

## **Thoughts and Themes**

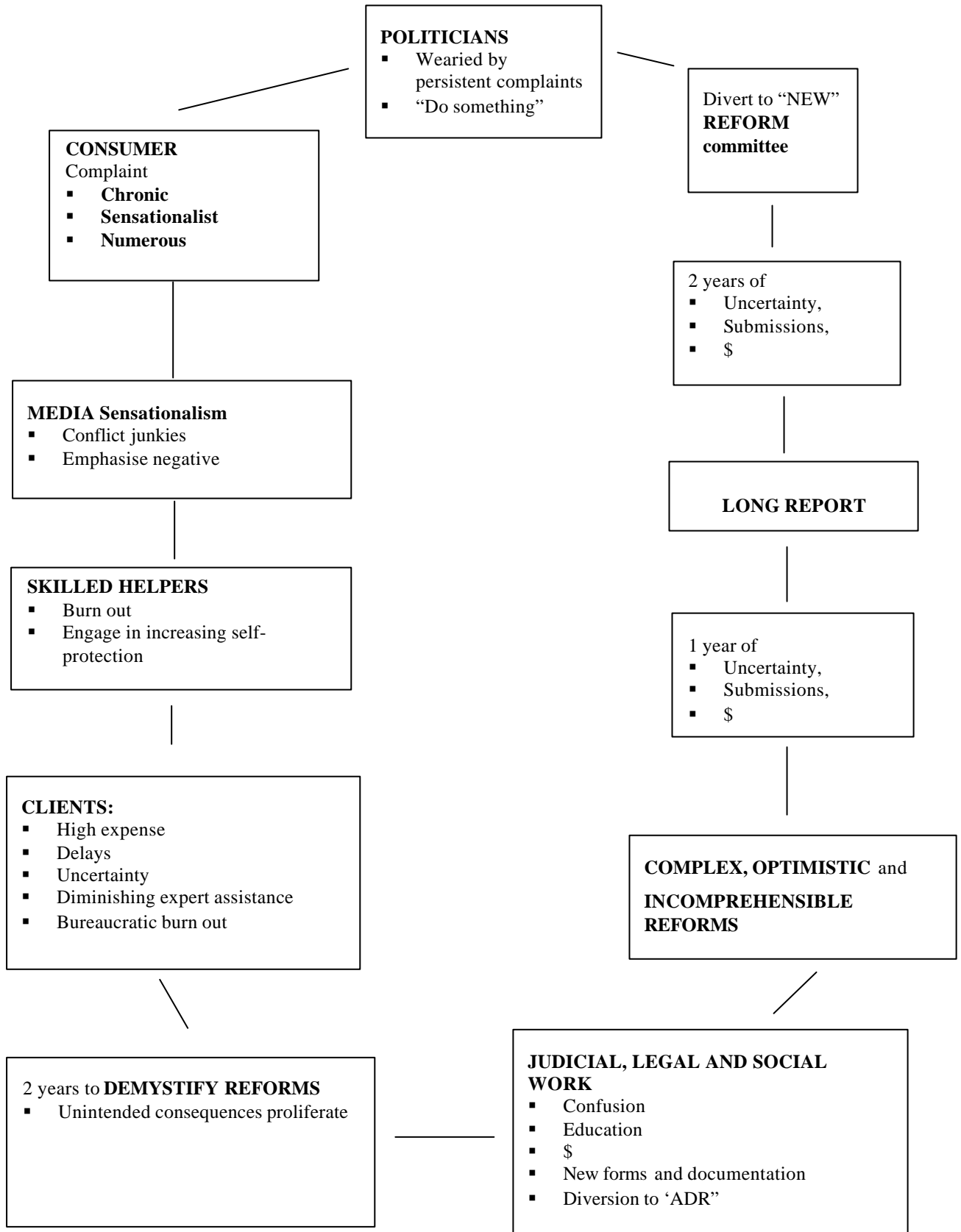
### **COLLABORATIVE LAWYERING - SOME PRELIMINARY THOUGHTS FOR AUSTRALIA**

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#### **(A) Collaborative Lawyering – Sociological and Historical Contexts in Australia**

##### **Unceasing Change**

In Australia and elsewhere, private and public responses to family conflict have been changing constantly over the last 45 years. The attached diagram illustrates the increasing cycle of change. Many lawyers suffer from “reform fatigue”.



