten, above n30, at 721-22.

<sup>84</sup> Van Moorst, above n3, at 290.

<sup>85</sup> See, eg, VLA, above n23, at 26-28; Legal Aid NSW, above n24, at 31-36; and Cf Attorney-General's Department, above n4, at 47, 49-51; Senate Legal and Constitutional References Committee, above n1, at 214-217.

law reform activities.<sup>86</sup> These must be what drive CLC work into the foreseeable future, if CLCs are to remain relevant to, and unique in, their communities.

It is interesting to examine the US civil legal aid program with the themes discussed above in mind.<sup>87</sup> US Federal Government funding for civil legal aid is arguably a 'casework on the cheap' model. For example, the LSC distributes government funding to a national network of independent legal service programs based in local areas across the entire country and there is no corps of government salaried civil legal aid lawyers.<sup>88</sup> Civil legal aid is now severely under-funded,<sup>89</sup> with the LSC strongly encouraging funded

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<sup>86</sup> Note that some LACs now undertake reasonably extensive community legal information and education activities in addition to direct service work. They also undertake more law reform activity than in the past, however, their capacity to undertake certain types of activities, particularly campaigning, remains limited due to their nature as government agencies (albeit in some cases independent statutory authorities), thus their law reform activity tends to involve mainly producing submissions and participating in organised consultation processes: see, eg, VLA, above n23, at 24-5, 31; Legal Aid NSW, above n24, at 24, 47-51; cf Legal Aid Queensland, *Annual Report 2006-07*, 2007, 34, indicating that Legal Aid Queensland also engaged in some media commentary.

<sup>87</sup> Civil legal aid (including family law) and criminal defence are distinct programs in the US, with different histories. The US Constitution guarantees the right to counsel for all criminal defendants facing imprisonment, and government-funded public defender programs have developed federally and in each state: for a good summary, see NLADA, 'History of Right to Counsel', *NLADA website*, [www.nlada.org/About/About\\_HistoryDefender](http://www.nlada.org/About/About_HistoryDefender).

<sup>88</sup> See, eg, LSC, *What is the Legal Services Corporation?*, Fact Sheet, undated; LSC, *Semiannual Report to the Congress of the United States From the Legal Services Corporation Board of Directors For the Period April 1, 2007-September 30, 2007*, November 2007, at 20-21. In the early 1980s a 'judicare' element was also introduced when funded programs became required to devote a certain proportion of their grant funding to pay private attorneys to represent legal aid clients: Robert Baum, *Public Interest Law: Where Law Meets Social Action*, Legal Almanac Series No. 86, 1987, 27-28; NLADA, 'History of Civil Legal Aid', *NLADA website*, [www.nlada.org/About/About\\_HistoryCivil](http://www.nlada.org/About/About_HistoryCivil); see *Legal Services Corporation Regulations* 45 CFR Ch XVI Part 1614 - Private Attorney Involvement.

<sup>89</sup> LSC, *Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans*, 2<sup>nd</sup> ed. June 2007; LSC, *Semiannual report*, above n88, at 21-22; Alan W. Houseman, 'Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward' (2002) 29 *Fordham Urban Law Journal* 1213, 1221-22; see also, eg, Liza Q. Wirtz, 'The Ethical Bar and the LSC: Wrestling with Restrictions on Federally Funded Legal Services' (2006) 59 *Vanderbilt Law Review* 971, 972 & 1006-1007; Deborah Rhode, 'Access To Justice: Connecting Principles To Practice' (2004) 17 *Georgetown Journal of Legal Ethics* 369, 373-74.

programs to incorporate more *pro bono* contributions from private practitioners into their practices to plug the funding gap.<sup>90</sup>

A network of independent legal aid organisations in the US originally developed independently of government, although on a haphazard basis.<sup>91</sup> As in Australia, it was the commencement of Federal Government funding to legal services, in the US in 1965 as part of the ‘War on Poverty’, that gave some financial stability to legal aid services and enabled the serious expansion of civil legal aid to the poor and disadvantaged, with legal services programs eventually established in every US county in 1981.<sup>92</sup> While government funding is therefore responsible for the development of an extensive legal aid network in the US, it also gave control over how independent legal service providers undertake their work to the government.

Importantly, the program originally intended the funded legal service programs to engage in a full range of activities, including policy and law reform advocacy.<sup>93</sup> However, this broad approach to legal services for the poor was not universally politically popular, and over time Federal Government funding has been reduced and more and more restrictions have been placed on the activities that funded programs may engage in, particularly when conservatives have been in power.<sup>94</sup> Discussing the

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<sup>90</sup> LSC, *LSC 2007 Action Plan for Private Attorney Involvement: Help Close the Justice Gap, Unleash the Power of Pro Bono*, January 2007; LSC, *Semiannual report*, above n88, at 29.

<sup>91</sup> NLADA, above n88; Baum, above n88, at 19-23.

<sup>92</sup> NLADA, as above; Baum, as above at 23-26; LSC, *Documenting the Justice Gap In America*, above n89, at 1-2. For a good discussion of the LSC program, see Houseman, above n89.

<sup>93</sup> NLADA, as above; Baum, as above; see also Scott L. Cummings and Ingrid V. Eagly, ‘After Public Interest Law’ (2006) 100 *Northwestern University Law Review* 1251, 1252-53. Note that at this time, when legal services were first funded in 1966, funding came from the Office of Economic Opportunity (OEO), which was the agency set up by the Johnson administration to administer the entire War on Poverty program. After the Nixon administration came to power, it began to dismantle the OEO. After much debate, the legal services program was preserved by the 1974 *Legal Services Corporation Act*, which established the independent LSC to administer legal services funding, but with some new restrictions on what legal services programs could do. For a brief history, see also Robert Bickel, ‘Limited Legal Services: Is It Worth It?’ (2006) 39 *Columbia Journal of Law and Social Problems* 331, 334-337.

<sup>94</sup> NLADA, as above; Baum, as above, at 25-29; Bickel, as above, at 335-37; LSC, *Documenting the Justice Gap In America*, above n89, at 1-2. The current funding situation is reported in LSC, *Semiannual report*, above n88, at 22: ‘In fiscal year 2007, Congress appropriated \$348.5 million for LSC, \$22 million more than the year before. This is LSC’s first budget increase in four years and largest appropriation since 1995,

enactment of the *Legal Services Corporation Act* in 1974,<sup>95</sup> the National Legal Aid and Defender Association (**NLADA**) says:

The debate in Congress [on the Act] made clear a fundamental difference of opinion about what the mission of legal services should be- whether it should continue the very broad, anti-poverty approach that had characterized OEO legal services, with its focus on addressing the problems of the client community as a whole, using tools such as legislative and administrative advocacy and class actions, or whether it should revert to the older "legal aid" model, limited to resolving individual problems on a case-by-case basis.

As enacted, the Act endorsed the broader approach, allowing legal services programs to continue most of their previous work, with a few new restrictions....The underlying debate about the Corporation's mission was not resolved, however, and has continued for the past twenty-five years.<sup>96</sup>

Today, there are further restrictions on the activities that LSC-funded independent legal services programs may engage in, even using non-government funds, including undertaking organising activities, lobbying or engaging in class actions.<sup>97</sup> Many of these were imposed in 1996 after conservatives won a majority in US Congress elections.<sup>98</sup> The NLADA describes the developments in 1996:

[A] bipartisan majority of the Congress remained committed to federally funded legal services. However, key congressional decision-makers determined that major changes in the delivery system would be required if the program was to survive. *Grants were to be awarded through a system of competition. More fundamentally, Congress redefined the role of federally funded legal services, restricting the broad range of program activities that it had mandated in the past. In essence, Congress determined that federal funds should go to programs that focus on*

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when it received \$400 million...For fiscal year 2008, the Board has requested \$430.7 million. In July, the House voted to increase LSC's current budget by \$28 million, for a total of \$377 million. Shortly after the reporting period ended, the Senate approved an increase of \$41.4 million, for a total of \$390 million.'

<sup>95</sup> This act established the LSC, which took over the funding of legal service programs from the OEO.

<sup>96</sup> NLADA, above n88.

<sup>97</sup> *Legal Services Corporation Act* 42 U.S.C. s.2996f; *Legal Services Corporation Regulations* 45 CFR Ch XVI Parts 1600-1644; see LSC, *Statutory Restrictions on LSC-funded Programs*, above n13; Rhode, above n89, at 379.

<sup>98</sup> See Laura K. Abel and David S. Udell, 'If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor' (2002) 29 *Fordham Urban Law Journal* 873, 876-79.

*individual cases, while broader efforts to address the problems of the client community should be left to entities that do not receive federal funds.* Certain kinds of advocacy that had previously been deemed to be important tools for legal services attorneys to employ on behalf of their clients would no longer be permitted by LSC recipients, even if the program used non-federal funds to pay for them.

Congress imposed a number of new restrictions on LSC grantees. Legal services attorneys could no longer initiate or participate in class actions. They could not engage in direct or grassroots lobbying on behalf of their clients, although they could use non-LSC funds to respond to written requests from officials for information or testimony. They could not represent certain categories of aliens or engage in litigation on behalf of prisoners. They could no longer collect statutory attorneys' fees. They could not challenge welfare reform measures as unconstitutional or otherwise illegal. With a few minor exceptions, these restrictions applied to funds from non-LSC sources as well.

Along with the new restrictions came a major reduction in funding, down to \$278 million from the \$400 million for FY 1995 [my emphasis].<sup>99</sup>

Professor Rhode provides a neat summary of the effect of these restrictions:

Since these are the very strategies most likely to address the causes of poverty and to deter future abuses, legal aid programs have faced an unpalatable choice. They can do without federal funds and help far fewer individual clients, but in a more effective fashion. Or they can handle greater numbers of cases, but only for politically acceptable claimants, and in ways least likely to promote broader social reforms.<sup>100</sup>

Despite the numerous differences between the US and Australian contexts, the US experience provides a useful example of what an emaciated Australian CLC program might begin to look like. However, even before the more recent developments, in 1977 Gary Bellow wrote a now well-known piece exposing the reality of how legal services programs were operating, highlighting concerns such as how the system leads to the routine and quick processing of cases, lawyer control over matters and a tendency to settle cases for inadequate outcomes.<sup>101</sup> While careful to

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<sup>99</sup> NLADA, above n88. Funding has still not returned to pre-1996 levels, even in nominal terms: see n94 above.

<sup>100</sup> Rhode, above n89, at 379.

<sup>101</sup> Gary Bellow, 'Turning Solutions into Problems: The Legal Aid Experience' (1977) 34 NLADA Briefcase, 106.

point out that this was not the individual lawyers' fault, he asked why legal advice to the poor was becoming 'shallow, cautious, and incomplete' and why cases were being handled 'passively, routinely, unaggressively'. He also commented:

Both personal involvement and a political orientation in legal aid work seem to me essential to avoiding its further bureaucratization. Indeed, the conception of the legal problems of clients as capable of division between large (and political) "test case" claims, and routine (apolitical) grievances not only depreciates the importance of day-to-day legal aid work but actually fosters the very limiting perceptions of what can and could be done in those cases to which it purports to respond.<sup>102</sup>

Bellow went on to outline some possible approaches to counter-act these problems, which are discussed in section 4.1.1 below. However, what he made clear are the shortcomings of legal services provision that simply concentrates on providing routine and passive legal advice and assistance to the poor and disadvantaged.<sup>103</sup>

This is by no means the whole story of legal assistance on civil law matters to the poor and disadvantaged in the US. For example, many legal service providers have successfully sought additional funding from other sources to supplement US Federal Government funding, such as from state and local governments and state Interest on Lawyers' Trust Accounts (**IOLTA**) funds, philanthropic foundations, private donations and recovery of attorney fees.<sup>104</sup> Some services do not take LSC funding, precisely so that they may engage in activities such as lobbying or class actions, relying solely on other funding sources.<sup>105</sup> Further, there is a large network of other organisations that engage in public interest law work, including private bar-sponsored *pro bono* law firms, public interest law firms and public interest organisations.<sup>106</sup>

In a sense, though, this highlights that there are two different (albeit related) questions, the first being how to ensure the ongoing vitality of legal

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<sup>102</sup> As above.

<sup>103</sup> See also, Richard Abel, 'Law Without Politics: Legal Aid Under Advanced Capitalism' (1985) 32 *UCLA Law Review* 474, 570-79.

<sup>104</sup> However, LSC funds remain the most significant source of funding for civil legal aid: LSC, *Semiannual report*, above n88, at 21; further, as noted above, LSC-funded programs largely cannot use these other funds for restricted activities. See also Houseman, above n89, at 1227-28.

<sup>105</sup> Cf Rhode, above n89, at 379-80.

<sup>106</sup> See, eg, Baum, above n88, at 29-61; Cummings and Eagly, above n93, at 1253.

service programs and the second asking how to maximise legal services to the poor through a variety of different institutional forms and other means.<sup>107</sup> Particularly given the relative lack of development of alternative options for poor and disadvantaged people to access legal services in Australia, at least at the present time, the need to ensure the ongoing strength and effectiveness of Australia CLCs seems to take on even more importance. Again, the path towards this goal does not seem to be via 'casework on the cheap', but rather via a renewed commitment to the unique CLC service delivery model that incorporates a collective and community approach.

### 3.2.2 Effectiveness of policy and law reform work

Regardless of any historical or unique vision for CLC legal practice, there would be no reason to advocate a continuing commitment to it if it was not, in fact, helpful for CLC clients. However, an ongoing commitment to CLCs' unique vision of a mix of activities – including community education work and, especially, policy and law reform activities – is important precisely because it *is* more effective than *only* undertaking individual service work. This is particularly the case in pursuing a more substantive vision of justice for the poor and disadvantaged, rather than merely a procedural goal of equal access to the law,<sup>108</sup> although it holds either way.

Bruce, van Moorst and Panagiotidis have noted that debates over the relative merits of legal aid services engaging in individual casework versus community legal education and law reform tend to re-emerge particularly in difficult times when resources are limited.<sup>109</sup> However, they argue that all three remain important, and that community education and law reform cannot be sacrificed just because resources are tight – in fact, they point out that this would further stretch, not conserve, limited resources because it means the same problem will continue to arise over and over and each time require assistance, using up further resources:

Isolated solutions to problems remain just that – isolated; and an isolated problem-solving process, while important for a particular service user or

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<sup>107</sup> See Louise G. Trubek, 'Embedded Practices: Lawyers, Clients, and Social Change' (1996) 31 *Harvard Civil Rights-Civil Liberties Law Review* 415.

<sup>108</sup> See text at nn29-32 & 47-51 above.

<sup>109</sup> Bruce, van Moorst & Panagiotidis, above n2, at 279.

group of service users, cannot in itself change the structural and socio-economic circumstances which gave rise to the problem.<sup>110</sup>

Van Moorst elaborates further, writing that CLCs undertake their mix of three functions because they recognise that ‘a person’s relationship to the law cannot be separated from the socio-economic circumstances of their lives’, and as the legal system has institutionalised structural inequality, working to achieve structural change becomes necessary.<sup>111</sup> This is not to downplay the importance of individual legal assistance, but to highlight that it alone cannot address the *underlying* causes of various legal problems that disadvantaged people present to legal services with.

In an article discussing the value of CLC casework, Giddings notes that taking on a number of individual cases on the same issue can highlight that issue as a systemic problem, calling this sort of individual casework ‘collectively important cases’.<sup>112</sup> However, he also makes the point that ultimately CLCs must couple this ongoing individual casework with other initiatives such as advocating for change, or else the casework alone does not change practices.<sup>113</sup> Moreover, he notes that continuing to undertake individual casework without this broader change focus can have negative, not just neutral, consequences:

Community Legal Centres must keep in mind the need to avoid becoming part of the court system in a way which means that they are simply assisting an unjust system to process the cases which are put before it. Centres need to focus on the importance of challenging the existing legal system whenever and wherever this is appropriate.<sup>114</sup>

Similarly, Basten has advocated strongly for legal aid to the poor and disadvantaged to focus on more than providing assistance individually.<sup>115</sup> He argues that legal aid cannot approach the level of use of the law by

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<sup>110</sup> As above at 280. Almost conversely, Ellis has noted that it is partly because of the lack of resources that CLCs have had to develop alternative approaches to address issues affecting their clients, including involvement in community projects, lobbying, community legal education, law reform and media work: Teresa Ellis, ‘Human Rights and Social Justice: A frontline perspective from a Community Legal Centre’, (1996) 3:4 *Murdoch University Electronic Journal of Law*.

<sup>111</sup> Van Moorst, above n3, at 290. Note that this is a view that accords with views put by the critical legal studies movement that came out of the US in the 1970s.

<sup>112</sup> Jeff Giddings, ‘Casework, bloody casework’, (1992) 17:6 *Alternative Law Journal* 261, 263.

