The challenge of remaining 'unfinished' in the campaign for justice

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Introduction

After Paula's thoughtful and thought-provoking paper, I am looking at CLCs from a different perspective: focussing on the centres themselves, their own status, purpose and self-perception.

CLCs have for many years – longer than you may think – been either unconcerned, or concerned but confused, about their identity: their identity as legal practices, as NGOs, as service providers, as educators, as partners, as reformers, as agents for radical change …

A lot turns on what legal centres call what they do. If it is nothing other than legal practice for people who can't afford lawyers, then legal aid commissions do it and private lawyers do it when they work pro bono. If it is something other than that, then it doesn't consistently have a name, or even a description, which enables CLCs to definitively differentiate not only their practice, but their purpose, policies, ethics, and organisational structures.

When I was first employed in legal centres, Redfern Legal Centre decided to appoint a poverty lawyer. Their intention was to advertise for a poverty lawyer, and I was on the look out for the poverty lawyer ad, in the days when one scoured the Saturday Sydney Morning Herald for job ads. Clearly the typesetters at the Herald shared the general unfamiliarity with the idea of a poverty lawyer – the job I applied for (and got) was actually run as an ad for the much more familiar 'property' lawyer.

Literature

We do not have, as the US does, a canon of 'poverty lawyering' or even the more recent and relatively anodyne term, public interest lawyering.

Analogies with the US are problematic, especially in legal practice, and we are all familiar with having to counter the television-derived stereotypes of ambulance-chasing, contingency fee-driven, Bill-of-Rights-advocating, court theatrical American lawyers. But at a level of principle – especially when exploring the role of lawyers in a liberal democratic market-based state, and its institutions – the US literature is a powerful resource. Wexler's landmark 'Practicing Law for Poor People', Lopez's rebellious lawyering, Lucy White's focus on narrative, Louise Trubek on public interest lawyering, the rare but sage reflections of Gary Bellow, Scott Cummings on lawyers and community development – these are just the tip of an iceberg of accounts written by practitioner/academics in the US.

We are very fortunate that in the scarce literature we have on CLCs in Australia we have such quality. Mary Ann Noone's chapter on CLCs in the book 'Lawyers in Conflict' is mandatory reading for anyone working in the sector who wants to know – and shouldn't everyone? – where the sector came from and what it has gone through to get to where it is. Of similar status are Mark Rix's articles on CLCs and new public management, Mary Ann Noone and Jeff Giddings' article on CLCs moving into the 21st century, and Nicole Rich's report *Reclaiming Community Legal Centres*.

Lack of identity

A consequence of the thin body of CLC-related literature in Australia is that CLCs have not kept track of who – and why – they are. CLCs need to derive their identity not only from action but also from reflection, not only from the rush of being engaged in the journey but also from the vision of reaching a goal.

Instead of an evolving and maturing sense of their identity, CLCs tend to take for granted the continuing truth of the rhetoric of a CLC identity from days long past. To an extent, early CLCs did have a strongly reformist, if not radical purpose. As I'll return to later, they rejected the power relationships in the structures of, at least, the legal institutions, most especially the organisation of the profession and of legal education, though less obviously of the liberal state more generally.

This no longer characterises CLCs. But what does? Lou Schetzer (1998, 254) includes 'independence' as one of the features of 'the very essence of what a CLCs is' along with accessibility, a global approach, being community-based, and a host of managerial claims that could be made for most contemporary corporations, and that you all have in your strategic plans: 'innovative, solution-oriented, activist, responsive and progressive'.

Schetzer refers to the 'shared evolutionary experience' of CLCs', and it seems that the 'reasons for being' of the early CLCs persist as the 'reasons for being' of the sector as a whole.

But it is, as Giddings and Noone noted in 2004, difficult to generalise across more than 200 CLCs. That difficulty attaches to ascribing philosophy and values and purpose as much as it does to describing work and structure. In the absence of a strong and consistent culture of reflection it is hard to track CLCs' diversity, and the resulting divergence of direction.

