

TO COERCE OR TO COLLABORATE

Human rights lawyers relating with other professions

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This article aims to identify interdisciplinary work as a critical bulwark for the development and preservation of human rights. It encourages greater effort by legally-trained people when working with other professional groups, to foster sustainable and innovative interdisciplinary and interagency models of practice. Jim Ife framed social work as a human rights profession in his important book *Human Rights and Social Work*,¹ and we believe it is also essential for lawyers — particularly those of us who work in Community Legal Centres (CLCs) or otherwise self-identify as social activists — to recognise law as a human rights profession. Such analysis suggests it is imperative that human rights professionals work together to foster and further develop a culture of deep respect for broadly-defined human rights.

This article was conceived shortly after the August 2007 quarterly meeting between the Principal Solicitors of all NSW CLCs. The meeting was addressed by staff of the Human Rights Committee (HRC) at the NSW Legal Aid Commission (LAC) who wanted to both inform CLCs of the HRC's work and also invite referrals for the conduct of human rights test cases. This invitation apparently originated from a perception that CLCs refer fewer cases to the HRC than might be expected, given our broad catchment of socially and economically disadvantaged clients. Although CLC solicitors at the meeting generally considered the existence of the HRC to be a good thing, some reservations were expressed about the relevance of the human rights test case approach to the broad range of human rights issues faced by the majority of our clients.

The essence of these reservations is that almost none of the matters coming through the doors of CLCs will ever meet the criteria required for consideration by LAC's HRC.² Rather, we tend to see matters in which broadly-defined human rights are clearly prejudiced, but in a context that appears immune to engagement through courts, tribunals, the NSW Anti-Discrimination Board (ADB) or the Human Rights and Equal Opportunity Commission (HREOC). In the public sphere, these matters might involve clients who feel disempowered and disregarded by bureaucratic or business processes. Often, clients' abilities to understand bureaucratic or juridical systems and outcomes fall short of the capacities generally attributed to citizens by our social and legal institutions. In the private sphere, our matters primarily involve intractable violence, abuse and communication issues within and between families and other social groups.

Returning to the public sphere, many of our clients experience complex and coexisting cultural, social, mental health, learning and behavioural issues which decrease the likelihood that they will obtain satisfactory outcomes from government and non-government administrative processes. Although social disadvantage is often analysed in a human rights context, the remedies we generally focus on, as lawyers, are frequently (if not exclusively) based on the improvement of administrative practice through the implementation of rules, policies and procedures within individual agencies. But if the systems are followed and we are still left with sub-standard human rights outcomes — because the human interface between person and organisation is inadequate, and there is a *failure of relationship* — then there are generally no legal remedies available.

Perhaps one of the reasons we miss the opportunity to address these issues is because, as a profession, we often throw in our lot with the flawed analysis that the law is akin to a machine and, if properly calibrated and tuned, good outcomes will follow inevitably once the machine starts running. But the law is not a mere machine. At its most fundamental, the law is a (primarily coercive) method of structuring human relationships; in fact, it is not possible for laws to apply outside the context of human relationships. Although the law is concerned exclusively with guiding human relationships, the complexities of human relationships are not encompassed within the constraints of the law. There is a wide range of behaviour manifested in relationships that is lawful, and which satisfies government policies and procedures, but which nevertheless leaves much to be desired from a broadly-defined human rights perspective. It is this fissure between the edifice of the law and the reality of human relationships that causes many of our clients' problems.

As the failure is one of relationship, the skill-set best suited to addressing the issue is one not generally possessed or even valued by lawyers. The skills required are usually spread across the various social science, medical and education professions — and are the particular province of social workers, especially those with an advanced understanding of community development theory and practice. Just as we lawyers are constrained by our training, so are social science and other professionals. Our lack of a common language leads to a situation where a gap is inevitable between actual legal process and the human experience of those processes. Often other professionals will be