<sup>113</sup> As above.

<sup>114</sup> As above.

<sup>115</sup> Basten, above n30.

those who can afford private legal services, due to both the huge disparity of resources available to the rich and poor (through government funding) to spend on legal services<sup>116</sup> and to structural issues such as the comparative advantage that falls to repeat users of the court system like trading corporations.<sup>117</sup> He concludes that these realities ensure legal aid will never achieve major social change,<sup>118</sup> but he also demonstrates that focusing on the individual assistance approach, by ignoring these realities, guarantees that procedural goals of equal access to justice will also go unfulfilled.<sup>119</sup> However, Basten considers that CLCs' different mode of practice better challenges these limitations.

Weisbrot, writing around the same time as Basten, also observes that legal aid, with its focus on individual casework, limited areas of coverage and limited eligibility, has not truly helped the poor (or altered the structure of the legal profession), making it 'more a palliative than an agent of social change'.<sup>120</sup> He too views the CLC model of legal services delivery as a valuable alternative; while he recognises that CLCs may not have achieved profound social change, they have nevertheless established a 'more humane, accessible and activist model of legal services delivery'.<sup>121</sup>

It seems correct to acknowledge that, two decades later, CLCs have not created major transformations in our social structures towards eliminating poverty and disadvantage from the community. However, this does not mean CLCs' law reform and policy work has not been effective. On the contrary, it has undoubtedly had a significant impact in various areas of public policy and the law, to the great benefit of poor and disadvantaged members of our community.<sup>122</sup> This was again demonstrated in a recent report by Curran examining the impact of Victorian CLCs' law reform work,

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<sup>116</sup> As above at 716.

<sup>117</sup> As above at 723, drawing on the important article by Marc Galanter: 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95.

<sup>118</sup> As above at 716.

<sup>119</sup> As above at 717-18, eg: 'There is also a danger that lawyers will tend to accept the concentration of the law on individual rights and needs which may be inappropriate for groups who do not traditionally use lawyers.'

<sup>120</sup> Weisbrot, above n26, at 245.

<sup>121</sup> As above at 246-47.

<sup>122</sup> For examples, see nn45-46 above; Giddings, above n112.

looking at first-hand materials and documentation from past CLC activities.<sup>123</sup>

In particular, Curran analysed six specific CLC law reform projects, on: fines/infringements; debt collection; police issues; energy deregulation; violence against women and children; and prison and corrections issues. All of these projects had an impact, some only after sustained and persistent work over a period of years.<sup>124</sup> Importantly, the law reform work undertaken by CLCs was not divorced from their individual service work. Rather, it was the casework that CLCs undertook for individuals that drove the subsequent broader activities seeking change to improve the community's experience with laws, policies and practices.<sup>125</sup>

Through this broad work on law reform and policy issues, CLCs have achieved outcomes such as amendments to legislation and even the enactment of new legislation, prompting government regulators to take action, convincing business and government to change their practices, and cementing ongoing consultative roles with governments and businesses.<sup>126</sup> Further, Curran found that some of the issues that CLCs have identified and raised might be considered 'mundane, uninteresting or incredible' at first, with CLCs often the sole agency identifying and advocating on issues experienced by their clients. It is therefore directly due to CLC persistence in advocating on those issues that awareness of a problem has increased and reform has ultimately been effected.<sup>127</sup> Her conclusion is thus that:

There is a critical need to ensure that this input on law reform and community education is able to continue unhampered by resource constraints, an overburdening of centres with too much casework and by allowing them the space to think and reflect on the ramifications and trends in their casework, that need to be examined more systematically.<sup>128</sup>

In the US, there has been extensive, considered and complex debate over what are the most effective and appropriate ways in which to provide legal

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<sup>123</sup> Liz Curran, *Making The Legal System More Responsive To Community: A Report on the Impact of Victorian Community Legal Centre (CLC) Law Reform Initiatives*, La Trobe University and West Heidelberg Community Legal Service, May 2007.

<sup>124</sup> As above at 5, 64.

<sup>125</sup> As above at 3, 63-64, 67-68.

<sup>126</sup> As above at 16-62.

<sup>127</sup> As above at 3-4, 63-64, 68-69.

<sup>128</sup> As above at 69.

services to the poor. It is not possible to do justice to this debate here,<sup>129</sup> suffice to say that it has included very thoughtful consideration of issues such as whether individual service work or policy and law reform work should be emphasised, whether there is or should be a division between the two, and whether law is effective in achieving social reform.

At a great risk of over-simplification, it appears that from a peak in the mid-1990s, this debate has settled somewhat by the late 2000s with regard to at least some issues, including general agreement that legal services for the poor must incorporate an element of social reform work in addition to individual casework if they are to make progress in improving the lives of the poor and disadvantaged.<sup>130</sup> The current debate in the US appears to (continue to) focus on *how*, not whether, to engage in legal services in a way that is effective in achieving social reform.<sup>131</sup> None of the interviewees visited for this Report considered that simply providing individualised legal services to the poor and disadvantaged is sufficient to have a real impact on their lives.

### 3.2.3 Moral imperatives

In the US, Professor Tremblay has argued that there is a *moral* obligation for legal services to undertake a mix of activities, not only individual service work.<sup>132</sup> This argument rests at least partly on an acceptance that engaging in a broader mix of activities is more effective in helping client

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<sup>129</sup> For a good introduction and launching pad, see, eg, the following selection: (1996) 31:2 *Harvard Civil Rights-Civil Liberties Law Review*, a symposium issue on 'Lawyering: Conversations on Progressive Social Change'; Marc Feldman 'Political Lessons: Legal Services For The Poor' (1995) 83 *Georgetown Law Journal* 1529; Peter Margulies, 'Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate' (1996) 3 *Michigan Journal of Gender & Law* 493; Alan W. Houseman, 'Civil Legal Assistance For The Twenty-First Century: Achieving Equal Justice For All' (1998) 17 *Yale Law and Policy Review* 369; Gerald P. Lopez, 'Living and Lawyering Rebelliously' (2005) 73 *Fordham Law Review* 2041; Cummings and Eagly, above n93; Orly Lobel, 'The Paradox Of Extralegal Activism: Critical Legal Consciousness And Transformative Politics' (2007) 120 *Harvard Law Review* 937.

<sup>130</sup> This view was confirmed by several of my interviewees. See also, eg, Bickel, above n93, at 364-65.

<sup>131</sup> See, eg, Scott L. Cummings and Ingrid V. Eagly, 'A Critical Reflection on Law and Organizing' (2001) 48 *UCLA Law Review* 443; Cummings and Eagly, above n93; Lobel, above n129.

<sup>132</sup> Paul R. Tremblay, 'Acting "A Very Moral Type Of God": Triage Among Poor Clients' (1999) 67 *Fordham Law Review* 2475.

communities. However, Tremblay's conviction is more fully articulated than this.

Tremblay starts by accepting the reality that there will be scarcity in public interest legal services. Given that, there must be some form of 'triage' in deciding to whom to provide legal services.<sup>133</sup> Tremblay is primarily concerned with undertaking triage in an ethical manner and argues strongly that "weighted triage" is justified, namely, triage based on some assessment of the client and/or their case.<sup>134</sup> He goes on to consider factors that should or should not form the basis of an ethical assessment for the purposes of weighted triage.<sup>135</sup> Indeed, several interviewees for this project also pointed out that triage always occurs; if no express decisions are made about triage it occurs on the basis of undesirable or irrational factors such as a waiting line.

These are decisions made at the microallocation level. However, Tremblay also observes that it is necessary for legal services to make an earlier assessment at the macroallocation level, one that determines the nature of the work they will undertake – the mission of the practice.<sup>136</sup> It is here that decisions about, for example, preferring individual service work or policy and law reform work, would take place. Tremblay identifies four broad service models or 'practice visions' that legal services need to choose between: individual case representation;<sup>137</sup> focused case representation;<sup>138</sup> law reform;<sup>139</sup> and mobilization lawyering.<sup>140</sup>

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<sup>133</sup> See also text at nn12-13 above.

<sup>134</sup> Tremblay, above n132, at 2484-89.

<sup>135</sup> As above at 2489-98.

<sup>136</sup> As above at 2499.

<sup>137</sup> '[W]ork which is done by advocates merely because it is beneficial to the individual client': as above at 2500-01.

<sup>138</sup> '[S]ervice work - that is, individual case work - chosen not merely for the benefit of the individual clients involved, but expressly to confront a particular broader social or legal concern within the program's client community': as above at 2501.

<sup>139</sup> 'Impact lawyering...litigation or similar focused advocacy (including legislative or administrative lobbying, for instance) in which broad change is sought to be effected through one case or a small number of related cases. Impact lawyering work consists of carefully crafted and framed advocacy which, if successful, will alter an important legal, political, legislative, or similar reality and will benefit the lives of many poor persons at once. The prototypical impact activities include class action lawsuits, test cases, and focused legislative efforts': as above at 2502.

<sup>140</sup> 'Recent criticism of poverty law practice has distinguished both service and impact work from a different kind of activity... "Mobilization lawyering," ...is activity dedicated to redressing the imbalance in political, economic, and social power between the haves and the have-nots...it eschews traditional forms of representation, such as litigation or

Tremblay argues that the choice of practice vision for a legal service should also be made in a considered and ethical manner, not simply according to the preferences of the people running the legal service, an approach which falsely assumes that each service model is equally valid and that all that matters is whether the service undertakes its chosen model well.<sup>141</sup> This decision can be made ethically by assessing how the legal service will best meet its obligations to its community.

Critically, Tremblay views poverty law practice as having a substantive goal – ‘the achievement of power for the program’s constituents’. He rejects absolutely the notion that legal services aim to meet procedural goals of access to justice and equality of representation, noting that if this were the case there would be no need for triage at all:

“Access” is not, and frankly cannot be, the end of any legal services program in any substantive way. Access to lawyers, and by extension to courts, is important because it represents a form of power, a capacity to control one's life. It permits a marginalized client to obtain some benefit that she cannot obtain otherwise. Access is a symbol of power and has no meaningful worth except as such...The triage discussion...reflected this reality...some access rights were seen as less worthy of...attention, and those instances are inevitably ones where the power imbalance matters less, or the need for control or for the benefit is less crucial. If access qua access were the crucial value at stake, such triage choices would be superfluous.<sup>142</sup>

Further, the constituents whom legal services programs serve include not only clients, or even persons now living within the community who could ask for help, but also persons who could ask for help in the future:

Legal services lawyers assume a commitment to a community of clients in ways not expected of private lawyers. That commitment,...the “trustee function,” includes future generations and not just the poor who might need help today...A poverty lawyer...assumes a distinct duty to further the interests of the community of clients for whom she is the only available lawyer in town...She cannot, as long as she works for the poverty law institution, actively pursue matters which will harm the interests of those remaining constituents...Her commitment to the polity trumps her

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legislative advocacy, in favor of political community organization and empowerment’: as above at 2502-03.

<sup>141</sup> As above at 2504-06.

<sup>142</sup> As above at 2509.

obligation to any one client in the same fashion as a lawyer's commitment to one private client precludes her from representing another client whose interests conflict with the first. It is true, of course, that the heterogeneity of interests within a community...makes this duty not always a clear one, but its complexity or inherent ambiguity does not deny the force of the proposition.<sup>143</sup>

For Tremblay, the ethical choice thus becomes clearer. A legal service trying to achieve power for its constituents now and into the future must, as a moral imperative, 'balance its commitment to the alleviation of present needs with a similar commitment to altering the political landscape of the poverty community'. This demands a combination or balance of the different practice types.<sup>144</sup>

Overall, Tremblay considers that a significant segment of the resources of legal services will necessarily go to the alleviation of current individual needs, although some of this work can also include focused case representation or law reform as more efficient and productive ways to address this need. However, mobilization lawyering work is particularly important as a balance to the individual case representation work, to ensure legal services meet their full "trustee" obligations to their community. Significantly, he recognises the risk that individual service work will come to dominate in an integrated practice, due to the strength of the 'rescue mission', that is, the intense human impulse to assist those currently in distress. However, this outcome would be morally wrong, as it would preference some constituent needs over others.<sup>145</sup>

Of course, not all writers have agreed with Tremblay's arguments.<sup>146</sup> For example, in a response essay Professor Dunlap disagrees that poverty law practice must be about achieving power for the poor and disadvantaged and asserts that access can be a valid goal. She states:

[I]t is hard to conceive that, on a very practical level, all - or even most - cases of representation are about enhancing political power...In a system where disputes are often resolved through the courts, and where the value

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<sup>143</sup> As above at 2509-10.

<sup>144</sup> As above at 2514-17.

<sup>145</sup> As above at 2517-21. Tremblay suggests that legal services implement an institutional division of labour so that some staff are effectively quarantined from the pull of the rescue mission.

<sup>146</sup> Indeed, Tremblay states that he took his title from a phrase in an earlier article that he contradicts with his piece: as above at 2475; he also refers to contradictory views throughout his article.

of having a lawyer assist in navigating the judicial system is self-evident, access seems to be an obviously desirable goal.<sup>147</sup>

If access is a valid goal for a legal services practice, this obviously diminishes the force of Tremblay's argument that there is a moral imperative for all legal services to undertake more than only individualised service work. Dunlap is also concerned that Tremblay's contentions treat client communities paternalistically by assuming the legal services staff can make better decisions about program priorities than community members, a process which is disempowering for the very people for whom the legal service is seeking to achieve power.<sup>148</sup> However, despite these concerns, Dunlap agrees that mobilization lawyering is of critical importance, although perhaps not appropriate for all legal services.<sup>149</sup>

Further, Tremblay's four categories of practice vision do not correspond neatly with Australian legal aid practices and service delivery functions. For example, in the Australian context his second, third and fourth practice visions might all be considered different techniques that can be utilised for policy and law reform work, which in Australia has never been dominated by test case litigation and class actions to the extent it has in the US. It is also unclear where the Australian conception of community legal education would sit within Tremblay's taxonomy, which does not explicitly recognise a preventative role for any of the four practice visions. Mobilization lawyering, where community legal education perhaps best sits, seems also to equate most closely with CLC community development work.<sup>150</sup> However, our community development work is arguably not as "political" or confrontational as the mobilization lawyering described here and, further, community development is often a component of, not separate to, CLC policy and law reform on a given issue.

Despite these reservations, Tremblay's conception of poverty law practice remains compelling and, at the very least, should prompt Australian CLCs to think more deeply about their obligations in serving client communities.<sup>151</sup> To the extent that further justification is needed for CLCs

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<sup>147</sup> Justine A. Dunlap, 'I Don't Want To Play God - A Response To Professor Tremblay' (1999) 67 *Fordham Law Review* 2601, 2606.

<sup>148</sup> As above at 2610-13.

<sup>149</sup> As above at 2615.

<sup>150</sup> See as above.

<sup>151</sup> The concept of an ethical obligation to do more than just service work has also been recognised in the Australian context. See, eg, many of the submissions to the Board of Taxation on the draft Charities Bill 2003, available at [www.taxboard.gov.au/charities\\_submissions.asp](http://www.taxboard.gov.au/charities_submissions.asp). In its submission, the Victorian Women's Trust said: 'As a

to engage in broader reform work, than that to do so is more effective for our clients and more appropriate given our role as unique legal services providers, the strong argument that CLCs have a moral imperative to do so may provide it.

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philanthropic body, we face an ethical choice – we can simply distribute our limited funds and hope they provide some soothing effect for women – OR, we can make grants that impact on a number of levels other than the women themselves can, to try and change conditions for the better': Victorian Women's Trust, Letter to Board of Taxation, 7 October 2003, available at [www.taxboard.gov.au/content/charity\\_subs/Victorian\\_Womens\\_Trust.pdf](http://www.taxboard.gov.au/content/charity_subs/Victorian_Womens_Trust.pdf).

## 4. Strategies for policy and law reform work

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CLCs have been undertaking policy and law reform work from their beginnings in the early 1970s. Current CLC workers are familiar with many of the strategies and techniques used to engage in change-focused activities.

Curran's recent report highlighted many of the law reform activities most commonly undertaken by CLCs. In the projects she examined, Victorian CLCs undertook research and produced reports on issues, made Freedom of Information requests to government for information, compiled case studies, published academic articles, wrote letters and submissions to government urging legislation reform, participated in government inquiries, lobbied government ministers and departments and private businesses, undertook test cases, engaged in media commentary, collaborated with other organisations, including providing legal advice and support to other agencies assisting affected persons, produced community legal education materials and participated in public meetings.<sup>152</sup>

Writing in 1992, Stuart and Renouf provided practical advice on strategies for law reform campaigns, particularly for CLCs.<sup>153</sup> The strategies they explicitly listed included many of the methods highlighted in Curran's report, including working with the media, taking part in government inquiries, preparing and launching a report, lobbying decision-makers and undertaking litigation and test cases. Others included running a phone-in, direct action and miscellaneous activities such as stalls and street theatre.<sup>154</sup>

Further, there are a number of good materials available to assist CLCs in engaging in these sorts of activities. For example, the FCLCV has made available an online toolkit of resources on a range of matters, including engaging in media and law reform work and community legal education.<sup>155</sup>

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<sup>152</sup> Curran, above n123, at 16-62.