There are broad commonalities in funding sources, casework criteria, and in a stated commitment to law reform and community legal education. Superficially CLCs share an identity defined in large part by getting their funding from a common source subject to common conditions. Beyond these commonalities, however, what CLCs do and why they do it differ widely. CLCs would struggle to agree on a shared identity defined by strategic goals and an ultimate vision of what they are committed to achieving.

How this came about it is a familiar story, and CLC writers have repeatedly wrung their hands in angst at the threat that funding and state control pose to the CLCs' sense of having once been a radical alternative to conventional lawyering. The situation is that CLCs are not now, if they ever were, agents of radical change. To the extent that CLCs engage in activity to reform law, they are reformers within established liberal laws and legal institutions.

One way of seeing the situation of CLCs is as the inevitable result of the way in which the liberal state operates. What I find useful about seeing CLCs' situation in this way is that, at the same time that it explains what has happened, it shows how things could be different in future – there is a way for CLCs to engage in truly radical reforms, at least of targets smaller than the entire apparatus of the state.

Mathiesen

In teaching law reform I use the work of Thomas Mathiesen, whose thinking was known to some of the early – by which I mean 1970s – writers in Australia on radical new approaches to law and lawyering.

Time and again I am struck by how the accounts of organisations' struggle for identity and purpose in the face of government funding, contracting and partnership fit Mathiesen's simple theoretical framework.

Thomas Mathiesen has been a leading activist and theorist in the very influential Scandinavian prison abolition movement. He led radical NGOs whose goal was to achieve the abolition of prison as a state practice. Such a mission struck at the heart of the state, of its power to exercise ultimate control over the freedom of its citizens.

Those activists have, so far, failed in their mission, as they acknowledge, but their work has led to very considerable concessions, internationally, not only in prison conditions, but in the terms on which prison is used as a sentencing option by the state.

Challenging the legitimacy of at least a part of the structure of the state led Mathiesen to reflect on what was involved, on how a non-government agency could secure and maintain fundamental changes to state practice. Mathiesen describes what we all know from experience to be true: it is hard to get the state to take notice, and if change is achieved it is harder to still to maintain a climate amenable to further and continuing change.

Caveat

Before I outline Mathiesen's theory and apply it to CLCs as a movement, I have to be clear about Mathiesen's particular perspective. His starting position is that the late capitalist democratic liberal state will resist pressure for change that comes from outside its own sanctioned processes. He asserts that the state will change willingly only on its own terms, and that the most the state will concede is a compromise between its interests and those of change agents. For many, such a compromise is exactly what they seek, and a collaboration with the state, to secure what beneficial concessions they can, is the very point of their activity. In political terms this is a conservative, not a radical, ethos. It is neither right nor wrong, but simply a particular approach

to change. It is not, however, how Mathiesen sees change. His is an analysis of radical action which assumes that a movement's goal is to fundamentally challenge structures and system of the state.

If this approach to change is not yours then of course you can and will reject this analysis of CLCs. If it is or could be then you might want to think about it further. This is an invitation to discuss, debate and disagree.

Defining in and out

The challenge for a political advocacy organisation in pursuing fundamental change to the prevailing power structure is to avoid the two principal strategies of the capitalist state in neutralising external pressures for change: defining in, and defining out.

The state either absorbs revolutionary proposals for change – and their advocates – into its own system of its decision-making, or it stigmatises the proposals and their advocates as extremist and sectarian. Either way, the revolutionary voice is 'finished' as a voice for change. Hence Mathiesen's prescription for remaining 'unfinished'.

There are two elements to being unfinished. (Mathiesen has an appealing to use tendency binary categories).

The first element is that it is necessary for the movement to be in contradiction with the state, for the basic premises of the movement, and those of the prevailing system, to be opposed. The state's response to this contradictory stance will be to attempt to absorb it or to 'define it in', transforming contradiction into accord.