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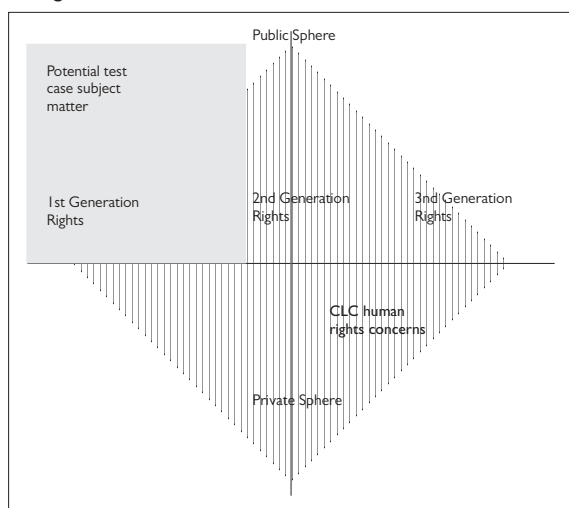
1. Jim Ife, *Human Rights and Social Work* (2001).
2. For further details on the criteria, see <www.legalaid.nsw.gov.au/asp/index.asp?pqid=758&cid=993&policyid=1&chapterid=3§ionid=2118> at 14 June 2008.

frustrated by (if not appalled at) the outcomes dictated by the law, but helpless to intervene in a useful way.

Primary human rights concerns for our clients

One possible way of mapping human rights issues, to capture some of the commonly dealt with systemic inadequacies, is to think of all human rights issues as falling somewhere along two axes. One axis is comprised of the so-called three waves or generations of human rights: these are generally defined as civil and political rights (first generation), economic social and cultural rights (second generation), and collective rights (third generation). The second axis is made up of the public and private spheres. Significantly, if a third dimension could be displayed, we might also depict an axis showing lawful and unlawful conduct. Most of the matters that potentially present as human rights test cases fall within a field delimited by first generation human rights on the one hand and the public sphere on the other. The issues that cause many CLCs grave human rights concerns, however, fall within a field that crosses all generations of human rights and includes both the public and private spheres.

Figure 1 The different human rights landscapes potentially covered by test case approaches and by CLC human rights casework



Many of our clients subjectively experience human rights abuse in circumstances where, on an objective analysis of the facts and in light of established legal principles, there is no unlawful human rights breach. Nevertheless we encounter strong feelings of grievance in response to these lawful human rights breaches. The perception that the more disadvantaged the client, the more our social institutions operate unfairly and erratically, is not only deeply entrenched but, in our experience, justified.

The depth of this issue is hinted at by the complaint statistics of the ADB, HREOC and the NSW Administrative Decisions Tribunal (ADT) that follow.³

Table 1 NSWADB: Outcomes of complaints finalised 2005–06

	No.	Per cent
Settled at or after conciliation	221	20.6
Settled before conciliation	125	11.6
Settled outside the Board	4	0.4
Referred to the ADT – conciliation unsuccessful or not suitable	115	10.7
Referred to ADT after 18 months	1	<1
Declined before investigation – not a contravention	221	20.6
Declined before investigation – not of vilified group	3	<1
Declined before investigation – out of time	21	1.9
Declined after investigation – s 92	51	4.7
Declined after investigation and referred to the ADT	30	2.8
Withdrawn s 92B	132	12.3
Abandoned	151	14.0
Total	1 075	100

3. All drawn from those organisations' 2005–2006 Annual Reports.

Table 2 HREOC: Outcomes of national complaints finalised over the past four years

	2002–03 (%)	2003–04 (%)	2004–05 (%)	2005–06 (%)
Terminated/declined	56	51	46	44
Conciliated	32	38	38	39
Withdrawn	11	10	16	16
Reported (HREOCA only)	1	1		1

Table 3 ADT: Equal Opportunity Division outcomes 2005–06

Withdrawn Dismissed/ Settled Dismissed/ No Appearance Dismissed	Summary dismissal under s 111, s 102D	Dismissed after hearing	Orders made	Total
82	5	19	10	116

From the above tables we can see that in 2005–2006 something like 32 per cent of cases before the ADB were settled, while a further 10 per cent were referred to the ADT after unsuccessful conciliation or if found unsuitable for conciliation. Obviously, we

cannot peer behind the 32 per cent of settled matters to determine how many produced an outcome that satisfied applicants. What we can say, however, is that 30 per cent of matters that came before the ADB were declined, 12.3 per cent withdrawn (presumably outside the conciliation regime) and 14 per cent abandoned — a total of 56.3 per cent. In other words, 56.3 per cent of people who felt aggrieved and sought assistance of the ADB did not obtain the result they were seeking, with over half of these people having their matters formally declined.

The figures for HREOC and the Equal Opportunity Division (EOD) of the ADT are somewhat more opaque, but it is clear that the majority of matters which come before HREOC are either terminated, declined or withdrawn (60 per cent in 2005–2006) and, of the matters that come before the ADT EOD for hearing, about two thirds are dismissed.