<sup>153</sup> Stuart and Renouf, above n1.

<sup>154</sup> As above at 241.

<sup>155</sup> FCLCV, 'Federation Toolkit', *Community Law website*, [http://www.communitylaw.org.au/fedclc/cb\\_pages/federation\\_toolkit.php](http://www.communitylaw.org.au/fedclc/cb_pages/federation_toolkit.php). These materials include a lobbying kit, notes

The Fitzroy Legal Service has developed an online Activist Rights website that provides comprehensive legal advice to activists and protestors and resources to assist in providing legal services and support to activists.<sup>156</sup> In NSW, PIAC runs regular workshops on advocacy skills for community workers.<sup>157</sup>

This project was not an attempt to catalogue all possible law reform and policy methods or detail strategies and techniques that CLCs are already using. Rather, its aim was to examine whether there are strategies or techniques being used by US public interest groups and law centres that were more unfamiliar in the Victorian and Australian context and could perhaps be adapted for use by CLCs.

There are several interesting developments in the US that would benefit from further examination. This Report has deliberately chosen to concentrate on three particular areas that presented themselves both in the literature and in the practices of the organisations whose staff were interviewed. Inevitably, a strong element of discretion was used to determine which areas would be highlighted. This discretion was based on an assessment of how practical certain strategies might be for Australian CLCs and how effectively they might be adopted in the Australian context at the present time.

The three broad areas examined in this chapter are: techniques closely linked to individual casework such as focused case representation; strategic campaign planning; and law and organising. The inevitable question of funding for policy and law reform activities such as these is also canvassed briefly.

Some of the other topics that might benefit from further examination at another time include the sophisticated use of the Internet and online advocacy tools by some organisations in their campaigning and organising work,<sup>158</sup> the arguably more substantial work undertaken by US law

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on strategic campaigning, advice on working with media and tips for preparing op-ed pieces.

<sup>156</sup> Fitzroy Legal Service, *Activist Rights website*, <http://www.activistrights.org.au/>.

<sup>157</sup> See PIAC, 'Accredited public training courses', *Public Interest Advocacy Centre website*, [www.piac.asn.au/training/Public.html](http://www.piac.asn.au/training/Public.html).

<sup>158</sup> See, eg, Kent A. McInnis, Jr, *The Activist Web*, The Foundation for Taxpayer & Consumer Rights, March 2008, available at the Consumer Watchdog website: [www.consumerwatchdog.org/resources/activistweb.pdf](http://www.consumerwatchdog.org/resources/activistweb.pdf), which outlines the thinking behind Consumer Watchdog's new website; online tools for taking action on the Consumer Action website: [www.consumer-action.org](http://www.consumer-action.org); interactive features, such as

students (as compared to Australian students) as part of clinical legal education programs focusing on areas of public interest law,<sup>159</sup> and the role of attorneys' fees and intervenor fees statutes in facilitating public interest casework that would probably not otherwise occur.<sup>160</sup>

## 4.1 Leveraging individual casework

The idea of doing more with individualised casework than simply helping the individual is not a new concept by any means, either in the US or in Australia. However, it is worth reporting on some of the ways that US law centres are accomplishing this goal. This is because it is possibly the most practical way to engage in policy and law reform work without putting a large additional strain on resources or funding, particularly for smaller CLCs with only limited staff numbers.

### 4.1.1 Focused casework

The most obvious form of leveraging individual casework for broader goals is to undertake casework that assists both the individual client and challenges a problem that affects a larger number of people. As noted in section 3.2.3 above, Tremblay referred to this model of service as 'focused case representation', by which he meant 'individual case work...chosen not merely for the benefit of the individual clients involved, but expressly to confront a particular broader social or legal concern within the program's client community'.<sup>161</sup>

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polls, blogs and take action tools, on the Consumers Union website: <http://www.consumersunion.org/>.

<sup>159</sup> See also, Abel, above n103, at 619-20.

<sup>160</sup> See Houseman, above n89, at 1230-31; WCLP, *Guide To Winning Attorneys' Fees In Federal Court*, February 2004, available at: [www.wclp.org/files/FeeChapter\\_Final.PDF](http://www.wclp.org/files/FeeChapter_Final.PDF); see also Abel and Udell, above n98, at 891. Consumer Watchdog, TURN and the WCLP all said that they obtain a significant amount of their funding from attorneys' or intervenor fees awards in successful legal action: see, eg, WCLP, 'Financial Information', *Western Center on Law & Poverty website*, [www.wclp.org/aboutwclp/financialinformation.php](http://www.wclp.org/aboutwclp/financialinformation.php); TURN, 'Energy', *TURN website*, [www.turn.org/article.php?list=type&type=12](http://www.turn.org/article.php?list=type&type=12); Consumer Watchdog, 'Going to Court' & 'Court Rejects Insurance Industry Attempt to Block Consumer Rate Challenges', *Consumer Watchdog website*, [www.consumerwatchdog.org/courts/](http://www.consumerwatchdog.org/courts/) & [www.consumerwatchdog.org/insurance/articles/?storyId=19025](http://www.consumerwatchdog.org/insurance/articles/?storyId=19025). Of course, legal services funded by the LSC are restricted from claiming attorneys' fees: see text and notes at nn97-99 above.

<sup>161</sup> Tremblay, above n132, at 2501.

This sort of approach actually breaks down the perceived distinction between individual service work and impact work<sup>162</sup> and is very much what Bellow advocated in 1977.<sup>163</sup> Bellow made a number of practical suggestions for legal services to improve the way they engage in service work, without waiting for resources to increase or other aspects of the legal system to change, and these suggestions appear relevant to the practices of today's CLCs.<sup>164</sup>

For example, Bellow suggests setting up systematic mechanisms for ensuring that legal work is continuously and accurately assessed for quality and potential improvements (divorced from processes for funding or internal staff evaluation). This might involve systematic reviews of case files and case presentations similar to post-mortems in medicine, regularly circulating case files within the office, pairing lawyers in handling cases and surveying clients to assess their reactions to the service. It might also involve practices such as visits to a client's home before a hearing in which housing conditions are an issue, or regular reviews of welfare and other benefits which clients may be eligible for before closing a case. While his concern here was largely with the quality of advice and representation in individual cases, such an approach is also likely to help CLCs better assess whether the full potential of individual casework is being realised.

More relevantly for our purposes, Bellow advocates for 'focused legal-political action' in undertaking individual casework. Indeed, he sees this as a way to reconcile 'accountability to individual clients and the need for larger systemic changes in the private and public institutions that daily shape their lives'. His practical advice includes:

- sufficiently limiting the number of day-to-day cases, so the lawyers have the time to coordinate and compare the way they handle cases;
- selecting "target" institutions/defendants whose illegal practices affect a significant number of the program's clients;
- representing large numbers of clients who have been victims of these practices, using not only referrals but soliciting clients as well;
- contacting the target institutions directly to seek change in the policies and practices documented in handling the cases; and

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<sup>162</sup> As above.

<sup>163</sup> See text at nn101-103 above.

<sup>164</sup> The following suggestions are taken from Bellow, above n101.

- initiating or joining coalitions with other community groups seeking similar changes.

For Australian CLCs, unlike the routinised US legal services that Bellow was describing, individual casework has always been a driver for broader change-focused work, as Curran's report found.<sup>165</sup> It is not disputed that CLCs recognise and often act on links between their casework and working to address a broader concern. However, what Bellow is advocating is the implementation of these suggestions as a *systemic approach* to the way a centre handles casework, not simply for centres occasionally to take up additional action if they happen to discover they are being faced with a number of similar cases. The ultimate example of such an approach is how Tremblay understands it:

The distinction...is that [individual case representation] permits acceptance of a case in which the only benefit sought is for the individual client, while [focused case representation] would not permit acceptance of a case unless that case promised some larger impact on, or connected in a meaningful way to, some broader concern identified as a priority in the office.<sup>166</sup>

While it is not suggested that Australian CLCs should apply the latter approach to 100 per cent of their casework intake, an approach that determined that at least a significant percentage of the centre's casework had to meet focused case representation goals would certainly seem feasible. Adopting such an approach would ensure a CLC used their casework resources, however small, in a way that also facilitated policy and law reform work.

One interviewee for this project commented that both larger and smaller legal services with which they were involved were managing to undertake some form of broader change-focused work in conjunction with their casework. While it still appeared that many US legal centres concentrated on traditional individualised service work, it did also appear correct that both larger and smaller legal services had developed interesting approaches to broadening the effect of their casework.

One large public interest legal organisation that concentrates heavily on direct legal services provision still manages to engage in work with an important broader impact from time to time:

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<sup>165</sup> See text at nn123-128 above.

<sup>166</sup> Tremblay, above n132, at 2501.

## Case study - Public Counsel Law Center (Public Counsel)

[www.publiccounsel.org](http://www.publiccounsel.org)

### Co-counselling

Public Counsel is the largest *pro bono* public interest law firm in the US. It was founded by the Beverly Hills Bar Association in 1970 and after the Los Angeles County Bar Association joined as a sponsor, its functions grew and it now both directly undertakes public interest litigation and coordinates much of the *pro bono* efforts of lawyers in the Los Angeles country area.<sup>167</sup> It receives a large proportion of its funding from private donations and also receives foundation grants, Californian state funds including from IOLTA and the state's Equal Access Fund, some cy pres awards and additional staffing through Equal Justice Works fellows.

Public Counsel is largely casework and litigation focused. It refers cases to *pro bono* lawyers but often commences work on them while arranging a referral and provides ongoing support to the *pro bono* lawyers. It also retains some cases for work in-house, particularly where conflicts exclude *pro bono* attorneys from taking on the case, the client has special needs or the case raises important policy issues. Public Counsel has developed six practice areas and both its referrals and in-house work are now mainly concentrated in these areas, being immigrants' rights, consumer law, early care and education, community development, children's rights and homelessness prevention. Most cases do not proceed to litigation and Public Counsel generally operates on an individualised model of providing legal services to the poor.<sup>168</sup>

However, it has undertaken some large impact litigation cases, including as co-counsel with *pro bono* attorneys. Co-counsel arrangements allow for more resources to be brought to the case through the involvement of *pro bono* lawyers, but the continuing involvement of Public Counsel is important not only given its expertise in public interest matters but, more importantly, because Public Counsel is better able to see how the case fits

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<sup>167</sup> It is also the Lawyers' Committee for Civil Rights Under Law's affiliate office in Southern California. See [www.lawyerscommittee.org](http://www.lawyerscommittee.org); Baum, above n88, at 34-38.

<sup>168</sup> Other legal services have recently criticised Public Counsel for its approach to legal assistance to the homeless: Anat Rubin, *Law Firms 'Adopt' Skid Row Residency Hotels: Unique Pro Bono Approach Underscores Debate Over How to Help Los Angeles' Poor*, Daily Journal, 5 June 2008.

into an overall campaign on the issue the subject of the case, rather than seeing the case as an isolated matter and prosecuting it as such.

For example, Public Counsel has been involved in running several cases on behalf of victims of the practice of “hospital dumping”. Hospital dumping is the discharge of homeless patients by simply driving them to Skid Row and dumping them on the street, with no medication or instructions for post-treatment care and no place to go to. The Los Angeles City Attorney has now prosecuted several hospitals for dumping homeless patients in this way, while Public Counsel has co-counseled with other lawyers to represent victims.

These matters, if undertaken simply as individualised cases, might result in isolated instances of compensation to the victims. However, Public Counsel has also sought court orders to stop the practice and changes to hospital discharge protocols, include training for all relevant hospital staff, to ensure the practice does not continue to occur. Such changes have been included as part of the settlement of lawsuits, rather than limiting settlement to individual compensation. Public Counsel’s aim is to get hospitals across the entire county, not just the individual hospitals involved in the cases, to adopt appropriate, comprehensive homeless discharge planning protocols. Public Counsel and its co-counsel have also spoken out in the media about the cases they are undertaking in order to increase the profile of the issue, and it has obtained significant national media coverage.

Another, much smaller, Los Angeles legal centre that also deals with issues affecting the homeless has developed a more innovative approach to amplify the impact of its individual casework:

### **Case study - Inner City Law Center (ICLC)**

[www.innercitylaw.org](http://www.innercitylaw.org)

#### **Tenant organising**

ICLC is located on the Eastern side of Skid Row in downtown Los Angeles. It was founded by a single law graduate in 1980 and has now grown to become a larger organisation with a number of lawyers and non-legal staff members, although it remains relatively small by US standards. ICLC is not a LSC-funded legal service, but a nonprofit public interest law firm. It receives funding from private donations, grants and government contracts,

for example with the Los Angeles Housing Department. It has also received cy pres awards of funding.

ICLC's main area of focus is on housing and homelessness issues, while it also has a significant practice helping its clients access government benefits to which they are entitled. In particular, ICLC takes on many habitability matters – these are cases in which the client is living in a substandard building and ICLC helps to force the landlord to repair the building and compensate the tenants for the harm they have suffered from living in unhealthy and unsafe conditions.

ICLC almost always takes on housing habitability cases when approached by a tenant. However, it has developed a method of undertaking these cases different to an individualised approach. Rather than the standard legal approach of having a lawyer take instructions from the client who complained, negotiate with the landlord, and then file a lawsuit if needed, ICLC involves its non-lawyer advocates and tenant organisers. The organisers visit the building to assess the conditions and build relationships with other affected tenants in the building, with the aim of organising the tenants to participate in the matter collectively and, if relevant, join in a lawsuit. The organisers may organise a tenant meeting to discuss problems in the building, involving some of the tenants themselves in organising this meeting and encouraging other tenants to attend. The organisers will try to identify tenants who are inclined to take a leadership role in the matter and cultivate them as leaders, so that the tenants themselves have a lead role in determining how the matter should be conducted. The matters might then involve negotiating with the landlord, collaborating with relevant government agencies and/or filing a lawsuit, sometimes using *pro bono* assistance.

Sometimes referrals about poor buildings come from sources other than the tenants, for example from other nonprofit organisations or from government agencies. In these cases, ICLC is able to employ its organising approach by visiting the building to begin meeting with tenants and identifying potential tenant leaders.

By applying an organising approach to its individual cases, the ICLC's habitability cases address problems building by building rather than tenant by tenant. This approach also gives the tenants themselves a central role in the conduct of the cases and thus a sense of their own ability to work to solve these problems.

In some matters ICLC has had to sue the landlord more than once to get results for the tenants. ICLC has also undertaken matters in which it has sued the same landlord in relation to different buildings. More recently it has begun trying to systematically identify buildings owned by bad landlords as a target for its organising efforts rather than waiting for complaints.

In a similar approach to ICLC's organising method above, groups such as the Los Angeles Community Action Network<sup>169</sup> and LAFLA have been reported as approaching law firms to "adopt" whole residency hotels in the Skid Row area as their *pro bono* clients. By adopting a residency hotel, the law firm represents all of the tenants and, in particular, addresses important collective issues such as mass evictions, which are occurring because affordable housing such as these residency hotels is coming under pressure from the forces of downtown gentrification.<sup>170</sup> This is explicitly described by those involved as focused casework:

It's an approach legal scholars call focused case strategy - combining direct representation of individual tenants with larger issues, such as preserving affordable housing.

"You handle cases in a way that aims to solve the underlying problems and not just the consequences for the individual," said UCLA law professor Gary Blasi, who helped Skid Row activists mount the effort.

According to Esther Lardent, executive director of the Washington, D.C.-based Pro Bono Institute, focused case strategy is one of the most effective ways to utilize pro bono services. "You can do individual representation so that each engagement is thought through and building on systemic change," Lardent said.<sup>171</sup>

LAFLA is LSC-funded, thus it cannot undertake class actions, lobbying or formal organising work. Nevertheless, in addition to work such as that above, it has developed a sophisticated community economic development practice:

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<sup>169</sup> [www.cangress.org](http://www.cangress.org).

<sup>170</sup> Rubin, above n168; LAFLA, *Unlawfully Displaced Alexandria Residents Relocated*, Media Release, 27 May 2008, available at [www.lafla.org/news/viewNews.asp?id=364](http://www.lafla.org/news/viewNews.asp?id=364).

<sup>171</sup> Rubin, as above.