The second element to an movement's remaining unfinished is to be in competition with the state, for the movement to identify a fundamentally unsatisfactory element of the prevailing system, and offer its constituents an alternative to it. (A point I will return to: the extent to which what the movement offers appeals to its constituents as competitive with the state is dependent on the extent to which it is grounded in the real experience of the constituency). The state's response to this competitive stance will be to attempt to stigmatise it, or to 'define it out', transforming an alternative into irrelevance.

There is the problem for a radical change movement – a movement risks being 'finished' as a voice for change by being defined in, or out, by the state. The solution is to avoid being defined in or out, and thereby to remain unfinished, to be neither brought into accord nor rendered irrelevant, but to remain in a state of competing contradiction.

To remain unfinished means not choosing, not accepting the choice the system offers of either working for reform from within or from being ostracised: to choose either is to be finished. To choose to pursue reform by working within, the movement loses its contradictory stance in relation to the state and is defined in to a liberal reformist role; to choose to pursue change by attacking from outside the movement loses its competitive stance in relation to the state and is defined out, to a marginal sectarian role.

A radical change movement must do both, remaining, as Mathiesen says, at the 'junction between reform and revolution'.

To remain unfinished means a knife-edge existence – a razor's edge (de Folter), to be always in a contested relationship with the state, both apart from but relevant to the state, in a position where the movement says 'We have something to say to you but have no wish to align with you', and the state says 'We disagree with you but cannot ignore you'.

None of this analysis applies if the movement does not have a fundamental change agenda but is merely reformist. Being defined in is exactly what a reformist organisation seeks: a conventional movement for change will seek accord, will want a place at the table, will not contradict so much as critique, will not compete so much as collaborate.

Eg: the women's movement

An example of Mathiesen's political action theory as an analytical framework is a recent account by Sarah Maddison and Gemma Edgar of the political activity of Australian women's organisations (Jo Barraket, 188). They describe the women's movement, broadly speaking, as having operating both within and outside government to bring about recognition of women's issue .

Mathiesen would say that the women's movement was balancing nicely on the knife-edge, resisting choosing between being in and being out, not 'unfinished' as a force of change and maintaining a state of competing contradiction.

But Mathiesen warns that the pressure to choose is enormous: the absorbent nature of the state almost requires a movement to chose: either you are with us or you are against us. And in Maddison and Edgar's view, that what happened: the state effectively absorbed the women's movement.

The knife-edge balance was lost, and the women's movement, as a movement for fundamental change, was finished, with the move 'away from the outsider-within feminist bureaucrat towards the appointment of insiders, profession female public servants' (196 quoting Chapple).

The movement lost its contradictory stance in relation to the state, and was defined in.

Eg: environmental movements

Maddison and Edgar describe an environmental movement (198-204) which did remain unfinished in the achievement of its long term goal, the abolition of land clearing in Queensland. They describe (205) a coalition of NGOs which 'had, to varying degrees, engaged in consultative processes with the Queensland government in order to effect this change'. They were invited in by the state, but they resolved instead 'to minimise their participation in formal consultative process to pursue conservation objectives independently of the committees that were established to negotiate the new legislation's implementation'. (206 quoting Whelan and Lyons). They refused to work with a process they didn't support, and they had seen a similar process in NSW 'capture' (or, as Mathiesen would put it 'absorb') the conservation movement there.

The movement rejected orthodox processes of consensus politics 'in favour of a strategic blend of community mobilisations, electoral politics and protest'. Quoting Carber (207) 'Their goals were neither co-opted nor watered down'.

CLCs defined in

To put CLC history into Mathiesen's terms, state funding has been a process of capture, of defining in.

State funding doesn't necessarily mean state control. But as a result of a process that began under the Hawke Government in the early 1990s (Noone 2006 218), by the late 1990s the Commonwealth Government was no longer funding legal centre activity generally, it was purchasing a defined range of legal services (220; 228). Much of the commentary on the phenomenon has been pulled together by Nicole Rich (39-46) who refers to the 'double-edged sword' of government funding programs.