We are not offering the above analysis as a criticism of the ADB, HREOC or the ADT. In declining or dismissing matters, all three bodies operate within clearly-defined legislative frameworks, and without doubt the strong medicine of formal legal remedies needs to be carefully and frugally administered. What the statistics do suggest, however, is that a significant number of aggrieved people find themselves in a position where they are told it is unlikely they have been the targets of unlawful conduct, and therefore have no further official avenues open to them for addressing (as distinct from redressing) that sense of grievance.

Why is this? The ADB, HREOC and the ADT all deal with the protection of first generation human rights (in this case, primarily civil rights). Jim Ife points out that this particular activity is a natural field for lawyers; first generation rights ‘can be protected and guaranteed by laws, conventions, regulations and legal sanctions, and this has become the implicitly accepted way in which activists seek to guarantee’ them.⁴ In other words, all three bodies deal with first generation rights and determine where matters coming before them fall on the lawful/unlawful axis. Any grievance which relates to conduct on the lawful side of the axis, or outside the first generation of human rights, is therefore outside the job descriptions of these three agencies.

We need to be very careful however, in concluding that just because individual litigants had their matters dismissed, they were not experiencing genuine human rights problems. We also need to avoid adopting the legal-centric attitude that human rights issues which fall outside the narrow definitions of unlawful conduct or, more broadly, outside the boundaries of first generation rights, are beyond being dealt with by lawyers. As we indicated above, our legal system directs itself towards *redressing* grievances, but because of limitations inherent in its coercive application, without some revision, the legal system is not equipped to *address* grievances. Accordingly, if our strategies for developing and protecting human rights are entirely based on the traditionally framed operations of the legal system, then we might expect that many significant issues will fall between the bar stools. That is not to say

some appropriate revisions are not possible. In fact, it is our view that, on a variety of fronts, some very constructive revisions are indeed taking place, although inevitably these are collaborative strategies involving other professional groups.

Other challenges to a complaints-based, coercive system

Even within the first generation category, there are complexities inherent in our complaints driven legal model of addressing human rights issues, particularly when it comes to the allocation of public money:

- many issues that are the subject of current test cases (for example, visa cases involving refugees) are in fact triggered by deliberate legislative policies. We have to ask whether it is appropriate to address such laws indirectly through the judiciary rather than through more direct political approaches;
- in any event, the legislature can change the laws at will and by the passage of legislation materially alter the substantive law, thus potentially reversing gains that might have been obtained through judicial processes;
- test cases can be lost, as spectacularly demonstrated in the *Al Masri* case;⁵
- litigation is expensive;
- emphasizing litigation as the mainstay of human rights practice in our culture maintains our system as complaints-based, rather than compliance-based;
- public resources are scarce, and a better use of those resources may be to leave the conduct of these matters to the pro bono departments of large law firms and the private bar; and
- legal interventions are coercive and top down, and it can’t be taken as given that they thereby effect genuine social change.

On this last point, it is important to note that our legal system is an expert-based system, and the results of test cases — judgments — are resources that generally can only be reliably used by lawyers. In fact, the majority of legal resources are not even available to all lawyers. In the case of Elizabeth Evatt CLC (EECLC), for example, our access to basic commentary on legislation and case law is strictly limited by our ability to buy subscriptions from the major legal publishers. Given our budget, subscriptions are only taken out over publications that cover our primary areas of casework — family law and employment law. Even so, as lawyers we are still in a far better position than the majority of citizens in this democracy.

The preceding paragraph notwithstanding, judicial decisions obviously do have an effect on the broader culture, but this is generally indirect and, to a degree, somewhat fragile. As indicated above, a hostile government can change the law or, for example, attempt to reframe the way the separation of powers doctrine works, as did several senior state and federal politicians in response to the *Wik* case and decision.⁶ If our society relies on the exoskeleton of legal principle rather than on building an intrinsic resilience within our community — that is, a culture of respect for

4. Ife, above n 1, 29.

5. *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54.

6. See, eg, Robert McLelland, ‘In Defence of the Administration of Justice: Where is the Attorney-General?’ [1999] *University of Technology, Law Review* 13.

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human rights — we leave our human rights exposed to unavoidable periodic shifts in the balance of political power. As we suggest below, there are more direct and perhaps less fragile ways of achieving cultural change.