## Case study – Legal Aid Foundation of Los Angeles (LAFLA)

[www.lafla.org](http://www.lafla.org)

### Community economic development

LAFLA is one of the principal civil legal aid providers in Los Angeles. The modern LAFLA is the product of a number of predecessor legal aid organisations, beginning with a legal aid clinic established at the University of Southern California in 1929. It receives over half of its funding from the LSC and also receives California state funding including from IOLTA and the Equal Access Fund, city funding from Los Angeles and Santa Monica, Los Angeles County funding, private and public grants and private donations. It is restricted from claiming attorneys' fees in successful cases but it often co-counsels with other organisations and law firms, who are able to claim attorneys' fees for their share of work done.

LAFLA is structured into several different units of legal expertise, such as consumer law, family law, employment law, government benefits, immigration and community economic development units. Each of these is based at one of LAFLA's six geographic offices across the general Los Angeles-Long Beach area and/or at courthouse clinics, although LAFLA is currently considering whether it should return to a model of providing greater access to any of its areas of expertise from any of its offices. It also runs several specialist projects on issues such as human trafficking, criminal record expungement and homeless veterans' support.

Much of LAFLA's work is focused on individualised advice, assistance and representation. However, its Housing/Eviction Defense and Community Economic Development (**CED**) units in particular also undertake broader public policy advocacy work. LAFLA's CED work is undertaken with a view to substantive improvements in people's lives, not just the procedural goal of access to legal representation. It aims 'to empower Los Angeles communities and community-based organizations in their efforts to attack poverty at its roots. The CED unit is committed to building clean, safe, and economically vibrant neighborhoods through community education, policy advocacy, and legal representation.'<sup>172</sup>

To do this, LAFLA's CED unit primarily represents organisational clients rather than individuals. These clients are community-based organisations

<sup>172</sup> LAFLA, 'Community Economic Development', *LAFLA website*, [www.lafla.org/clientservices/ced/index.asp](http://www.lafla.org/clientservices/ced/index.asp).

that represent the interests of low-income people in their community. LAFLA assists them in several areas, including typical areas of advice such as nonprofit corporate structure, tax, employment and real estate issues, but also assistance with issues such as developing affordable housing, childcare or recreational facilities, implementing job training programs, and participation in land-use, transportation and environmental planning processes.

LAFLA's CED unit also works on what is termed 'accountable development'. This work involves representing community organisations that wish to get involved in a local economic development process and shape a better outcome for low-income residents. A proposed development might not necessarily be likely to have a negative impact, but it provides an opportunity to work for an even better outcome for the community. The goal might be to win an agreement that the project developer hire locals, pay a living wage or provide other community benefits, for example public recreational space or a certain amount of affordable housing. Often this is achieved through the negotiation of a Community Benefits Agreement with the developer; the City, County or State might also be targeted to convince the relevant government agency to make the provision of such benefits a condition of development approval.

LAFLA works on discrete accountable development 'cases' for clients, retaining a traditional lawyer-client relationship. However, from the client's perspective LAFLA is essentially its legal resource for its campaign. LAFLA helps its clients to use legal levers within the development process to maximise their influence, such as representing clients in processes assessing land use and planning concerns or environmental impacts. LAFLA also helps with the drafting of agreements that record negotiated community benefits. In doing so, LAFLA often attempts to build community power by including enforcement mechanisms within the agreement that enable communities to enforce the agreement, rather than having to rely on government for enforcement. In undertaking this work, LAFLA has also been involved in efforts to improve the functioning of the Community Redevelopment Agency of the City of Los Angeles, which is charged with attracting private investment into economically depressed communities.<sup>173</sup> For example, this agency is now required by law to set aside 20% of its revenues for affordable housing.

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<sup>173</sup> [www.crala.net](http://www.crala.net).

Thus, within what is in many ways the provision of legal assistance in a traditional format, LAFLA is able to contribute to broader efforts to tackle poverty and improve the lives of low-income people. It is able to do so by focusing its casework in this area on acting for organisational clients which represent low-income communities, with a willingness to provide this casework assistance within the context of, and with the understanding of its role in, a broader campaign.

Despite helping to win community benefits for low-income people, LAFLA is increasingly recognising the limitations of its work in that it is tied to individual development processes and does not address broader trends towards gentrification that are displacing low-income people. LAFLA is now considering how it can help clients address these issues, for example by perhaps supporting efforts to create public trusts that buy land to take it off the private market and hold it for the community.

#### 4.1.2 Representing organisations and groups

The case study above outlining LAFLA's community economic development work raises the broader notion of using casework capacity to represent organisational clients as well as individuals. By its very nature, representing organisations has the potential to increase the impact of service work as the direct benefits of this service work are received by an entity representing the interests of more than one person. The nature of the organisations represented can further amplify the benefits of direct service work if those organisational clients have objectives specifically directed to public interest goals such as improving the lives of low-income or disadvantaged persons.

US legal services programs do not necessarily engage in a lot of casework on behalf of organisational clients.<sup>174</sup> However, there are some good examples of such work, for example LAFLA's community economic development work as described above. One of Public Counsel's practice areas is also in community development, through which it consciously directs its legal services provision to nonprofit organisations and even micro-businesses.<sup>175</sup> Another non-LSC-funded legal centre in Los Angeles, WCLP,<sup>176</sup> does not undertake any direct service work for

<sup>174</sup> See Ann Southworth, 'Lawyers and the "Myth Of Rights" in Civil Rights and Poverty Practice' (1999) 8 *Boston University Public Interest Law Journal* 469, 507.

<sup>175</sup> See [www.publiccounsel.org/overview/cdp.html](http://www.publiccounsel.org/overview/cdp.html) for more information.

<sup>176</sup> [www.wclp.org](http://www.wclp.org).

individuals at all, instead undertaking impact litigation on behalf of organisations and groups of people, as well as class actions. These strategies flow from WCLP's explicit aim of providing more than minimum access to legal representation for the poor and working for broader change to address poverty.<sup>177</sup> WCLP also acts as a legal services support centre for other legal services programs that do provide direct individual assistance, and engages in lobbying and advocacy for legislative and administrative changes.<sup>178</sup>

Australian CLCs do not currently tend to represent groups or organisations as clients, certainly not on a regular basis, although some important exceptions are discussed below. The WCLP model, in which legal work is targeted exclusively towards organisational clients and individuals whose cases raise broader "impact" issues is somewhat familiar with PIAC in NSW following a similar approach to its legal work, but there is no equivalent of PIAC in other states, including Victoria.

While casework on behalf of individuals will always be central to the work of CLCs, there seems to be no reason why CLCs should not be developing programs or setting aside capacity to represent organisational clients which have aims consistent with the overall goal of CLCs, particularly aims relating to assisting the poor and disadvantaged. In fact, the latent ability of CLCs to take on legal work on behalf of organisational clients is a feature that does (or should) distinguish CLCs from government legal aid, particularly today when government legal aid offices are engaging in more, and often substantial, community legal education activities and also some law reform activity.<sup>179</sup>

One of the exceptions to the general trend in the CLC sector of undertaking work for individuals rather than groups or organisations are the

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<sup>177</sup> WCLP, 'Mission and History', *WCLP website*, [www.wclp.org/aboutwclp/missionhistory.php](http://www.wclp.org/aboutwclp/missionhistory.php).

<sup>178</sup> As part of the US Congress' funding cuts to, and restrictions on, federally-funded legal services in 1996 (see text at nn98-100 above), WCLP lost its federal funding. WCLP recounts that 'Unwilling to accept the prospective loss of such an invaluable resource, California's LSC-funded neighborhood legal services programs scrape together scarce money from their own budgets to keep Western Center afloat': WCLP, *40 Years 1967-2007*, Brochure, Spring 2007. WCLP also receives relatively little Californian state funding, only 6% of WCLP's total funding in 2007; by contrast, 25% of its funding last year came from attorney's fees in successful legal cases, 23% from private donations, 15% from foundation grants and another 13% from support contracts with other legal services programs: WCLP, 'Financial Information', above n160.

<sup>179</sup> See text and note at n86 above.

PILCHs in Victoria, NSW and Queensland. The PILCHs receive requests for legal assistance and, after assessment against their eligibility criteria, refer eligible requests to member legal services providers who provide legal help on a *pro bono* or reduced fee basis.<sup>180</sup> These requests are accepted from both individuals and groups or organisations, with organisational clients being a significant source of work, for example, not-for-profit organisations made up over 68% of PILCH Vic's clients in the 2006-07 financial year, with unincorporated groups another 6.64% of its clients.<sup>181</sup>

The acceptance of legal matters on behalf of organisations and groups is recognition of the public interest value that can lie in representing such clients in addition to individuals. However, unlike the *pro bono* law firm Public Counsel in Los Angeles, the PILCHs do not generally themselves represent or otherwise provide direct legal services to clients, instead referring cases to member *pro bono* legal service providers. Of course the first PILCH, PILCH NSW, remains a project of PIAC and PIAC provides its own legal services to clients including organisational clients, as noted above, but the PILCHs do not do so.<sup>182</sup>

This method of legal service provision – referring to *pro bono* providers rather than retaining “in-house” at CLCs – necessarily takes the work outside the CLC sector. It also dissipates the potential broader impact of representing organisational (or individual) clients by channelling their legal matters into an individualised mode of dispute resolution using private providers. This is not to say that *pro bono* legal services do not provide a valuable contribution in themselves – they do, enabling a large number of matters to benefit from legal assistance when they would otherwise go unrepresented. However, they tend to retain a narrower focus on resolving a discrete legal dispute or providing advice on discrete legal issues.<sup>183</sup>

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<sup>180</sup> PILCH NSW, ‘Public Interest Law Clearing House (PILCH)’, *Public Interest Advocacy Centre website*, [www.piac.asn.au/legal/pilchhelp.html](http://www.piac.asn.au/legal/pilchhelp.html); PILCH Vic, ‘What is the Public Interest Law Clearing House?’ *PILCH Vic website*, [www.pilch.org.au/html/s12\\_content/default.asp?tnid=10&dsb%3D22](http://www.pilch.org.au/html/s12_content/default.asp?tnid=10&dsb%3D22); QPILCH, ‘About QPILCH’, *QPILCH website*, [www.qpilch.org.au/01\\_cms/details.asp?ID=1](http://www.qpilch.org.au/01_cms/details.asp?ID=1).

<sup>181</sup> PILCH Vic, *Annual Report 2006 – 2007*, October 2007, at 7.

<sup>182</sup> The PILCHs also undertake specialised projects or clinics in particular areas or for particular clients, for example for homeless persons or asylum seekers, or in consumer law or human rights law, but direct legal service provision through these projects or clinics still tends to be provided using *pro bono* legal help, with in-house staff co-ordinating the service and providing training and support for the service provision.

<sup>183</sup> See also Scott L. Cummings, ‘The Politics of Pro Bono’ (2004) 52 *UCLA Law Review* 1, at 147-48: ‘[P]rivate lawyers do a tremendous service representing individual poor

Indeed, Public Counsel noted in its interview that it continues to undertake its own legal work in addition to making *pro bono* referrals because the clearinghouse system does not allow for law firms to see the overall goal of engaging in certain types of legal cases.

PILCH Vic has recently established a new specialised legal service for not-for-profit organisations. This service, conducted in-house at PILCH, may eventually lead to a greater retention of expertise within the CLC sector in representing organisational clients. However, while the new service's stated aims include becoming a specialist hub of not-for-profit legal and legally-related knowledge and practice and providing its own information, advice and training to not-for-profit organisations, it proposes to continue referring legal matters out to *pro bono* providers.<sup>184</sup> Again, such services may well be of substantial benefit to not-for-profit organisations. However, they are of a very different character to legal services provided by a CLC that understands and accepts the role of its legal support in strategically progressing its organisational client's broader aims, as embodied by the example above of LAFLA's accountable development work.

This difference can perhaps also be seen in the example of the network of EDOs in each state and territory in Australia,<sup>185</sup> another exception to the general lack of representation of organisational clients by CLCs. The EDOs explicitly aim to, and do, represent groups and community

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clients in routine matters and lending their institutional resources to support the reform agendas of public interest groups. Their volunteer work ranges from the mundane to the transformative and includes matters of intense personal interest and immense social import. But the central dilemma of *pro bono* remains: A system that depends on private lawyers is ultimately beholden to their interests. This means not just that private lawyers will avoid categories of cases that threaten client interests, but also that they will take on *pro bono* cases for institutional reasons that are disconnected from the interests of the poor and underserved--and often contrary to them...Associates who gain skills in the volunteer context spend most of their time using them to vigorously advocate against the interests served through *pro bono* representation...*Pro bono* lawyers do not invest heavily in gaining substantive expertise, getting to know the broader public interest field, or understanding the long-range goals of client groups. Particularly in contrast to the way big-firm lawyers seek to understand and vigorously advance the goals of their client community, the partiality and narrowness of *pro bono* representation is striking.'

<sup>184</sup> PILCH Vic, 'New Not-For-Profit Legal Service', *PILCH Vic website*, [www.pilch.org.au/html/s02\\_article/article\\_view.asp?id=437&nav\\_cat\\_id=255&nav\\_top\\_id=66](http://www.pilch.org.au/html/s02_article/article_view.asp?id=437&nav_cat_id=255&nav_top_id=66). As a longer-term goal the new service would like to be able to offer basic advice through in-house lawyers, although *pro bono* referrals would still be made for ongoing matters: PILCH Vic, *Establishment of Not-For-Profit Legal Service: Research Report*, May 2007, 37-39.

<sup>185</sup> [www.edo.org.au](http://www.edo.org.au).

organisations as well as individuals. For example, EDO Vic reports that almost all its clients for services beyond initial information and advice are groups or organisations.<sup>186</sup> EDO Vic also clearly notes that its role as a CLC in working with organisations and groups can be distinguished from that of private legal practitioners because its legal services are provided within a community development framework.<sup>187</sup> This framework leads it to retain work in-house so as to build up expertise in assisting both larger and smaller organisations and groups, and ensures a focus on broader goals than simply narrow legal questions or tasks. EDO Vic states:

[C]ommunity development framework is an inherent feature of much of the work we do.

...

Our work with larger conservation organisations requires a high level of expertise in environmental law to match their sophisticated understanding of environmental issues and policy.

Working with smaller voluntary community groups, on the other hand, requires not only environmental law expertise but also an appreciation of how these groups work and an understanding of the competing demands on the time of their members. We are proud that our experience in working with such groups has led us to develop a particular expertise and style of client service which cannot be matched by pro bono or fee for service providers in the legal profession.<sup>188</sup>

It could be added that such legal service provision is also different to legal service provision by government legal aid which, like services provided by the private profession, focuses on resolving or completing discrete legal issues or tasks. Further, government legal aid would be unlikely to be provided in strategic support of broader, perhaps political, aims of an organisation or group.

There is thus potential for more CLCs to reserve casework capacity for the provision of services to organisational clients in support of those clients' attempts to achieve broader aims.<sup>189</sup> Interestingly, the principal current

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<sup>186</sup> EDO Vic, *Annual Report 2006 - 2007*, 2007, 9.

<sup>187</sup> As above.

<sup>188</sup> As above.

<sup>189</sup> PILCH Vic also notes that two other CLCs, the Arts Law Centre and the Communications Law Centre, provide assistance to not-for-profit organisations as well as individuals: PILCH Vic, *Establishment of Not-For-Profit Legal Service: Research Report*, above n184, at 18, 52-53. The direct legal services provided by both these CLCs is limited, with no ongoing casework undertaken. However, both CLCs engage in

examples in Australia of CLC work for organisational clients come from specialist CLCs, and there does seem to be further potential for CLCs that specialise in particular areas of law to assist organisations and groups using their specialist skills and expertise. However, the US examples cited above come from generalist legal service programs that have chosen to focus work in particular legal areas, demonstrating that local community or neighbourhood legal services can also play an important role in helping local community organisations achieve strategic goals for their community. In Victoria, this potential for local CLCs to help with local concerns is indicated in examples such as the legal action taken by the Gippsland Community Legal Service on behalf of a group of local landowners and residents challenging an unfair and arbitrary decision by their local council in relation to Tambo Bluff on the Gippsland Lakes.<sup>190</sup>

In time, services such as the PILCHs or the specialist PILCH Vic not-for-profit legal service might also be able to assist in retaining some of this work within the CLC sector. This might include developing greater in-house capacity themselves, or facilitating referrals to CLCs of certain types of legal work for organisations, namely work that calls for an ongoing relationship with the client and an ability and willingness to engage actively with the client's broader vision and goals. The use of co-counselling arrangements, such as those described in section 4.1.1 engaged in by Public Counsel, might also provide a way to ensure ongoing CLC involvement in these types of matters while harnessing *pro bono* goodwill and resources. For example, the HRLRC's recent, and successful, legal action on behalf of an Indigenous woman prisoner, Vickie Roach, challenging federal legislation denying all prisoners the right to vote in federal elections, involved not just the HRLRC but a team of private lawyers and academics acting on a *pro bono* basis, indicating that co-counselling has begun to develop in Victoria.<sup>191</sup> Gippsland Community Legal Service also engaged in co-counselling with private lawyers acting *pro bono* in pursuing the Tambo Bluff action noted above.<sup>192</sup>

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policy and law reform activity: see [www.artslaw.com.au](http://www.artslaw.com.au) and [www.comslaw.org.au](http://www.comslaw.org.au) for more information.