As legislation, funding and courts change, so do the dispute resolution products, in new or recycled forms. These have included a variety of forms of counselling, home reports, round table conferences, case appraisal, legal aid conferences, arbitration, a variety of forms of mediation, case management, pathways to justice, court annexed conciliation etc.

Each new product tends to go through a predictable “product” cycle as follows:

Multiple horror stories and even statistics about the disadvantages of “old” dispute resolution services; design of new product in USA; wonder stories from USA; charismatic presenters at the multiple Australian family law conferences; no systematic surveys to back up any wonder stories; disorganised anecdotal resistance by older practitioners; zealots and disciples for government funding of a new product; training, training, training; books, tapes, videos; accreditation debates; charismatic pioneers advertising the product and writing articles which footnote each other; false comparisons of worst “old” practices to best “new” service; little or no research; many anecdotal success stories; gradual disillusionment of clients and practitioners as horror stories, expense, delay, unsatisfied customers emerge; subspecies of the product emerge; law reform commission questions; a few judges are asked to rule on procedure in the new product; nervousness and insurance emerges; less charismatic scientific researchers begin to publish the traditional questions about definitions and evidence; quality management guidelines and regulations emerge; a few hard working and respected practitioners remain in business; the new product and its subspecies become “old”; its alleged advantages and disadvantages become part of orthodox literature, research and gossip; practitioners revert to more traditional services; universities begin to teach about the product; the charismatic pioneers die, disappear or move onto another product; the conference circuit looks for new products; the critiques of the now “old” products escalate in newspapers, media and gossip; (repeat the cycle).

This cycle of change is normal, inevitable and has some helpful features.

Collaborative lawyering comes to Australia in this historical, sociological and psychological context. Presumably it will follow a similar cycle and collaborative lawyering and its offspring will find a modest place in the catalogue of dispute resolution services. A few respected and hard-working legal practitioners will eventually regularly provide the service of collaborative lawyering in some corners of this country.

## **(B) What is “Collaborative Lawyering”?**

Like all new or old movements, processes or ideas, collaborative lawyering has a “core”, and then a huge number of potential variations. Like mediation, psychology, lawyering and plumbing, it has an ABACUS of variables.<sup>1</sup>

One possible description of collaborative lawyering is a diplomatic process of joint problem-solving by lawyers and clients which includes the necessary requirement that the lawyers and other helping experts contract never to act as litigators if the diplomacy is unsuccessful.

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<sup>1</sup> Every “new” process has multiple steps which can be varied occasionally, frequently or never like beads on an abacus based on habit, ideology, marketing or diagnostic choice. See J H Wade, “Mediation – The Terminological Debate” (1994) 5 *Australian Dispute Resolution J* 204.

The core element, to which many variations can be attached, is that by contract or court order, the lawyers and other experts are precluded from further involvement or income-earning if the conflict is not resolved by diplomacy.<sup>2</sup> They are employed only as skilled diplomats, and cannot switch hats to another role as advocates or warriors. In Australia, this would be a unique structural experiment by limiting the role of lawyer to an exclusive negotiator-problem solver.

### **(C) Alleged Advantages and Disadvantages**

This core structural limitation on the role of lawyers and helpers, **potentially** has the following advantages and disadvantages:

#### **Alleged Advantages for Clients, Lawyers and Society**

- (1) Places pressure on collaborative lawyers to upgrade their skills and processes in relation to communication, problem solving and diplomacy.
- (2) Removes **one** conflict of interest between lawyers and clients, namely that even if a lawyer manages negotiations badly or clumsily, (s)he is not sacked. Rather, (s)he is paid well as a consequential litigator.

This profitable sequential multi-skilling is like a doctor saying: “Even if I poison you with inappropriate drugs, I still get the well-paid job as your stomach-pumping restorative surgeon”.

[N.B. However collaborative lawyering brings new lawyer-client conflicts of interests of its own, familiar to the mediation movement. For example, “as long as I keep negotiating, I keep getting paid”.]