When thinking about the utility of test cases, it is important not just to examine the activity of running a case, but to also look at the structural decisions involved in making resources available to litigants. Do we passively wait for test cases to arise or, as is the case currently with the HRC, do we actively go looking for them?

It is our opinion that test cases present as an attractive option to lawyers because they provide a form of intervention in human rights issues which fits well with our day-to-day work. However, this begs a significant question: are we genuinely interested in fostering a society where the risks of human rights abuses are minimised, or are we more concerned with pursuing interventions that lie squarely within our own areas of professional expertise?

These are not reasons to abandon the pursuit of test cases, but they are reasons to be conservative in our views about their ultimate utility and exercise caution in allocating substantial public resources to their prosecution. Unless it can be shown there are significant cultural results that flow from the prosecution of test cases, greater efforts to support broadly-defined human rights through a variety of non-litigious initiatives ought to be investigated, particularly addressing systemic problems that operate below the ceiling of unlawful conduct.

Obstacles to successful non-litigious, collaborative approaches

One of the key issues that emerged from the Law & Justice Foundation's *Gateways to the Law* study⁷ related to the network participation of not-for-profit legal and non-legal agencies delivering free assistance to clients with legal problems. The benefits of effective networking identified by the study included:

- clarification of roles;
- more appropriate referrals;
- sharing of resources; and
- increased access to the expertise of other workers.⁸

However, this study also noted that:

while there were a number of examples of strong networks, access to and participation in networks varied.

There appeared to be a lack of cross-sectoral networks between agencies assisting clients with legal problems.⁹

If collaboration is such a good idea, why didn't Scott and Sage find more of it? Our own experience over the years suggests a blunt answer: collaboration is easier said than done and there are significant difficulties that emerge in attempting to make the process work.

Scott and Sage note that the following factors can assist in developing networks:

- commitment and resourcing for networks at both individual and central agency level;
- allocation of adequate time to building networks;
- participation of all relevant stakeholders;
- clear boundaries, either geographic or by area of specialisation;
- regular face-to-face contact through conferences and interagency meetings, with email and newsletters to provide ongoing support;
- participation in the management committees of other agencies; and
- co-location of services.¹⁰

This is good commonsense advice, but is it really enough to get most collaborations over the line? The short answer is *no*, not because Scott and Sage's advice is wrong, but because it doesn't take into account some highly confounding spanners-in-the-works.

Empirical research in the social sciences is replete with descriptions of the sometimes overwhelming complexity that arises in collaborative enterprises.¹¹

This frequently leads to what might be referred to as 'collaborative inertia',¹² of which some symptoms are certainly mentioned by Scott and Sage,¹³ though without specific reference to the broader social science literature. According to Huxham and Vangen,¹⁴ some of the key factors leading to collaborative inertia are difficulties in:

- negotiating joint purpose because of the diversity of organisational and individual aims which those involved bring to the collaboration;
- communicating because of differences in professional (and sometimes natural) languages and organisational (and sometimes ethnic) cultures;
- developing joint modes of operating given that partner organisations inevitably operate quite different internal procedures;
- managing the perceived power imbalances between partners and the associated problem of building trust;

7. Sue Scott and Caroline Sage, *Gateways to the Law: An Exploratory Study of How Non-Profit Agencies Assist Clients with Legal Problems* (2001).

8. *Ibid* 101–102.

9. *Ibid* 102.

10. *Ibid*.

11. For example, Siv Vangen and Chris Huxham, 'Nurturing Collaborative Relations: Building Trust In Interorganizational Collaboration' (2003) 39(1) *The Journal of Applied Behavioural Science* 5; Margot Rawsthorne, 'Working Collaboratively? The Community Sector and Universities' (Paper presented at the Communities and Change Research Festival, University of Sydney, October 2007).

12. Chris Huxham and Siv Vangen, 'Ambiguity, Complexity and Dynamics in the Membership of Collaboration' (2000) 53(6) *Human Relations* 771.

13. Scott and Sage, above n 7.

14. Huxham and Vangen, above n 12, 773.

- managing the accountability of the collaborative venture to each of the partner organisations and to other constituencies while maintaining a sufficient degree of autonomy to allow the collaborative work to proceed; and
- the sheer logistics of working with others who are based in physically remote locations.