<sup>190</sup> FCLCV, 'Community law partnership delivers access to justice in Gippsland', *Community Law News*, August 2008, 2.

<sup>191</sup> Laura MacIntyre and Ben Schokman, 'Prisoners Win Right to Vote' (2007) 81:10 *Law Institute Journal* 80. For a range of resources about this case, see also HRLRC, 'Prisoners' Rights: Roach v AEC and Commonwealth of Australia – Prisoners and the Right to Vote (Aug 2007)', *HRLRC website*, [www.hrlrc.org.au/html/s02\\_article/article\\_view.asp?id=168&nav\\_cat\\_id=132&nav\\_top\\_id=56](http://www.hrlrc.org.au/html/s02_article/article_view.asp?id=168&nav_cat_id=132&nav_top_id=56).

<sup>192</sup> FCLCV, above n190.

### 4.1.3 Information and record keeping

Even if no overt policy or law reform work is undertaken, a CLC can begin to contribute to policy and law reform activity in basic ways. One interviewee pointed out that legal services can “turn a weakness into a strength”, meaning if they concentrate only on direct legal service provision and not broader advocacy work, they can nevertheless begin to use the knowledge and skills they derive from their direct service work to target more systemic problems.

This interviewee noted that the most fundamental first step that any legal service can take is to keep good records of every matter they undertake, including the exact nature of the legal issues being raised in casework and the identity of opposing parties. This allows useful information and data to be collected not only for research or policy projects, but to help the legal service in choosing which legal matters to prioritise, including whether to target particular opposing parties, and in identifying problem practices that might be targeted through, for example, using a dedicated staff member for these cases or obtaining additional legal help such as *pro bono* support for a larger test case. In other words, good information and record-keeping is an important first step in moving towards a more focused casework approach.

While it seems almost too simple to suggest that Australian CLCs should collect better information and records of their advice and casework, in practice this is often not a priority for CLC workers who are already overstretched in actually delivering direct services to clients (as discussed in section 3.2 above), let alone recording details of these services.<sup>193</sup> For example, the Federal Government requires federally-funded CLCs to use the CLSIS database to record information about legal services provided and activities undertaken. CLSIS transmits certain items of data to a central database accessible by the Federal and State Governments, the national and state peak organisations for CLCs and, in some cases, individual CLCs, and also functions as a local database for the individual CLCs that use it, able to record various items of data beyond the ones transmitted to the central database.<sup>194</sup> However, the accuracy and consistency of the information recorded in CLSIS remains problematic.<sup>195</sup>

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<sup>193</sup> Cf the discussion of lack of resources for CLCs in Senate Legal and Constitutional References Committee, above n1, at 216-17.

<sup>194</sup> Attorney-General’s Department, above n4, at 82-85.

<sup>195</sup> As above at 84.

Further, the CLSIS database is not designed with needs in mind such as identifying systemic issues or prioritising casework for a focused casework approach. For example, NACLC has noted that CLSIS cannot accurately record strategic litigation, does not record community development activities, and does not contain information and tools useful for assisting CLCs in mapping legal need and planning service delivery, including case study information.<sup>196</sup>

The power of good information and record keeping can already been seen in the strength of the case study. CLCs have traditionally used case studies to powerful effect, as described by Curran in her report on Victorian CLCs' law reform work.<sup>197</sup> In his classic text on lobbying in the US, Richan states that cases in point are the most powerful form of evidence to support policy advocacy,<sup>198</sup> noting that '[t]his is not to say that statistics have no place, but without a concrete example or two to bring them to life they tend to be forgotten quickly.'<sup>199</sup> Perhaps even more pointedly for CLCs, he also notes the influence that direct service providers can have in recounting case studies. Discussing a hypothetical example of an elderly homeless woman giving testimony about her experiences, Richan states:

Jenny has two things going for her: the arresting reality of the concrete example and the fact that she is speaking from her own experience. People whose work brings them in close contact with the victims on a daily basis can be nearly as persuasive. They are actually in a better position to show that this is not one older woman's idiosyncratic problem, but something happening to many persons with whom the advocate works.<sup>200</sup>

However, despite its demonstrated effectiveness, case study information is not collated by CLCs in a systematic manner.<sup>201</sup> In relative terms, the

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<sup>196</sup> NACLC, above n9, at 59, 64, 75, 77.

<sup>197</sup> Curran, above n123: at 27 on debt collection; at 38 on police misconduct; and at 48, 51 and 53 on the experiences and difficulties faced by women and children victims of violence, particularly in navigating court and tribunal processes. See also NACLC, above n9, at 27: 'CLCs also work closely with Government and statutory agencies – Centres are often sought out to provide submissions, sit on panels, provide case-studies and run test case litigation.'

<sup>198</sup> Willard C. Richan, *Lobbying for Social Change*, 2nd ed., 1996, 131-34.

<sup>199</sup> As above at 132.

<sup>200</sup> As above.

<sup>201</sup> NACLC advocates that there should be a standard format for recording case studies directly into CLSIS: NACLC, above n9, at 75-76, 78. Recording case studies of policy and law reform work itself is also important, for example, Curran recommends in her

resources needed to record accurate and useful information about the direct service work being undertaken by a CLC, including case studies, are small, with a large return in terms of useful data for focused casework and other policy and law reform activity. An effort to determine useful types of information for these purposes and record them would therefore be beneficial across the entire CLC sector, and is recommended.

## 4.2 Strategic campaigning

A strong sense of the importance of strategic campaigning flowed from the advocacy work of US public interest organisations examined for this project. The inherent value in, and benefits of, planning for policy and law reform work in a strategic way are well-recognised in Australia in (and beyond) the CLC sector.<sup>202</sup> Despite this recognition in theory, in practice the truth is that Australian CLCs often tend not to apply a strategic approach to planning specific policy and law reform activities, although they do undertake strategic planning in relation to matters such as their overall management or the appropriate service delivery mix they should engage in. The US experience therefore has some potential to provide useful learnings that CLCs might apply to improve their policy and law reform work.

A strategic approach to policy and law reform work manifests itself in activities undertaken as part of an organised campaign. Strategic campaigning involves planning for proactive policy and law reform activities focused on achieving aims identified in advance. By contrast, much CLC advocacy work is not undertaken as part of a campaign but instead leans towards *ad hoc* or reactive activities. For example, the FCLCV notes that a campaign is '[a]ny coherent and planned series of actions, designed to achieve an overall aim and objectives', whereas '[a] lot of law reform/justice policy work we [CLCs] do is not part of a campaign'.<sup>203</sup>

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report that CLCs undertake improved record-keeping of CLC meetings with decision-makers: Curran, above n123, at 5, 66.

<sup>202</sup> See, eg, NACLC, above n9, 19; numerous references to strategy in the program of the most recent National CLC conference, *Just Is As Just Does*, August 2008; Combined Community Legal Centres Group (NSW) Inc, 'Showcasing Law and Policy Reform' workshop, 2008 NSW Community Legal Centres State Conference, [www.nswclc.org.au/State\\_Conf\\_08/Conf\\_proceedings.html](http://www.nswclc.org.au/State_Conf_08/Conf_proceedings.html).

<sup>203</sup> FCLCV, *Strategic Campaigning*, Workshop presentation, 2005, available at [www.communitylaw.org.au/fedclc/cb\\_pages/law\\_reform\\_cle\\_law\\_reform.php](http://www.communitylaw.org.au/fedclc/cb_pages/law_reform_cle_law_reform.php).

This feature of CLC policy and law reform work revealed itself strongly in Curran's report on Victorian CLCs' law reform initiatives. After examining materials related to six CLC law reform projects, her first finding was that none of these law reform projects were conducted as a strategic campaign:

[T]he strategies identified were often dictated by client imperatives, rather than on a planned strategic basis. Whilst on the surface it might appear that the law reform activities of CLCs were calculated and planned, on closer scrutiny of the documentation held by CLCs, it was revealed that it was in fact the duty to the client/s which would dictate the direction and approach in the law reform activities undertaken. This is not to imply that some strategic thinking did not occur in relation to activities such as legal education, media attention and meetings with decision-makers, but often CLCs decisions emerged from casework imperatives.<sup>204</sup>

Strategic campaign planning does not therefore appear to be a strong feature of CLC policy and law reform work. It is possible that the same resource and time pressures that militate against good information and record keeping, discussed in section 4.1.3 above, are also at play here, with CLC workers pressed to find time to plan and co-ordinate actions as opposed to responding to immediate demands for assistance or action.<sup>205</sup> Further, without a tradition of, or experience with, strategic campaign planning, CLCs possibly lack the necessary knowledge and skills to engage in it.

Whatever the reasons for it, however, by failing to consider in advance strategic considerations such as the aims of, the targets of and the resources needed for the work, any policy and law reform work engaged in by CLCs becomes necessarily even more speculative than it already is.<sup>206</sup> There can be benefits to the approach to law reform work described by Curran above, including that it is explicitly client-focused. Ultimately, though, while it is always uncertain whether and to what extent CLC policy

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<sup>204</sup> Curran, above n123, at 63.

<sup>205</sup> Immediate demands for action can also occur on the policy level, with government-initiated inquiries, consultations and calls for submissions on issues affecting CLC clients putting pressure on CLCs to devote any policy and law reform resources they do have towards reacting to these processes, leaving even less resources for more proactive policy and campaign planning. Thank you to Hugh de Kretser for making this point to me.

<sup>206</sup> For example, Tremblay, above n132, at 2511-14 discusses the speculativeness of different forms of legal practice, noting that each of his four identified practice visions (see text and notes at nn136-140 above) represent increasing levels of speculativeness and risk. He explicitly rejects that a legal service should engage only in mobilization lawyering because such work is too speculative.

and law reform activities will be effective in achieving their aims of addressing systemic problems affecting disadvantaged members of the community, investing time in planning for a strategic set of actions geared towards these aims gives them a better chance of succeeding.

Not all US groups necessarily engage in good strategic planning of their policy and law reform work, particularly legal services programs. For example, LAFLA produced a report of its advocacy and systemic change work for 2005 that lists an impressive amount of individual instances of litigation, policy advocacy and publication activity but does not give any indication of whether these individual activities formed part of any overall strategic campaign or were prompted more by client imperatives and other external events.<sup>207</sup>

However, other US organisations with a deliberate core focus on policy and law reform work used strategic campaigns as a matter of course. A good example is the Consumers Union,<sup>208</sup> which explicitly divides its policy and advocacy work into particular campaigns, rather than simply working on general or broad areas of concern. For example, the Consumers Union does not just work on financial services issues, product safety and health care problems. Rather, it has specific campaigns with dedicated campaign websites, including its 'Credit Card Reform', 'Financial Privacy Now', 'Not In My Cart', 'Stop Hospital Infections' and 'Prescription For Change' campaigns.<sup>209</sup> Campaign names were deliberately chosen to be easy to remember and explain the subject-matter of the campaign. Further, many of the Consumers Union staff work on specific campaigns rather than using their policy, advocacy and organising skills across different areas.

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<sup>207</sup> LAFLA, *Major Advocacy Report 2005*, available at [www.lafla.org/pdf/majoradvocacyreport2005.pdf](http://www.lafla.org/pdf/majoradvocacyreport2005.pdf). However, it is at least clear that LAFLA has developed strategic priorities in terms of the types of work it undertakes, despite being essentially a local or neighbourhood legal services program – this is a strategic step that not many generalist CLCs in Australia have taken.

<sup>208</sup> [www.consumersunion.org](http://www.consumersunion.org). Consumers Union is similar in nature to the Australian organisation CHOICE, being a not-for-profit consumer organisation that is the largest independent consumer product testing organisation in the US and producing the well-known *Consumer Reports* magazine. It engages in advocacy work on behalf of consumers, including a very small amount of litigation, funded primarily from sales of *Consumer Reports*, although it also receives private donations and smaller amounts from Foundation grants and, on occasion, cy pres awards.

<sup>209</sup> See [www.creditcardreform.org](http://www.creditcardreform.org), [www.financialprivacynow.org](http://www.financialprivacynow.org), [www.notinmycart.org](http://www.notinmycart.org), [www.stophospitalinfections.org](http://www.stophospitalinfections.org) and [www.prescriptionforchange.org](http://www.prescriptionforchange.org).

Another example of an organisation focused heavily on policy and law reform work is the much smaller Californian group, Consumer Watchdog.<sup>210</sup> In addition to its legal work, Consumer Watchdog engages in policy and advocacy work which it divides into specific campaign areas, clearly identified and delineated on its new website.<sup>211</sup> Interestingly, in contrast to the Consumers Union, Consumer Watchdog has largely moved away from the promotion of campaign-specific websites.<sup>212</sup> However, as with the Consumers Union, Consumer Watchdog clearly distinguishes between each campaign, which have names reflecting what the campaigns are aimed at achieving and which have their own campaign blogs. Again, many of the Consumer Watchdog staff are dedicated to working on specific campaigns.

There are a range of materials already available that provide very useful guidance to public interest organisations interested in planning and undertaking strategic campaigns. For CLCs, a first port of call might be the PILI's 2001 handbook *Pursuing The Public Interest*,<sup>213</sup> as this handbook is focussed specifically on assisting legal organisations, albeit with a primary focus on a different environment than Australia, particularly Central and Eastern Europe. The handbook has specific chapters on both strategic litigation and campaigning in the public interest, and provides advice on the steps that should be taken in preparing for as well as undertaking a campaign, which it defines as 'any sustained effort to focus attention on an issue or message in order to persuade people to change their views or to take certain actions'.<sup>214</sup> Some of this advice is also similar to the advice presented in the FCLCV's strategic campaigning workshop.<sup>215</sup>

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<sup>210</sup> [www.consumerwatchdog.org](http://www.consumerwatchdog.org). Consumer Watchdog was known as the Foundation for Taxpayer and Consumer Rights until a name change in mid-2008.

<sup>211</sup> Consumer Watchdog relaunched its website in 2008 – see n158 above.

<sup>212</sup> Consumer Watchdog had previously established various campaign-specific websites including <http://arnoldwatch.org> and [www.dirtywatch.org](http://www.dirtywatch.org) (which still exist but are no longer promoted individually). One exception is its OilWatchdog website, [www.oilwatchdog.org](http://www.oilwatchdog.org), which Consumer Watchdog informed me had built up valuable "brand-recognition".

<sup>213</sup> Edwin Rekosh, Kyra A. Buchko and Vessela Terzieva (eds), *Pursuing the Public Interest: A Handbook for Legal Professionals and Activists*, Public Interest Law Initiative in Transitional Societies, Columbia Law School, New York, 2001, available from the PILI website at [www.pili.org/en/content/view/352/53/](http://www.pili.org/en/content/view/352/53/). PILI was formerly the Public Interest Law Initiative in Transitional Societies at Columbia University, but changed its name to the Public Interest Law Institute in 2007 after it formally separated from the university: [www.pili.org/en/content/view/433/187/](http://www.pili.org/en/content/view/433/187/).

<sup>214</sup> Rekosh, Buchko and Terzieva, above n213, at 115.

<sup>215</sup> FCLCV, above n203.

There has also been a growth in free Internet-based tools to assist in the planning, undertaking and evaluation of strategic campaigns. This accessibility makes them well-suited for use by CLCs wanting to trial a newer, more strategic approach to their policy and law reform work without having to invest a large amount of up-front resources. As a CLC began to undertake more, and more sophisticated, campaigning it could perhaps then pursue more detailed campaign tools or campaign training for its staff.

For example, one US group has developed an online planning tool called the *Advocacy Progress Planner* that can be used for any advocacy and policy change campaign.<sup>216</sup> This website allows the user to complete a campaign plan and strategy online as they proceed through the different steps, and is flexible enough to accommodate a range of different goals that might be relevant to CLC policy and law reform work, from working to develop a new policy, to seeking enactment of new legislation, to implementing or defending good policy that has already been enacted on the books.<sup>217</sup>

Two experienced former Greenpeace campaigners have established helpful websites that provide a good introduction to planning and undertaking strategic campaigns. The first, *campaignstrategy.org*,<sup>218</sup> includes 12 basic guidelines for campaigns and a list of more detailed resources, and starts with a “reality check” about when campaigning should and should not be embarked upon.<sup>219</sup> The second is the *A different view* website,<sup>220</sup> which takes as its starting point that a campaign is ‘a set of actions designed to achieve specific behavioural changes among one or more key groups of people where there are vested interests in preserving the status quo or in resisting the change or in promoting a different set of changes’.<sup>221</sup> Its advice is thus predicated on the assumption that the changes being sought are ones that will be opposed by others. It contains advice on the different stages of a campaign and sets out a rigorous

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<sup>216</sup> <http://planning.continuousprogress.org/>.