- (3) Assists to market lawyering services to clients who are suspicious of “churning” and inflammatory profit-making by aggressive lawyers. A collaborative lawyer can honestly market himself/herself by saying “I will lose my client/my income/my reputation if I am aggressive. Moreover, I will lose all of these if I cannot respond very skilfully and manage any aggression from other lawyers, their experts and clients”.
- (4) Like mediation and negotiation, some training and role modelling in collaborative lawyering will have a spill-over effect into other areas of legal practice. Lawyers will incorporate some of the diplomacy skills back into their traditional negotiation-problem solving-litigation practices.
- (5) All new movements have a series of important benefits including enthusiasm, publicity, hard work, collegiality, skill development, reinvigoration of jaded practitioners, increase in competition, research, self reflection, and conference euphoria. All of these benefits also have dark sides.
- (6) Ideally, a collaborative lawyer might be the “first stop” for a person in conflict. (Similar hopes are expressed by specialised lawyers and mediators). Therefore there may be less escalation of the conflict at the time of this early diplomatic intervention.
- (7) All the other alleged benefits and skills of collaborative lawyering appear to be similar to the claims and skills of the various kinds of negotiation, round table conferences, specialist family law accreditation, counselling, mediation, conciliation, early neutral evaluation and arbitration. These benefits include

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<sup>2</sup> See P Tesler, *Collaborative Law*, ABA, 2001; *Family Mediation News*, Summer 2003.

client control, client empowerment, preservation of long term relationships, less expense, less delay, less uncertainty, less stress, more focus on the interests of children, less publicity, more creative outcomes, sense of being listened to, more informed decision-making, early rather than late intervention, early rather than late resolution, higher compliance rates, more job-satisfaction for skilled-helpers etc.; and standard skills include preparation, planned ritual, active listening, reframing, care with language, structured meetings with key players present, coaching of clients, etc.

Only a few of these predictable anecdotal claims have been confirmed by extensive research in relation to certain types of structured counselling and problem-solving models of mediation.<sup>3</sup> It is likely that the skilled “collaborative lawyers” who are regularly employed exhibit the same outstanding communication skills shown by other skilled and regularly employed lawyers and mediators.

The anecdotal success stories related to collaborative lawyering raise the classic questions attached to any new euphoric service product. “Success” – compared to what? What control groups? How is “success” defined? How is “success” measured? What factors apart from the new process are possibly/probably causing “success”? Are the worst of the old products being compared with the best of the new? How will the new product survive the normal ageing and institutionalisation processes?

- (8) Who previously did the dispute resolution work for the small niche of families who now employ collaborative lawyers? Is the answer that they employed no lawyers, but rather acted for themselves? If so, then collaborative lawyering is skilfully marketing dispute resolution services to a new group, who formerly exited the pyramid of conflict without professional services.
- (9) Disciples of collaborate law will bring some refined diplomacy skills into certain geographical areas and cultures which have been relatively untouched by various waves of mediation and mandatory early conferencing.

#### **(D) Alleged Disadvantages of Collaborative Lawyering for Clients, Lawyers and Society**

The core structural limitation on lawyers and other experts from “changing hats” from diplomat to formal advocate potentially has the following disadvantages.

- (1) It is arguably only suitable for a very small client group (see “diagnostic factors” later).
- (2) It therefore self-selects those conflicts which are “easier” to settle, and leaves more difficult or escalated conflicts to other service providers.
- (3) It has a risk that some collaborative lawyers will negotiate for too long, or in diagnostically inappropriate cases, in order to earn fees.

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<sup>3</sup> Eg see Kelly, J. “A Decade of Divorce Mediation Research – Some Answers and Questions” (1996) 34 *Family Conciliation Court Review* 373; *Federally-Funded Family Mediation in Melbourne – Outcomes, Costs and Client Satisfaction* (1995); *Federally-Funded Family Mediation in Sydney – Outcomes, Costs and Client Satisfaction* (1996).

- (4) It can be used as a tactic to delay, or to disqualify involved expert lawyers, valuers or psychologists from subsequent litigation.
- (5) It raises expectations unrealistically that negotiators will suddenly be generous, skilled, problem-solving, interest based bargainers. Nearly all interest based negotiations make skilful or clumsy transitions to packaged solutions (or “positions”).
- (6) Like highly skilled barristers, valuers, counsellors or mediators, there will be an inevitable shortage of highly skilled collaborative lawyers. This will cause waiting lists for clients (particularly in remoter areas), and will cause the less skilled to practise thereby discrediting the name of “collaborative lawyering” (compare lawyers, doctors, mediators, counsellors). It requires very uncommon skills to be a respected diplomat.
- (7) Horror stories and judicial supervision will slowly emerge in relation to the diverse behaviours conducted under the title “collaborative lawyering”.
- (8) Many lawyers will be reluctant to be labelled “collaborative lawyers” as the market will move towards a skilled few; and because there is more stable money to be made by being a traditional multi-skilled negotiator-litigator-problem solver.
- (9) Despite the many attempts to educate clients and other lawyers, there will be ongoing market confusion about what are the various models of collaborative lawyering (compare “mediation” confusion also).
- (10) Collaborative lawyering will never be mandatory for clients in conflict, and therefore widespread education and confidence is unlikely. (Again, compare how common some form of mandatory mediation has become in all areas of conflict in Australia.)
- (11) The ideas of peace and harmony, coupled with wonder-stories and litigation trauma, will attract some zealous ideological practitioners who will bring the movement into disrepute.
- (12) In the narrow group of clients who try collaborative lawyering process, and yet do not settle reasonably quickly, there will be the shock of hiring and paying for a second set of lawyers and experts. These horror stories will inevitably lead to blaming and claiming against the “deceitful” and “unreasonable” opposition, and possibly against disappointed lawyers.
- (13) The raw legal costs attached to the multiple meetings in the collaborative lawyering model and practice seem to be high.