Problems with membership structures can have further negative impacts on all of the above factors. In the context of examining inter-organisational collaborations tackling social issues, Huxham and Vangen suggested that significant inertial pressures flow from problems such as confusion over the status of different members within the collaboration, changes in staffing at member organisations, mismatches between members' agendas, and shifting obligations to funding bodies.¹⁵

Many of these issues are unavoidable, so the strategies recommended by social science literature to deal with their confounding influence often involve a recognition of complexity and commitment to consciously and maturely working through the resulting obstacles, particularly those involving issues of trust¹⁶ and inequality of power.¹⁷ This clearly requires some virtuosity in managing the demands of human relationship. Relationship is the very essence of human culture, and if systems don't foster and support human relationships it is difficult to see how those systems can possibly support collaboration between professions and agencies, much less the protection of human rights. On the positive side, however, good relationships seem to be what most people in human services organisations want to develop. By way of illustration, a recent report into the delivery of services to young people noted that:

information is only one element of communicating with others; workers consider that developing connectedness, trust and strong relationships with other services is an essential step towards making appropriate referrals.¹⁸

Nevertheless, Rawsthorne¹⁹, Huxham and Vangen²⁰ have pointed out that establishing the groundwork necessary for effective collaboration comes at a cost, including the need for an investment in resources and time, and significant managerial skills and goodwill between participants and organisations. Margot Rawsthorne notes many attempts fail, and that 'unproductive collaborations come at a serious cost, taking time from other activities that may have better social change outcomes'²¹. Sobering stuff. Plainly, even with a clear understanding of both the challenges and strategies developed in a variety of social science disciplines, the prognosis for many collaborations is not good. This is the case particularly for client groups with complex needs, such as people with mental health issues. To put it bluntly, flying by the seat of our pants is a very bad strategy to adopt if we are seeking to derive collaborative advantage in our work with disadvantaged clients.

But although some literature from the legal sphere alludes to the social science literature and challenges faced by collaborations,²² some of the most significant studies do not look beyond literature generated by

lawyers and law-focussed bodies,²³ and 'flying by the seat of our pants' seems to be precisely the default strategy of many collaborations with a legal service delivery emphasis. So it is probably not surprising at all that Scott and Sage found 'a lack of cross-sectoral networks between agencies assisting clients with legal problems'.²⁴

We believe that a great deal more interdisciplinary effort should be directed at identifying the necessary ingredients for successful legally-focussed collaborations. Given the cautions contained in social science literature, we also feel emphasis should be placed as much on building the skills and supports necessary to improve the capacity of individuals to develop relationships both formally and informally as is placed on strategies to tackle human rights concerns directly. For example, we lawyers receive precious little formal training in interpersonal skills; perhaps it's time this training deficit was addressed.

To fill the picture out a little, current initiatives and approaches that focus on developing organisational and inter-organisational communication and relationships (whether or not self-consciously identified as human rights strategies) include:

- **The Coexisting Offenders Program:** This program is run through NSW Probation and Parole, in a number of regions including Bathurst and Newcastle, for offenders with mental health issues (including head trauma) coexisting with drug and alcohol abuse. The program aims to link service providers, including Health and Housing, through case conferencing and effective referral.
- **The NSW Youth Drug and Alcohol Court:** The Court's programs involve day-to-day collaboration between Juvenile Justice, the Department of Community Services, Justice Health, LAC, and other agencies. Because of the high level of collaboration involved, and the intensity of the work performed by the Court, the program is expensive and requires substantial administrative support. Nevertheless, an evaluation conducted in 2002 found that, within the first two years of the program's operation, 39 per cent of participants completed the program successfully and most participants reported a decrease in drug use and an improvement in their mental health.²⁵
- **Youth Justice Conferencing:** This is a diversionary program under the *Young Offenders Act 1997* (NSW), originally inspired by a traditional Maori practice that requires offenders to meet with the people who have suffered as a result of their actions. Conference conveners are usually community members drawn from outside the justice system, contracted to organise and facilitate conferences on a periodic basis. There has been a particular emphasis on recruiting and training Indigenous conveners and people from culturally and linguistically diverse backgrounds.²⁶
- **The Cooperative Legal Service Delivery Model (CLSDM):** This initiative is currently coordinated by the NSW LAC to develop regional partnerships involving government (Legal Aid, courts and tribunals), community groups (CLCs, Indigenous

15. Ibid 778.

16. Vangen and Huxham, above n 11; Rawsthorne, above n 11.

17. Rawsthorne, above n 11.

18. Far Chiang and Matthew Tyne, *Spinning the Web: Better Connections between Services Working with Young People* (2006) NSW Centre for the Advancement of Adolescent Health <www.caah.chw.edu.au/resources/spinning_the_web.pdf> at 6 June 2008.