<sup>217</sup> Continuous Progress Strategic Services, ‘Advocacy Progress Planner: An Advocacy & Policy Change Composite Logic Model’, *Advocacy Progress Planner website*, <http://planning.continuousprogress.org/>.

<sup>218</sup> [www.campaignstrategy.org](http://www.campaignstrategy.org).

<sup>219</sup> Chris Rose, ‘Reality check!’, *campaignstrategy.org website*, [www.campaignstrategy.org/reality.html](http://www.campaignstrategy.org/reality.html).

<sup>220</sup> <http://nickgallie.org>.

<sup>221</sup> Nick Gallie, ‘Who this site will help’, *A different view website*, at <http://nickgallie.org>.

planning process and accompanying tools to establish a successful campaign.<sup>222</sup>

There is also a wide variety of other free tools available on the web that provide more assistance with specific aspects of strategic campaigning, from tools that assist with media and communications advice such as the SPIN project's basic tutorials and other publications,<sup>223</sup> to the Survey Monkey website which allows groups to design and undertake surveys and analyse the survey information collected.<sup>224</sup> Australian campaigning resources include the Change Agency's website, which contains useful papers, case studies and other resources on strategic campaigning.<sup>225</sup>

Given the community development aspect of CLC work, another tool of interest to some CLCs might be the seminal guide to direct action organising produced by the US Midwest Academy, *Organizing for Social Change*.<sup>226</sup> The Midwest Academy<sup>227</sup> teaches community organising and its manual thus contains advice that stretches beyond the typical work of an Australian CLC, but it includes excellent basic advice to help focus a strategic campaign. This includes guidance on defining a good issue or solution to a problem towards which to work and developing a strategy for a campaign that is specific as to important matters such as goals, targets, tactics and organisational considerations.

Importantly for CLCs though, the focus of this manual is on direct action organising and the advice it contains is therefore explicitly framed in terms of mobilising the power of the people affected by a problem, and building their own power and organisational capacity to achieve change. There is a clear distinction made between this sort of activity and direct service work to help individuals with their problems, which is the bread and butter of CLC legal work. The authors write:

Direct action organizations avoid shortcuts that don't build people's power, such as bringing in a lawyer to handle the problem, asking a friendly politician to take care of it, or turning it over to a government agency.

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<sup>222</sup> These include the 'seven jewels' of campaigning, the 'chariot wheel' process for a campaign and an 'observatory' of basic tools to analyse different aspects of a campaign.

<sup>223</sup> [www.spinproject.org](http://www.spinproject.org).

<sup>224</sup> [www.surveymonkey.com](http://www.surveymonkey.com).

<sup>225</sup> [www.thechangeagency.org](http://www.thechangeagency.org).

<sup>226</sup> Kim Bobo, Jackie Kendall and Steve Max, *Organizing for Social Change: Midwest Academy Manual for Activists*, 3<sup>rd</sup> ed. 2001.

<sup>227</sup> [www.midwestacademy.com](http://www.midwestacademy.com).

Giving people a sense of their own power is as much a part of the organizing goal as is solving the problem.<sup>228</sup>

They illustrate what they mean using the example of unaffordable prescription drugs:

People who can't afford prescription drugs could get them in many ways.

*Direct service.* A service organization such as a senior organization could provide discounts to its members by buying in bulk.

*Self-Help.* People who need the drugs could form their own buying cooperatives to get lower prices.

*Education.* An education organization could do a study...[or] prepare materials on how to find the lowest cost sources.

*Advocacy.* An organization might advocate for people who need prescription drugs...The people who need the prescription drugs might or might not know that an advocacy organization is doing this.

*Public Interest.* A public interest organization might go beyond advocacy and actually write the legislation for a state or national drug insurance plan that the group would attempt to get passed. Neither the advocacy organization nor the public interest organization is necessarily made up of the people who actually have the problem, but it works on their behalf.

*Direct action.* The people with the problem organize. They agree on a solution that meets their needs and, with the strength of their numbers, pressure the politicians and officials responsible. The people directly affected by the problem take action to solve it.<sup>229</sup>

The manual ultimately advises that direct service work and direct action are both needed but should not be undertaken in a single organisation. Apart from a general concern that division can emerge within the organisation about whether the service or direct action aspect of the work of the organisation is the most important, the manual particularly notes that funding for direct service work often comes from the same sources who may be the targets of direct action activity, such as government officials. Direct action campaigns can thus put funding for service work at risk.<sup>230</sup>

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<sup>228</sup> Bobo, Kendall and Max, above n226, at 12.

<sup>229</sup> As above at 11.

<sup>230</sup> As above at 12.

This is in many ways an apposite piece of advice for Australian CLCs, which rely on government funding for their legal service work. An example of just this risk is also given in section 4.3 below. However, as noted above most CLCs do not typically engage in such direct action activity in any case. CLC community development and community legal education work is arguably less “politically” focussed in that it does not necessarily involve actions specifically designed to confront those in power as a tactic to have demands met.<sup>231</sup>

Thus, beyond its general advice on strategic campaigning, the Midwest Academy manual’s advice may have more practical relevance to CLCs in terms of the insights its direct action approach provides when contrasted with other approaches to addressing problems that are more familiar to today’s CLCs. Australian CLCs could perhaps reflect more deeply on the way in which the common CLC approaches to addressing client needs - through direct service work and advocacy - interact with other important considerations such as building the power of disadvantaged communities, and whether service work and advocacy may sometimes undermine such power even as they achieve victories for our constituents.

One newer approach that tries to steer through some of these considerations is “law and organising”, which was the subject of widespread discussion in the US. Section 4.3 below considers this approach in more detail.

### 4.3 Law and organising

“Law and organising” is shorthand for a broad vision or model of legal practice that has emerged in the US over the last two to three decades in particular. Essentially, law and organising is the delivery of legal services in service to or support of an organising approach to solving problems and creating change, rather than legal services provided as the solution to a client’s problem (the direct service approach) or that speak for a client’s or client or constituent group’s interests (the advocacy approach).<sup>232</sup>

It is probably best described as a broad vision or model because there seems to be no one way of undertaking a law and organising approach to

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<sup>231</sup> See also discussion in text at n150 above.

<sup>232</sup> See Loretta Price and Melinda Davis, ‘Bibliography: Seeds of Change: A Bibliographic Introduction to Law and Organizing’, (2000-2001) 26 *New York University School of Law Review of Law and Social Change* 615 for an excellent list of sources as an introduction to the topic.

legal services. Rather, there are examples of different practical methods and strategies employed by various legal organisations that demonstrate a commitment to using law in support of an organising effort and to build constituent power. Cummings and Eagly, who have undertaken an extensive and critical examination of the American law and organising approach, provide a useful summary:

Accounts of law and organizing suggest that progressive lawyers should de-emphasize conventional legal practice and instead focus their efforts on facilitating community mobilization. Specifically, lawyers seeking to improve the conditions of poor clients are encouraged to supplement conventional litigation strategies with community education programs, link the provision of legal services with membership in organizing groups, and become directly involved in organizing campaigns.<sup>233</sup>

It is worth noting upfront that this Report does not propose law and organising as an approach that should be adopted by all CLCs or for all (or even the majority of) legal problems that CLC clients may face. However, it does hold out some very real potential for fresh attempts to tackle particular types of problems affecting poor or disadvantaged communities. Cummings and Eagly conclude that it 'should not be promoted as an idealized model for producing meaningful social change' but that it should still 'be viewed as an important tool that practitioners can use to complement more conventional legal strategies'.<sup>234</sup>

As noted above, law and organising places an emphasis on community organising and empowerment over legal strategies. Writing in 1994 Quigley described a vision of 'empowerment lawyering', which he sees as 'primarily the representation of groups rather than individuals' in a style 'which joins, rather than leads, the persons represented', with the overall purpose to 'enable a group of people to gain control of the forces which affect their lives'.<sup>235</sup> He goes on to highlight some lessons for lawyers who work with community organisations, drawn from the observations of community organisers. Amongst these lessons, Quigley argues that the primary goals of this sort of lawyering are to '[e]ducate, activate, and build the membership of the organization', thus lawyer involvement can be problematic if it leads to dependency on the lawyer:

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<sup>233</sup> Cummings and Eagly, above n131, at 447-48.

<sup>234</sup> As above at 517.

<sup>235</sup> William P. Quigley, 'Reflections of Community Organizers: Lawyering For Empowerment Of Community Organizations', (1994) 21 *Ohio Northern University Law Review* 455, 455-56.

There are two traditional methods of public interest lawyering: providing individual legal services to the indigent, usually in a government-funded setting, and providing reform or impact litigation which targets particular issues for focused high intensity litigation. Neither of these traditional forms of public interest lawyering is well suited to empowering. Both focus the power and the decision-making in the lawyer and the organization which employs the lawyer. The lawyer decides if she will take the case. The lawyer decides what is a reasonably achievable outcome. The lawyer and her employer decides how much time and resources can be committed to the effort. Both approaches individualize or compartmentalize the problems of the poor and powerless by not addressing their collective difficulties and lack of power.

While both approaches employ many hard-working and dedicated advocates, even when successful in achieving their defined mission they define for themselves, empowerment will not occur.<sup>236</sup>

Consistent with this approach, litigation in particular is singled out as being unhelpful for several reasons, including that it can teach people that lawyers produce change, not that people have the ability to produce change through their own collective actions. Quigley states that litigation should be undertaken only to facilitate other organisational goals, such as defending the organisation and its members or helping to garner publicity, legitimacy or fundraising support for its other efforts.<sup>237</sup> These views are also reflected in the conclusions of two social researchers who considered the impact that participation in protest activity in 1987 had on a group of homeless people in the city of Portland, Maine, in contrast to the impact of legal strategies to address the same problems:

In contrast to the strategy of lengthy litigation employed throughout the 1980s by professional advocates...the use of disruptive strategies by the very poor may not only be arguably quicker and more sweeping than advocacy, but it is possible that only direct action can develop the consciousness raising and empowerment necessary for solidarity ties...Three years after Tent City and the first creation of grievance committees in Portland, homeless and formerly homeless people continue to occupy seats on several city boards as well as in a number of service agencies. Groups representing the homeless appear at shelters, soup kitchens, and city hall to protest a wide variety of administrative actions. Such self-representation and capacity to mobilize would not have been

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<sup>236</sup> As above at 464-65.

<sup>237</sup> As above at 466-71.

possible had the homeless relied only on professional advocates to plead their case through legal or legislative action or through appeals to the public for charity and sympathy.<sup>238</sup>

Earlier discussion in sections 4.1.1 and 4.1.2 of this Report on focused casework and on representing organisations and groups indicated a law and organising approach being taken in some of the legal work discussed. For example, the ICLC's methods for dealing with housing habitability cases explicitly involve organising tenants in the affected building and facilitating their leadership in the matter, allowing for problems to be tackled building by building rather than tenant by tenant. LAFLA's accountable development legal work, while very different from ICLC's habitability cases, also indicates a law and organising approach in the way in which LAFLA recognises its role as the legal resource in a broader campaign led by its local community organisation client.

Professor Southworth has conducted research into the strategies that civil rights and poverty lawyers in Chicago pursued in undertaking their legal work, interviewing a large number of such lawyers in 1993 and 1994.<sup>239</sup> She found that most of the lawyers pursued a variety of strategies, and often more than one at the same time, to achieve their clients' objectives. Amongst these, Southworth noted that in a smaller number of cases the lawyers had employed community organising activities as part of their work:

A lawyer who prosecuted a suit to require a landowner to clean up a noxious dump site in a poor community said that she had "packed the courtroom" with residents who were prepared to testify. In zoning proceedings on behalf of a church that sought to shelter homeless people without acquiring a special zoning variance, the lawyer encouraged his client to gather signatures from every pastor in town. A lawyer who worked on redistricting litigation encouraged community members to express their views to their congressmen, who, in turn, might influence the negotiations. Another lawyer helped clients prepare to testify in congressional hearings on [US Department of Housing and Urban Development] tenant ownership initiatives. Lawyers also trained clients about their legal rights and political processes and, in three matters, participated directly in community organizing.<sup>240</sup>

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<sup>238</sup> David Wagner and Marcia B. Cohen, 'The Power of the People: Homeless Protesters in the Aftermath of Social Movement Participation', (1991) 38:4 *Social Problems*, 543-61.

<sup>239</sup> Southworth, above n174.

<sup>240</sup> As above at 484.

Interestingly, Southworth notes that it was primarily civil rights law firms, advocacy organisations and grass-roots clinics that used community organising strategies in their work rather than, for example, private law firms, law school clinics or legal services programs. She speculates on the reasons for this trend, including that it may be due to whether lawyers are representing individuals or organisational clients.<sup>241</sup>

In their paper on law and organising, Cummings and Eagly associate the use of law and organising techniques in the US with three distinct practice areas. These are workers' rights, environmental justice and community development.

In terms of environmental justice work, they cite the increasing use by lawyers of efforts to mobilise low-income clients to challenge the disproportionate placement of environmental hazards in their neighbourhoods. Rather than simply launch litigation against development proposals such as waste dumps or power plants, legal groups have worked to support community groups that use a variety of tactics to educate their community and oppose the developments, with legal actions only a part of these tactics.<sup>242</sup>

The authors describe community development legal work as transactional legal assistance to community organisations working to revitalise low-income neighbourhoods and note that it traditionally includes work such as developing affordable housing and commercial projects and structuring community-based organisations such as not-for-profits, child care centres, businesses and financial institutions.<sup>243</sup> However, they observe that:

the development of law and organizing initiatives has led many [community economic development] lawyers to move away from traditional market-based business development strategies and, instead, use their transactional legal skills to support movements for economic justice.<sup>244</sup>

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<sup>241</sup> As above at 506-508. Other potential reasons canvassed include that the regulatory restrictions on legal services programs (see text at nn97-100 above) discourage legal services lawyers from undertaking more comprehensive strategies and that advocacy organisations and grass-roots clinics may be emphasising multi-dimensional litigation strategies and non-litigation work to attract funding from not-for-profit foundations, a large source of funding support for advocacy organisations in the US, because such foundations have been reducing funding for litigation campaigns in favour of increasing support for grass-roots projects.

<sup>242</sup> Cummings and Eagly, above n131, at 473-76.

<sup>243</sup> As above at 476-77.

<sup>244</sup> As above at 479.

LAFLA's accountable development work, discussed above, is an example of this sort of law and organising approach to community development legal work. Cummings and Eagly cite examples such as assisting community organisations to negotiate, draft, and secure the passage of living wage ordinances, researching and drafting local first-source hiring agreements which typically require city contractors to hire low-income workers from local communities (particularly in exchange for public subsidies), and helping coalitions of union representatives, grassroots organisers and community residents to negotiate worker buy-outs of manufacturing companies and structure employee-owned businesses.<sup>245</sup>

Law and organising in the worker rights context draws on a tradition of labour organising but expands into non-unionised industries, especially ones in which many of the workers are undocumented immigrants and/or employed on a part-time or contingency basis and thus particularly vulnerable to exploitation.<sup>246</sup> A leading example of law and organising in this context is Jennifer Gordon's *Workplace Project*, which is also one of the better known examples of the application of a law and organising approach to legal services delivery in the US more generally.<sup>247</sup> In her book on the project, Gordon describes two basic ways in which a legal clinic can be designed to facilitate an active membership basis for collective action efforts:

One is to ask that service recipients do something active for the broader organizing effort in exchange for the services they receive...That approach uses service as leverage to produce participation, without an organic link between the two. But it opens up the possibility that the worker...will become committed to organizing in the process...The other set of approaches seeks to provide the service in a way that reinforces the organization's mission and strategy (for example, by emphasizing self-help and mutual support in the resolution of individual problems, or by responding to individual problems with collective action rather than advocacy). Here the form in which the service is provided is organically related to the organizing effort's overall strategy...<sup>248</sup>

Gordon's *Workplace Project* also used law in other less direct ways, for example it incorporated discussion of health and safety laws into its

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<sup>245</sup> As above at 477-78.

<sup>246</sup> As above at 470-71.

<sup>247</sup> For a discussion of the *Workplace Project* and its place in the broader public interest law arena, see Cummings and Eagly, above n93.