### **(E) Diagnosis**

Which clients/conflicts is collaborative process suitable for? Arguably, all the following criteria need to be satisfied:

- (1) **Both** clients want to settle, and have some flexibility and problem-solving skills.
- (2) **Both** clients are trustworthy and are **perceived** to be trustworthy.
- (3) **Both** clients are confident that the other will make “full disclosure”.

- (4) **Both** clients have enough money to hire two new sets of lawyers and experts if no settlement occurs.
- (5) **Both** clients hire available, experienced, dedicated, collaborative lawyers.
- (6) **Both** clients have strong interests in good future relationships with each other and with children.
- (7) **Neither** client suffers from deep grief; psychiatric disorder; drug or alcohol problems; desire to win or punish; domestic violence; history of dishonesty.
- (8) There is no history of **persistent** conflict between the parties.

### **Questions**

- (1) What percentage of your current files would be suitable for collaborative lawyering, if the above criteria are correct?
- (2) How would you try to persuade that percentage of clients to try this process?

### **(F) “Success” of Collaborative Lawyering Compared to X?**

Like all new or rediscovered dispute resolution services, collaborative lawyering claims to be “better” than what has gone before (X). “Better” includes more settlements; less expensive, faster, more-creative settlements; more preserved relationships; more client control; etc. Moreover, it predictably makes unhelpful contrasts with “litigation”, when the most important comparison should be with negotiated family settlements, either pro se or lawyer-assisted.

However, it is unlikely that any of these predictable anecdotal claims will ever be validated by systematic studies. This is at least because:

- The standards and competence of collaborative lawyers will vary greatly.
- Collaborative lawyering is “suitable” to only a small range of disputes and clients
- It is impossible to create random control groups from this small range of clients to be serviced by equally competent psychologists, lawyers, registrars, various types of mediators, doing nothing etc.
- With the passage of time, collaborative lawyering will be subjected to a number of standard institutionalised, post-pioneer, post-charisma transitions which will change the nature of collaborative behaviour (see the following chart of analogies in the mediation movement).

Meanwhile, like the early 1980s handbooks on mediation, beware of the propaganda and over-selling contained in early collaborative law handbooks.

In Australia, collaborative lawyering is likely to be a minor wave in the important ongoing movement of multi-skilling lawyers and their clients to be diagnostically wise Dobermans and diplomats.

**FORMALISATION OF A NEW MOVEMENT  
(e.g. MEDIATION; ARBITRATION  
COLLABORATIVE LAWYERING??)**

-	INFORMAL	?	FORMAL
-	RISK TAKING	?	RISK AVERSE
-	FLEXIBLE	?	RIGID
-	ANTICIPATE SUCCESS	?	ANTICIPATE FAILURE
-	FEARLESS	?	FEARFUL
-	<u>UNINSURED</u>	?	<u>HEAVILY INSURED</u>
-	FEW/NO SANCTIONS OUTSIDE MARKET	?	SUBJECT TO MULTIPLE SANCTIONS
-	FREE TRADE	?	MONOPOLISTIC
-	NO PRINT	?	FINE PRINT
-	<u>MULTI DISCIPLINARY</u>	?	DOMINATED BY LAWYERS
-	GRASS ROOTS	?	EXPERT DOMINATED
-	GRASS ROOTS	?	UNIVERSITY CONNECTED
-	INEXPENSIVE WONDER STORY	?	EXPENSIVE, HORROR STORY AND RESEARCH
-	RECOMMENDED DUE PROCESS	?	OBSESSIVE DUE PROCESS
-	CHARISMATIC	?	BUREAUCRATIC