19. Rawsthorne, above n 11.

20. Huxham and Vangen, above n 12, 800.

21. Rawsthorne, above n 11, 9.

22. For example, Scott and Sage, above n 7.

23. For example, WestWood Spice, *Evaluation of the Cooperative Legal Service Delivery Model (CLSDM) Pilot* (2005) NSW Legal Aid Commission <www.legalaid.nsw.gov.au/data/portal/00000005/public/13935001128470643765.pdf> at 6 June 2008.

24. Scott and Sage, above n 7, 102.

25. Youth Drug and Alcohol Court website <www.lawlink.nsw.gov.au/youthdrugcourt> at 13 June 2008.

26. NSW Department of Juvenile Justice's website <www.djj.nsw.gov.au/conferencing.htm> at 13 June 2008.

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legal organisations, tenancy workers etc), private lawyers (Sydney and local) and quasi-legal service providers (financial counselling services, Family Violence Protection Units, etc). The aim is to improve disadvantaged community members' access to effective legal services by improving referral networks, identifying gaps and dovetailing the delivery of related services.²⁷

- **WA Legislative Assembly Community Development and Justice Standing Committee Inquiry into Collaborative Approaches in Government:** This committee is currently investigating ways community services can be delivered more effectively by engaging in partnerships and collaborations across the government, community and private sectors. The committee has drawn particular inspiration from 'joined-up' models of government service delivery currently being developed in the United Kingdom.²⁸
- **Educational and workplace responses to bullying:** Another framework for examining human rights is from the perspective of the enormous amount of work undertaken in recent years on bullying, in both playground and workplace. Interestingly, it is often blandly asserted that bullying is simply one of many kinds of human rights abuses. In fact, the relationship is far more comprehensive, to the extent that we believe all human rights abuses are instances of bullying. Ken Rigby defines bullying as 'repeated oppression, psychological or physical, by a more powerful person or group of persons'²⁹. Given this, it's to our advantage to examine strategies for improving outcomes currently being tested in schools and workplaces. Interestingly (since they are the approaches that most mimic the functioning of the legal system in the broader culture), the least effective long-term outcomes are derived from non-systemic approaches which focus on either the bully or the victim. The most commonly accepted approach is now to support the emergence of a culture hostile to bullying.³⁰

Conclusion

The traditional litigious approach to protecting human rights necessarily focuses on first generation, public sphere rights. While this approach has some virtue, it neglects second and third generation human rights, as well as human rights concerns that fall in the private sphere. Supporting the development of a culture of respect for broadly-defined human rights requires lawyers to do more than simply pursue the narrow

range of strategies available to us from within the scope of our traditionally-defined skill set. If we are to become members of a genuine human rights profession, we need to proactively seek out and develop collaborative alliances with other professions such as social work, health and education, with potentially strong human rights values. Authentic collaboration is beset by numerous complex obstacles, and entails more than simply working under the same roof or with the same clients. The refinement of already existing strategies will require continuing work at both academic and practice levels, and will necessarily entail a preparedness to cross academic corridors and transcend professional boundaries. Most importantly, the promise offered by collaborative work will not be realised unless we are prepared to do the groundwork and develop some virtuosity in interpersonal skills.

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27. See Westwood Spice, above n 23 for an evaluation of the CLSDM.

28. WA Legislative Assembly Community Development and Justice Standing Committee Inquiry into Collaborative Approaches in Government <www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Legislative+Assembly+-+Current+Committees> at 6 June 2008.

29. Paul McCarthy et al (eds), *Bullying: From Backyard to Boardroom* (2001) 1.

30. *Ibid.*

Justice, human rights and crime writing

From 18 to 20 July, the inaugural Crime & Justice festival will take place at the Abbotsford Convent in Melbourne. The festival will be a celebration and promotion of contemporary writing and thought in the interlinked and complementary fields of social justice and human rights, and the literary genre of crime fiction.

With a strong line-up of participants — both creative and legal — the festival will provide a forum for the public, writers, social commentators, judicial luminaries and the legal profession to come together.

International patron for 2008 is Brendan Kilty SC, barrister and owner of James Joyce House in Dublin. He will be joined by Irish crime writer Declan Hughes, and a raft of speakers and sessions will spotlight justice, human rights and crime writing.

For more information, check out the website at <www.crimeandjusticefestival.com/>