<sup>248</sup> Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights*, 2005, 234.

workers courses.<sup>249</sup> From the overall workplace project experience, others report that Gordon has posited three possibilities for the use of law to support organising. Law can be used as a “draw” to bring new members into the organisation, it can be used as a “measure of injustice” helping workers to understand the difference between legal ideals and their lived reality, and it can be used as part of a broader organising campaign such as starting legal action not simply to win the case for the individual plaintiffs but to highlight structural problems or put pressure on an employer or industry.<sup>250</sup>

Gordon initially started the Workplace Project by providing more traditional legal services to immigrant workers on Long Island, before the project moved towards an organising-focused approach.<sup>251</sup> This is not to romanticise the law and organising approach; Gordon does not shy away from the tensions involved in running a legal clinic within an organising effort. However, she believes that there can be large benefits from using the law in this way, as long as the people involved remain aware that these tensions will always exist.<sup>252</sup>

More recently, Cummings has written about law and organising in the Los Angeles garment industry anti-sweatshop movement.<sup>253</sup> Despite successes along the way, the movement has declined in the face of powerful forces, including globalisation that has seen garment manufacturing moved off-shore. Interestingly, however, Cummings notes that the experience and skills built up in the long fight against unfair working conditions in the garment industry are now being transferred into other low-wage industries that are more closely tied to the local economy and cannot necessarily be exported, for example taxi driving and car washes. One of the more lasting benefits of the law and organising approach in this case may be that it has built up institutional structures and alliances and has cultivated leaders, who will go on to challenge unfair practices in other contexts.<sup>254</sup>

Ashar has also written about a campaign against unfair practices in this sort of low-wage industry, describing a law school clinic’s involvement with

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<sup>249</sup> As above at 154-56.

<sup>250</sup> Cummings and Eagly, above n131, at 467-68; Lobel, above n129, at 960.

<sup>251</sup> Gordon, above n248, at 188.

<sup>252</sup> As above at 185-236.

<sup>253</sup> Scott L. Cummings, ‘Hemmed In: Legal Mobilization in the Los Angeles Garment Industry’, *forthcoming*, copy on file with this Report’s author.

<sup>254</sup> As above at 107-08.

a worker centre in a campaign against a chain of New York restaurants over an eighteen month period.<sup>255</sup> She notes that lawyer involvement with worker centres varies, partly because of shared concerns about how individual legal action can undermine collective action strategies, and posits three broad types of legal work within such an organising context:

claim-centered work - legal advocacy with the aim of winning damages for individual or groups of workers who worked under unlawful conditions...

organizing-centered work - legal advocacy to promote and defend workplace organizing and the tactical use of direct action protests against target employers...

policy advocacy-centered work - legal analysis, drafting of reports and petitions, and lobbying to government agencies and elected officials - both at the behest of, and independent of, worker centers.<sup>256</sup>

Again, Ashar does not present a rose-coloured depiction of this particular campaign, describing some of the daunting challenges that were faced including the hostility of legal institutions such as the courts and government regulators to the use of legal tactics coordinated with collective action<sup>257</sup> and the physical and emotional pressure the work took on those involved.<sup>258</sup> She also writes about how the campaign dealt with the difficulties posed by the way in which law individualises disputes, given this was a collective campaign. For example, she notes that lawyers' professional rules prohibit the influence of third parties in legal decision-making and lawyer-client privilege is foregone if a third party is present when advice is given. She describes the construction of a 'tripartite relationship between lawyers, workers, and organizers' to manage these tensions. The law school clinic lawyers had to comply with professional rules and ensure clients made their own legal decisions, but they also had to recognise that it was the organisers who had developed the overall campaign strategy with the client workers' consent, and the organisers were, in fact, critical in helping to collect evidence, ensuring client participation and preventing employer cooptation of the workers over the course of the legal action.<sup>259</sup> Ashar writes:

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<sup>255</sup> Sameer Ashar, 'Public Interest Lawyers and Resistance Movements', (2007) 95 *California Law Review* 1879. This campaign drew on various influences, including Gordon's Workplace Project: at 1889-91.

<sup>256</sup> As above at 1895.

<sup>257</sup> As above at 1908-10, 1914.

<sup>258</sup> As above at 1915-16.

<sup>259</sup> As above at 1910.

In delineating lawyer-client decision making, we could either reject the influence of the organizers or learn to discern the boundaries between lawyer-client, lawyer-organizer, and client-organizer decision making. We chose the latter.<sup>260</sup>

Perhaps one of the more useful examples of a US law and organising approach for Australian CLCs is the experience of the La Raza Centro Legal centre in San Francisco, as described by the current executive director of the centre. The history of this centre bears some resemblance to the founding of the first Australian CLCs. Loya writes that it was founded in 1973 by a group of Chicano law students and volunteer lawyers who felt that Latinos in the San Francisco area had legal needs that were not being met by existing organisations. In its early years it provided free legal assistance through volunteer law students and lawyers. It now has permanent staff and serves several thousand clients each year, with direct legal services provided in the legal areas of employment, housing, immigration and senior and youth law.<sup>261</sup>

However, Loya states that her centre not only addresses people's legal concerns and provides free legal representation, it also seeks to do more by creating 'long-term complete transformation in people's lives'.<sup>262</sup> Its legal work in several areas tries to achieve this by involving clients directly in making decisions about and conducting the running of matters. For example, the centre pursues wage claims even if they involve only a small amount of money, but does so not by simply filing a legal claim and representing the client in the traditional legal manner, but by providing training to the workers to undertake the legal support in their own cases. The workers conduct client intakes, telephone employers to negotiate claims and, if unsuccessful, in addition to the legal claim being filed they organise a picket of the employer's home, a tactic that the workers involved themselves decided upon. The centre provides support, training and guidance.<sup>263</sup> Loya also notes that clients often like this approach as they are able to actively participate in the effort to regain their wages, rather than simply waiting months and months for a legal hearing.<sup>264</sup> In the

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<sup>260</sup> As above.

<sup>261</sup> Anamaria Loya, 'Creating a New World: Transformative Lawyering for Social Change', in Andrew L. Barlow (ed.), *Collaborations for Social Justice: Professionals, Publics, and Policy Change*, 2007, 33, at 39.

<sup>262</sup> As above at 33.

<sup>263</sup> As above at 40-41.

<sup>264</sup> As above at 43.

youth law area, the centre involves students and parents directly, for example, they worked with a parent-led coalition to organise parents and students to advocate for and eventually obtain a policy across San Francisco's public schools outlining when and when not to involve the police in school discipline matters, given that some schools had been quick to call in police for school incidents, criminalising student behaviour.<sup>265</sup>

The centre has taken its “transformative” approach further in undertaking more recent projects, including a more general day labour program that commenced in 2000 and provides social services other than just legal services as well as job development initiatives. The centre insists that the day labourers set the agenda for the program and decide on the strategies that will be used to achieve this agenda.<sup>266</sup> Loya notes the difficulties with this approach, including the greater resources needed, especially for training and development, than if lawyers simply filed legal claims,<sup>267</sup> and the need to resist taking over decision-making given the influence that centre staff can have.<sup>268</sup>

Loya also describes vividly how the decisions made by clients can be uncomfortable ones. At one time the day labourers organised to challenge the police practice of issuing them with fines for standing on the street (to solicit work). They eventually organised public protests against the mayor for supporting the practice. However, the mayor's office was the largest funder of the day labor program and Loya knew that the strategy chosen by the labourers could jeopardise the centre's funding for the services being provided.<sup>269</sup> The tension caused by organising against the same targets who fund direct service provision, noted by the Midwest Academy in section 4.2 above, was directly invoked here.<sup>270</sup>

In fact, the centre did lose its funding due to the protest. The centre lost a large number of staff and all remaining staff took a large pay cut, so that services could continue to be provided. However, Loya seems upbeat about the end result, which saw the goals of the labourers' action achieved and, perhaps more profoundly, the workers themselves taking full charge for the program:

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<sup>265</sup> As above at 44.

<sup>266</sup> As above at 46-47.

<sup>267</sup> As above at 50.

<sup>268</sup> As above at 47-48.

<sup>269</sup> As above at 48.

<sup>270</sup> See text at nn229-230 above.

There is nothing easy about following the decisions and direction of indigenous leadership. Yet today, day laborers are free from police harassment and ticketing as a result of that campaign. Even more important, the laborers themselves run our Day Labor Program – a leadership that was created by our commitment to facilitate and follow indigenous leadership. Finally, as a result of a day laborer-led activity, the new mayor has committed to at least five years of funding for day labourer services.<sup>271</sup>

The emergence of law and organising approaches to progressive lawyering in the US is to at least some extent a result of particular American conditions. While it is not possible to do justice here to a full review of these conditions, Cummings and Eagly have identified a number of both ideological and practical factors that have both “pushed” and “pulled” towards law and organising.<sup>272</sup> Practical factors include funding restrictions on the work that federally-funded legal services programs can undertake,<sup>273</sup> more conservative federal courts less receptive to traditional public interest litigation, and the availability of competitive funding grants for innovative approaches to solving problems.<sup>274</sup> Ideological factors include scepticism about the effectiveness of legal strategies to achieve social change, concern that both legal action and lawyers have undermined other social activism and the availability of the community organising movement as an alternative model for progressive legal practice.<sup>275</sup>

However, the combination of law and organising can also be seen outside the legal centre or law clinic context. TURN, a California consumer advocacy group that focuses on utilities issues,<sup>276</sup> has relied largely on the work of its legal practice for a number of years, with the intervenor fees it earns from legal actions in regulatory forums supporting this legal work.

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<sup>271</sup> Loya, above n261, at 49.

<sup>272</sup> Cummings and Eagly, above n93, at 1264. Cummings and Eagly describe the current situation as “after public interest law”: ‘It is the decline of optimism and opportunity that marks the current era, challenging liberal public interest lawyers to rethink strategies and adapt tactical approaches’: at 1256, note 39.

<sup>273</sup> See text at nn94-100 above.

<sup>274</sup> As above at 1254-55, 1264-67; Cummings and Eagly, above n131, at 446.

<sup>275</sup> Cummings and Eagly, above n93, at 1255, 1268-82; Cummings and Eagly, above n131, at 451-65. For example, Loya displays such views about the legal system and lawyers in explaining why her centre believes it is important to involve clients directly in their own matters: above n261, at 40-41. Lobel has provided an analysis that “unbundles” the different concerns about how law and lawyers may co-opt social movement energy and agendas: above n129, at 948-58.

<sup>276</sup> [www.turn.org](http://www.turn.org).

More recently, though, it has appointed an executive director with a community organising background and has embarked on non-legal organising and community mobilisation strategies.<sup>277</sup>

“Law and organising” is not a familiar concept in Australia. One of the reasons for this is probably that both CLC and general public interest legal practice in Australia look quite different to their US counterparts. For example, some of the concerns in the US regarding the law’s effectiveness in achieving social change and its effect on social action stems from the fact that US public interest lawyering has traditionally been based heavily on large strategic litigation, which has not been nearly as strong an element of progressive legal practice in Australia. Further, funding restrictions on CLCs have not been as stringent and, conversely, there is a limited availability of philanthropic funding for innovative legal practice.

It is therefore unclear what an Australian version of a law and organising approach might entail. However, there does seem room to experiment with different methods to integrate law and collective action in Australia with a view to achieving law reform and other social change. The EDO Vic’s overt focus on working with small, voluntary community groups to help them address local environmental concerns, discussed in section 4.1.2 above, might be one example and a place to start exploring Australian possibilities.<sup>278</sup> CLCs’ traditional understanding of their role in facilitating collective and community participation in the legal system, while not equivalent to organising or collective action per se, also provides a springboard for new approaches to working for social change.

Once again, this Report does not suggest that a law and organising approach will be appropriate to working on every issue or for every CLC. However, it also seems that different forms of combining law with an organising effort have not been explored to a great degree in Australia, such as applying the ICLC’s approach to organising tenants in the same building - or customers of the same company, or persons affected by the same government practice.

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<sup>277</sup> Information drawn from interviews. Note that the latest news item on TURN’s website indicates that in opposing a utility company’s attempt to discount gas rates for large companies, which would destabilise the funding base for discounts given on gas bills of low-income consumers, TURN seems to have facilitated ordinary consumers speaking out against the big business discounts at public participation hearings, helping to drive the judge’s decision to reject these discounts: [www.turn.org/article.php?id=786](http://www.turn.org/article.php?id=786).

<sup>278</sup> See text at nn185-188 above.

Law and organising is necessarily speculative work, and has an even longer-term focus than other policy and law reform activity. This means any CLCs that experiment with such an approach must be willing to risk not succeeding - in developing community power or achieving social change. However, the time seems ripe for some experimental pilot projects in Australia.

In this regard, there is also room for funders, especially philanthropic foundations, to take more risks in being willing to fund innovative but speculative approaches to law reform and policy work by CLCs that incorporate collective mobilisation. Funding issues generally are touched on below.

#### **4.4 Funding issues**

In section 3.2 above, the Report discussed the significant funding constraints that today's CLCs operate under. The demand for direct legal service provision simply cannot be met, and CLCs have to make tough choices about whether to devote precious resources and staff time to policy and law reform work, thus reducing the amount of individual legal assistance they can give, especially given that most CLCs do not have dedicated policy or advocacy staff.

Although this Report argues strongly that CLCs should engage in policy and law reform work in the face of these funding pressures, for the various reasons canvassed in section 3, it is also realistic about the difficulties of doing so with limited funding.

It is easier to engage in policy and law reform work when specific staff positions exist within CLCs to coordinate and facilitate this work, and specific funding to CLCs for policy and law reform work can also facilitate the undertaking of this work. On the other hand, such funding must first be sought, and too often CLCs do not manage to take the steps to seek and obtain funding to enable them to complete policy and law reform work for which they have identified a need.

Even with current limited funding levels, CLCs should be able to engage in some policy and law reform work. This may be limited to some of the approaches to leveraging individual casework canvassed in section 4.1, which can be done without investing much in the way of additional resources or diverting large resources from direct service provision. For instance, CLCs can try to implement a focused casework approach

systematically across their legal practice, or collect and publish case studies that highlight systemic problems. Indeed, some CLCs already do this more successfully than others, despite not having dedicated policy or law reform staff members. Further, CLCs can seek specific funding and/or *pro bono* support to address a problem once it has been identified, if they are not able to do justice to working on the problem within their current resources.

Otherwise, the threat of becoming “casework on the cheap” is realised. De Brennan has noted that CLCs may be ‘their own worst enemy’ in this regard by continually adapting to and making do with limited funds, instead of vocally pressing for better funding.<sup>279</sup> Indeed CLCs, and the CLC sector more broadly, should perhaps consider whether we should continue to accept funding and operate if we are not given some funding capacity to undertake policy and law reform work in addition to casework.<sup>280</sup>

However, undoubtedly an increase in funding would assist CLCs to do more, including more advocacy work on systemic issues. The current reliance on government funding will continue for the foreseeable future, but this Report considers that there is a need to broaden out the sources of funding for CLCs and develop a wider CLC funding mix.

Professor Abel has noted that there are problems associated with all sorts of funding sources. For example, he writes about problematic features of government funding such as the ones discussed earlier in this Report, stating that it can place limits on which clients can be served, the subject-matter of cases and the legal strategies that may be used, while at the same time caseload pressures can lead to routinisation and dampen advocacy efforts. Further, government can never equalise legal resources

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<sup>279</sup> De Brennan, above n10, at 133.

<sup>280</sup> Rathus raised this possible course of action in 1992 writing about the precarious funding situation of Queensland CLCs: ‘What course is most likely to give us political success? Threaten to close all of our doors on a given date unless we receive State Government funding? Go easy on our criticism of the law reform agenda in this State? Or should we just bleed slowly to death struggling to maintain services to our clients while the Government makes us provide yet another permutation of our daily workload, statistics and financial affairs and asks what it is we all do all day’: Zoe Rathus, ‘Community legal centres: National Overview 1992: Queensland’, (1992) 17:6 *Alternative Law Journal* 284, 285.

in societies with structural resource inequalities, even if it funds legal aid well.<sup>281</sup>

However, Abel also notes problems with private philanthropic funding, including that foundations may risk their beneficial tax status if they fund activities that are too “political” and that they cannot fund routine legal services delivery to the same extent as government.<sup>282</sup> Private law firms and professional associations may help to deliver legal services but tend to work on injustices further removed from their own situations. They also prefer to work on matters that raise “procedural” injustice issues rather than work on substantive or partisan matters.<sup>283</sup> Self-funded legal services depend on rules about charging contingency or conditional fees and costs awards.<sup>284</sup>

As there is no one perfect source of funding, the need for a mix of funding sources – that spreads risk and the restrictions associated with any one source – becomes more apparent.<sup>285</sup> For example, Arup has noted that sustained efforts to engage in public interest lawyering require the development of a dedicated corps of public interest lawyers and legal services, which cannot be achieved with one-off *pro bono* interventions. He reflects on whether innovations in Australia such as conditional fee work and/or limitations on adverse costs orders might facilitate more public interest legal actions, and whether an increased availability of exemplary damages or *cy pres* awards could also facilitate this sort of work.<sup>286</sup>

Indeed, many of the US groups interviewed for this Report noted that they received some funding through *cy pres* awards. In the US, courts are able to make *cy pres* (“as near”) awards following successful class actions taken by law firms on behalf of plaintiff classes – funds from the damages or settlement fund remaining undistributed after identifiable members of the affected class have been compensated can be ordered to be distributed to

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<sup>281</sup> Richard Abel, ‘Speaking Law to Power: Occasions for Cause Lawyering’ in Austin Sarat and Stuart Scheingold (eds.), *Cause Lawyering: Political Commitments and Professional Responsibilities*, 1998, at 98.