The rapid rise in government funding affected both established and new CLCS; Mark Rix sees the Government's willingness to fund new centres, without regard to 'community involvement and consultation as showing the extent to which the Government 'regards CLCs as government agencies'. (Rix 2003, 239).

The funding terms have explicitly negated the capacity of the CLCs to be in a position of contest with the state. By accepting the funds CLCs have chosen to pursue only reform, if that, and to abandon a position of fundamental contest. What CLCs can do is make the legal system work better within its own parameters, to accept the fundamental principles and keep the system honest. In the diverse identity CLCs now have, this describes just what many CLCs see themselves doing.

In talking about her substantial research project into the history of CLCs in Victoria, Jude McCulloch (2008) said that CLCs' work shows 'that the law can work as a force for [good] increasing equality and fairness, [and CLCs] have built trust and faith in the legal system despite its shortcomings'. CLCs 'provide marginalised and disadvantaged people with access to justice'; they empower new voices and new kinds of rights'.

This describes and endorses reform activity that maximises the beneficial operation of the existing system, but is not intended to undermine it fundamentally.

There can be little doubt that Liz Curran is right when she protests that 'Community Legal Centres [are] a legitimate part of the legal landscape' (2007/2008 19); indeed, the state itself makes the claim (The Senate saw CLCs as 'a crucial part of providing access to justice for all Australians' (Rix 2005, 128), and the established legal profession advocate for the further entrenchment of CLCs in the legal landscape. But to announce CLCs as a legitimate part of the

legal landscape is effectively to announce that they finished as a force for fundamental change to that legal landscape.

CLCs have been almost enthusiastic to be defined in to the state's systems. CLCs are pleased to be represented on the boards of LACs (Giddings and Noone (2004, 266), but being there, they literally have a place at the table. They have been defined in by being made a legitimate, even a necessary, participant in the planning of legal service delivery (and therefore, in my own experience of being at the table as a CLC representative, party to allocating funds, managing reduced budgets, and implementing legal aid cuts).

All this is to say that CLCs have long been defined in to the state system against which they, or some of them were, at least to some extent, opposed. The terms of the relationship between CLCs and the state have absorbed CLCs, defining them in and removing any fundamental contest. There is no radical goal, no aspiration to challenge, fundamentally, the principles, presumptions and structures of the legal system. In Mathiesen's blunt and confronting terms, CLCs are finished as a revolutionary movement, if indeed they ever started out as such.

The law reform that is connected to CLCs' casework can, therefore, only ever be 'reform' of the established system. Although the rhetoric is of 'systemic change', that term is overblown and over-used. The system remains essentially the same, but reforms make it work better.

CLCs defined out

As well as defining CLCs in over a long period of time, more recently the state embarked on an explicit and powerful tactic of defining out, threatening CLCs (and all NGOs) with ostracism and being rendered irrelevant unless they remained aligned with the state.

Australia's conservative government in 1996-2007 used public choice theory (Staples in Barraket, 263-283) to characterise NGOs as driven by 'self' interest and opportunism, as making excessive demands on the state from outside the state's own accountability mechanisms, and thereby creating excessive expectations for secular interests. This characterisation of NGOs denies them a role in public policy debate because they are irresponsible, self-interested and external to 'proper' democratic processes of public policy formulation. The very purpose of public choice theory is to define *out* those organisations advocating for systemic change.

In relation to CLCs it was manifest in, for example, Attorney-General Ruddock's attack in 2006 on the work of CLCs (Rix 2007, 14) but more tellingly in the prescriptive terms of the purchaser/provider agreements signed by CLCs.

Louise Glanville anticipated this fear of ostracism, where CLCs have been driven by the purchaser/provider agreements, when in 1999 she said that 'the tendency in times of crisis may well be for organisations to focus inward to ensure a continued existence, rather than reaching outward for a survival which is meaningful' (Glanville 1999, 155). The inward focus leaves a movement finished as a force for serious, significant change.