<sup>282</sup> As above at 98-99.

<sup>283</sup> As above at 97-99.

<sup>284</sup> As above at 97.

<sup>285</sup> A wider range of institutional forms for the delivery of legal services to the poor and disadvantaged may also be necessary beyond merely CLCs, government legal aid and *pro bono* legal services: see Trubek, above n107.

<sup>286</sup> Christopher Arup, ‘Pro Bono in the Post-Professional Spectrum of Legal Services’, in Christopher Arup and Kathy Laster (eds), *For the Public Good: Pro Bono and the Legal Profession in Australia*, 2001, at 191, 203, 207-08.

compensate the class “as near as possible”.<sup>287</sup> One interviewee stated that this funding was particularly beneficial because it came with less restrictions than other funding; cy pres funds had to be applied towards addressing a particular topic or for the benefit of a particular class of people, but beyond such high-level requirements the recipient could choose how best to apply the funds, including through education, advocacy, legal services or other methods.

A recent Australian paper has also examined the impact of government funding on systemic advocacy by Australian non-government organisations, not merely CLCs.<sup>288</sup> While the relationship can be complex, the researchers do conclude that ‘for most third sector organisations, for most of the time, dependency on government funding, while it may not curtail all advocacy, certainly places strong limits on its form and extent’. They posit that an alternative and independent source of funding needs to be made available to fund systemic advocacy, such as government trust funds like the NSW Public Purpose Fund that require accountable use of funds granted but for which accountability is not to a specific government agency or department.<sup>289</sup>

More broadly, in the US Professor Blasi has made the important point that too often we fight for an increase in funding for our specialised area out of a limited pool of funds for social services and social justice-related concerns more generally, while not fighting to expand this pool by reducing regressive government tax and spending initiatives elsewhere:

So long as we are fighting over the scraps rather than uniting to get a fair share for all those in need, we will be left only with the scraps, even those of us who grew the food and cooked the meals.

We do not have a lot of tax specialists in the social justice community. Maybe it is pretty boring stuff, but everything else depends on it...rather than fighting separately to preserve particular health, education, or

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<sup>287</sup> Californian courts have a particularly strong history of cy pres awards. For more information see, eg, Natalie A. DeJarlais, ‘The Consumer Trust Fund: A Cy Pres Solution To Undistributed Funds In Consumer Class Actions’ (1987) 38 *Hastings Law Journal* 729; Kevin M. Forde, ‘What Can A Court Do With Leftover Class Action Funds? Almost Anything!’ (1996) 35:3 *Judges’ Journal* 19; Patricia Sturdevant, ‘Using the Cy Pres Doctrine to Fund Consumer Advocacy: Distributing Residues from Class Action Funds Satisfies Ethical Obligations While Promoting the Public Good’, [November 1997] *Trial Magazine*.

<sup>288</sup> Onyx, Dalton, Melville, Casey and Banks, above n5.

<sup>289</sup> As above at 10-12.

workplace safety programs of critical importance to low-income people and people of color, progressives might join together to use the...analysis that repealing a 1.7% state tax cut for the richest 1% of Californians (with an average annual income of \$1,518,700) would raise about \$ 2.5 billion per year. This is more than enough to preserve all these programs.<sup>290</sup>

Blasi's motto here is to "follow the money"; he notes that the policy areas of taxation and government spending, at least in the US, have been ceded to wealthier interests.<sup>291</sup> There seems to be scope for progressive organisations in Australia to develop more expertise on these issues as well, to help advocate for better outcomes for the poor and disadvantaged. Such developments would inevitably help CLC clients, and not merely through making more funding potentially available for CLC work.

#### 4.5 Evaluation

The final issue that this Report touches on is the role of evaluation in undertaking policy and law reform work.

Monitoring and evaluating the policy and law reform activities that CLCs undertake is crucial to assessing whether CLC policy and law reform work is or is not, in fact, successful in bringing about change for the benefit of our constituents. This is the ultimate reason for engaging in such work, thus we should be concerned with developing and using methods for evaluating the success of our advocacy activities.

For example, much CLC policy and law reform work is focused on achieving legislative reform for the benefit of our clients. However, it is not enough to see a law proposed if the details of the legislation do not fully address the problems identified, nor is it sufficient to see such legislation enacted if it is not then implemented and enforced.<sup>292</sup> The same can apply

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<sup>290</sup> Gary Blasi, 'Fifty Years After Brown v. Board: Five Principles for Moving Ahead', in Symposium, Rekindling the Spirit of Brown v. Board of Education, (2004) 19 *Berkeley Women's Law Journal* 443, 449.

<sup>291</sup> As above.

<sup>292</sup> On the consequences of social movements generally, Amenta and Caren write: 'Dividing the process of creating new laws containing collective benefits into the agenda setting, legislative content, passage, and implementation of legislation simplifies analysis and also makes it easier to judge the impact of challengers...Unless all processes are negotiated successfully...no collective benefits will result': Edwin Amenta and Neal Caren, 'The Legislative, Organizational and Beneficiary Consequences of State-Oriented Challengers', in David A. Snow, Sarah A. Soule and Hanspeter Kriesi (eds.), *The Blackwell Companion to Social Movements*, 2004, at 466-67.

to the delivery of direct legal services to clients. Blasi has written about learning of the ineffectiveness of a legal assistance program he had helped found. His story highlights what can occur if work is not evaluated for its outcomes:

To deal with the overwhelming number of eviction cases facing the neighborhood offices of the Legal Aid Foundation of Los Angeles, Barbara Blanco...and I established an Eviction Defense Center to provide assistance to tenants from across Los Angeles...we prepared the eviction defense paperwork for approximately 10,000 tenants a year, provided each of them with a packet of instructions customized to fit the facts of their case, and showed them a film of what to expect at trial. We also represented a few hundred tenants in court, rarely losing a case at trial...We did not know much about what happened to the people we had helped to represent themselves, other than that they never lost solely because they could not understand how to file a responsive pleading.

Nearly two decades later...twelve students and I evaluated the effect of the implied warranty of habitability on slum housing conditions in Los Angeles, as the legal concept played out in our local courts. We developed a “court watch” program and recorded what happened to tenants, nearly all of them unrepresented, in eviction cases...We documented a consistent pattern of a “law of the courtroom” that was completely at odds with clear statutory and appellate authority. In addition to the “court watch,” we reviewed a random sample of eviction case files with habitability claims. The results were striking: Out of 151 tenants who had asserted facts constituting breaches of the implied warranty of habitability, the total number who prevailed at trial without a lawyer was zero. And when the pro se tenants settled, as most did, the terms were no better than what would have happened had they gone to trial and lost. I was distressed to learn that more than half of all these pro se tenants had been assisted by the office I had helped to found, the Eviction Defense Center.<sup>293</sup>

Even after winning substantial public interest litigation, evaluation remains important in determining whether the victory has led to ongoing benefits. The WCLP<sup>294</sup> has a long history of significant and successful public interest litigation, including its earliest litigation successfully challenging California’s unequal school district financing system and school segregation.<sup>295</sup> However, elsewhere Blasi points out that despite these

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<sup>293</sup> Gary Blasi, ‘How much access? How much justice?’, (2004) 73 *Fordham Law Review* 865, 868-69.

<sup>294</sup> See text at nn176-178 above.

<sup>295</sup> WCLP, *40 Years 1967-2007*, above n178.

legal victories there remains large inequality between, and increasing re-segregation of, Californian schools.<sup>296</sup>

The same concerns apply in the Australian context. For instance, Giddings and Noone provide case studies of CLC work in several important policy areas.<sup>297</sup> One of these areas is consumer advocacy and the authors cite some examples of “effective” policy and law reform work in this area. These include activities that do seem to have proved effective in the longer-term, such as involvement in the development of industry-based dispute resolution schemes and litigation objecting to the renewal of HFC Financial Services’ credit provider licence in Victoria (this company still operates overseas but not in Australia).<sup>298</sup>

However, these examples of “effective” policy and law reform work also include activities such as combating the growth of payday lending through protests, research reports and engagement with politicians, and pursuing the issue of price discrimination against women by conducting research, litigation and spurring a parliamentary inquiry.<sup>299</sup> Closer examination shows that payday lending remains a focus of consumer advocacy groups and legal centres today due to its continued growth, while gender price discrimination also remains a common occurrence with the parliamentary inquiry referred to in the case study failing to result in any real outcomes.<sup>300</sup>

Several interviewees for this project argued that an evaluation component must be built into any planned advocacy work to ensure it is monitored and any gains are implemented, with one interviewee stating that such work is arguably not worth undertaking otherwise. It was noted that lawyers tend to view matters as legal cases meaning they have a discrete end, whereas in reality no campaigns for change ever finish, with any gains left

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<sup>296</sup> Blasi, above n290, 445, 448.

<sup>297</sup> Giddings and Noone, above n1, at 267-72.

<sup>298</sup> In fact, HFC was fined over £1 million by the UK Financial Services Authority in January 2008 for mis-selling payment protection insurance in that country: Financial Services Authority, ‘FSA fines HFC Bank £1.085 million for PPI failings’, *Media Release*, 16 January 2008, available at: [www.fsa.gov.uk/pages/Library/Communication/PR/2008/004.shtml](http://www.fsa.gov.uk/pages/Library/Communication/PR/2008/004.shtml).

<sup>299</sup> Giddings and Noone, above n1, at 271-72.

<sup>300</sup> The 2002 Consumer Affairs Victoria (CAV) annual report states that the Victorian Government reported back to the parliament in May 2002 with its commitments to address price discrimination and CAV established a working group to identify key projects in the area: CAV, *Report to the Minister for Consumer Affairs For the Year Ended 30 June 2002*, at 47; but no further references to the issue appear in future CAV annual reports.

unmonitored vulnerable to being lost. In relation to specific funding for policy and law reform work, funding for independent evaluation and monitoring needed to be included in the funding request, while in relation to policy and advocacy work generally it was seen as worthwhile to divert some funding from additional casework or other services being delivered by the organisation to undertake evaluation of work's effectiveness.

Further, interviewees noted that concrete and measurable goals for any advocacy work needed to be set to ensure effectiveness could be evaluated. The evaluation of the 2006 Victorian Smart Justice campaign co-ordinated by the FCLCV highlights some of these issues.<sup>301</sup> It notes that quantifiable and measurable targets were not developed for the campaign, and with only broader strategic goals and objectives against which to measure outcomes it was very difficult to gauge the campaign's effectiveness.<sup>302</sup>

The development of tools to monitor and evaluate advocacy work is an ongoing project in the US. Some of the more sophisticated work on evaluation in the US is being progressed by organisations focused on assisting with advocacy and advocacy evaluation, as opposed to undertaking advocacy themselves.<sup>303</sup>

Australian advocacy organisations, including CLCs, will probably require similar support from funders and other support organisations to incorporate better monitoring and evaluation practices into their work.<sup>304</sup> Ultimately, however, it will be worthwhile doing so if it leads to more effective policy and law reform work by CLCs, maximising our potential to achieve real, long-term and lasting improvements in the lives of our constituents.

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<sup>301</sup> FCLCV, *Evaluation of the Smart Justice campaign: 2006 Victorian State Election*, December 2006.

<sup>302</sup> As above at 16.

<sup>303</sup> Innovation Network, a not-for-profit organization that works with other not-for-profits on planning and evaluation, has developed various resources: [www.innonet.org/index.php?](http://www.innonet.org/index.php?); Alliance For Justice also provides resources for both advocacy organisations and funders and grant makers regarding advocacy evaluation: [www.afj.org/for-nonprofits-foundations/](http://www.afj.org/for-nonprofits-foundations/). In Australia, the Change Agency has also initiated a project examining advocacy evaluation: [www.thechangeagency.org/01\\_cms/details.asp?ID=82](http://www.thechangeagency.org/01_cms/details.asp?ID=82).

<sup>304</sup> Funders are in an interesting position in this regard. They can support improved evaluation but must be careful to avoid tying improved evaluation with re-funding criteria; if funding is threatened by negative evaluation outcomes, CLCs will be unwilling to innovate and experiment with new and possibly speculative strategies, and will also have less incentive to undertake rigorous and effective evaluation.

# Appendix A – Sample interview questions

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Victoria Law Foundation CLC Fellowship Project 2007-08  
Nicole Rich, Fellow: Citizen power - bringing US advocacy strategies  
to Victoria

Questions – [Organisation]

Date:

## Questions

### Organization - general

- What is your mandate/overall goal?
- Staff positions/skills? Eg lawyers, journalists, organizers?
- How do you attract high quality staff?
- Where does your organization get its funding?

### Legal services

- How many lawyers do you employ?
- How much *pro bono* legal assistance do you get?
- How do you use your *pro bono* assistance (eg working with you; referring to them)?
- What sort of legal work is undertaken (eg individual cases; regulatory interventions; against govt and/or business)?
- How do you choose which cases to take on?
- Do you recover your fees?
- Is there a risk of adverse costs against your clients?
- How does your legal work with broader advocacy/campaign work?

### Advocacy strategies - general

- What sorts of different strategies/tactics do you use?
- How do you choose which ones and in what combination?
- How do you incorporate consumer complaints into your advocacy work?

- How do you incorporate outreach activities into your advocacy work?
- Do you work with other organizations? How important are coalitions to your advocacy work? How used?
- What sort of lobbying do you undertake? How important is it to have a presence at the legislature/dedicated lobbyists?

### **Media**

- How many press releases do you put out?
- How much attention do they get? How do you ensure they get noticed?
- How important are editorials/op-eds?
- Do you give staff media training?
- Do you use “stunts”?

### **Online advocacy / Citizen advocacy / Organizing**

- How important is the website to your advocacy work?
- How many people have signed up for email alerts?
- Do you use blogs? Issue-specific websites?
- How popular are your on-line tools?
- How do you ensure people don't become overwhelmed or annoyed by the amount of material you produce?
- How else do you get members of the public involved in your advocacy work?
- Do you undertake organizing? Or work with grassroots organizing groups?
- What techniques do you use? How resource-intensive is it?

### **Outcomes**

- How do you measure the effectiveness of your work?
- What sort of strategies do you use to ensure implementation/follow-up of “wins”, including court judgments?

Victoria Law Foundation CLC Fellowship Project 2007-08  
Nicole Rich, Fellow: Citizen power - bringing US advocacy strategies  
to Victoria

Questions – [Academic]

Date:

### **Questions**

#### **Individual casework vs advocacy**

- Tension b/w individual service work and broader political/advocacy/mobilization work?
- Thoughts on the moral imperative to do advocacy work? Is it ok to limit service work even though such high demand?
- How do smaller organisations engage in broader advocacy work?

#### **Funding for public interest law**

- Do private and govt funds constrain advocacy? What are the alternatives?

#### **Law and organizing**

- Views on incorporating organizing into public interest legal practice?
- How do you “organize” a disparate group (eg consumers)?
- Are there other ways to be “client-centred” in doing public interest legal work?

#### **Effectiveness/implementation**

- The challenge of implementation – what strategies?
- How can you measure effectiveness?

#### **On-line advocacy/organizing**

- How important is it?

## **Appendix B – Quick guide to the Report**

Australian CLCs engage in three different broad types of activity:

- individual legal assistance or direct service work
- community legal education
- policy and law reform work or advocacy work

Despite insufficient funding to address the large amount of individual legal need, CLCs should still engage in more than individual service work, and in particular policy and law reform work, because:

- doing so forms a critical part of the unique history and nature of Australian CLCs and must continue if CLCs are to remain relevant as a distinct institutional form for the provision of legal services to the disadvantaged;
- it is simply more effective to engage in a mix of activities if we want to maximise the benefits we provide to our clients; and
- arguably, strong moral commitments should impel CLCs to engage in this broader work.

Several interesting developments in the US could perhaps be adapted for use by CLCs, including:

- leveraging individual casework, such as through focused case representation, representing organisations and groups, and better information and record keeping;
- strategic campaign planning; and
- law and organising.

CLCs should engage in policy and law reform work despite funding constraints, but more funding and a broader funding mix would assist. Progressive organisations should also develop more expertise in taxation and government spending to help expand the pool of government funding available for progressive social services and social justice initiatives.

An evaluation component must be built into any planned advocacy work to ensure any gains are implemented. CLCs will probably require support from funders and other support organisations to incorporate better monitoring and evaluation practices into their work.

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