A radical example: legal practice

Although CLCs are unable to challenge seriously the larger legal service system of which they are an integral part, there are smaller targets which CLCs could aim for within the discipline of Mathiesen's framework for political action. An example is in the CLCs' own achievement in redefining the legal institution of the lawyer/client relationship.

The following brief account draws on accounts written by Jud McCulloch, Jeff Giddings, MaryAnne Noone and Nicole Rich.

CLCs' challenged the dominant legal service model, delivering a 'distinctive … form of legal service delivery'.

The 'ways …early CLCs operated represented an implicit critique of the profession, both in the types of cases handles and in the refusal to concentrate on casework as a means of achieving reform'.

CLCs 'were a conscious alternative to other, existing forms of legal practice' (Rich 37 citing Weisbrot 'Australian Lawyers' 1989, 24), not only through volunteer participation, and a collective approach to addressing issues (Rich 38), but through the radicalism of their conception of legal practice, which 'saw access to legal assistance as a right' (Rich 37 citing Noone 'Activist Origins 2001, 133). CLCs had 'a different ideology to the procedural notion of 'access to justice' underlying support for government legal aid' (Rich 38).

These accounts show that at least for a time CLCs were a movement that actively campaigned for radical change in legal service delivery. The lawyer-client relationship is now different from what it was, due in large part to its radical reconception by CLCs. CLCs offered a model of legal practice which was contradictory to the prevailing model, and which genuinely competed with it. When, over time, that contradictory and competing model was adopted, CLCs as a force on this particular issue were finished, precisely because the reforms they sought were achieved. It was as if they had nothing more to say.

But that did not have to be so. The continuing development of models of legal services is not directly affected by state control though funding, although it might be vulnerable to the diverging identity of different CLCs. There are still fundamental aspects of the conventional lawyer/client relationship which CLCs are well placed to challenge and to reconceive. CLCs could still propose new ways of seeing legal practice, could exploit their indispensability to the legal landscape to challenge conventional rules of legal ethics, client capacity, restrictive practice, client privilege and so on.

A way forward

Mathiesen's political action theory offers not only an explanation of what has happened to CLCs as a force for systemic change, but also a way forward, enabling CLCs to consciously pursue radical reform. His framework is a conceptual model within which decisions – strategic choices – can be made. Every day, in their daily work, in case conferences and staff meetings and strategic planning, CLCs can ask of each issue that arises 'where does this fit within our political plan: is this a negative short term action which is a step towards our long term goal?'. 'Does this undermine our taking contradictory stance?'. 'Does this lessen the extent to which we offer a competing alternative?'. 'Is this grounded in the real experience of our constituency?'.

Glanville gave a clear example of where CLCs still have the capacity to be a credible competing voice when she reminded us that CLCs can and often do ground their proposals for change on the real experience of a constituency. CLCs' community engagement, she said, 'can potentially locate CLCs in an influential position at the margins of the legal system … guarding against the continuing cooption of CLCs' (Glanville 1999, 155). This gives CLCs access to a genuinely competing stance on a host of social and legal issues.

In one large and probably irrecoverable way, CLCs are finished; their integration with state legal service delivery has significantly compromised if not wholly negated their ability to radically alter the model.

But there are numerous other available targets for fundamental change which CLCs can address. Mathiesen's framework invites CLCs to engage in campaigns for change much more consciously, with self-awareness and discipline, determined to maintain a competing and competitive stance, and to resist both the inducements of conformity and the threats of ostracism.

CLCs can still avoid choosing to be absorbed, at least on specific issues. CLCs can still say to the state 'We have something to say to you but have no wish to align with you', and put the state in a position of having to say 'We disagree with you but cannot ignore you'. This is the finely balanced state of being unfinished which is at the heart of a sustained campaign for justice.

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