

REPOSITIONING THE LEGAL PROFESSION IN ADR SERVICES: THE PLACE OF COLLABORATIVE LAW IN THE NEW FAMILY LAW SYSTEM IN AUSTRALIA

ANNE ARDAGH*

One of the latest developments in the legal profession is the advent of collaborative law which commenced in the United States and Canada in the 1990s and was introduced in Australia in 2005. Collaborative law is a natural progression for lawyers within the changing landscape of dispute resolution in Australia. This paper examines the development of collaborative law particularly in family dispute resolution. It then seeks to critically assess its suitability by raising questions concerning the role of lawyers and Australian consumer needs, the costs and accessibility of collaborative practice, ethical issues concerning the repositioning of the legal role and the need for national guidelines. It suggests that it is too early to draw conclusions without empirical research.

I INTRODUCTION

Prior research has examined the changing role of the legal profession with regard to the incorporation of alternative dispute resolution practices (ADR), including mediation, into the profession.¹ ADR has been accepted and is now regarded as respectable within

* Associate Professor in Law, Charles Sturt University. The author has been a practising mediator since 1993 having originally studied dispute resolution in the United States; is accredited with NSW Community Justice Centres; NSW Legal Aid Commission; NSW Health Conciliation and is a registered family dispute resolution practitioner (FDRP) with the Commonwealth Attorney General. She is a member of the State Bar of California (non-practising) and the coordinator of a distance education postgraduate course in dispute resolution and may be contacted at aardagh@csu.edu.au. The author acknowledges the input from many mediators and legal practitioners during the preparation of this paper. Particular thanks are due to Lois Clifford, family lawyer, Canberra; Keith Roberts, lawyer/mediator, Wagga Wagga; Katrina Spyrides, Executive Officer, Conflict Resolution Services, Canberra and Marion Korn, Ontario collaborative lawyer, mediator and trainer.

¹ A Ardagh and G Cumes, 'Lawyers and Mediation: Beyond the Adversarial System?' (1998) 9 *Australasian Dispute Resolution Journal* 72; M Scott, 'Collaborative Law: A New Role for Lawyers' (2004) 15 *Australasian Dispute Resolution Journal* 207; A Ardagh and G Cumes, 'The Legal Profession Post-ADR: From Mediation to Collaborative Law' (2007) 18 *Australasian Dispute*

the legal profession.² The large number of lawyers having undertaken mediation and other ADR training is recognition of the changes that the profession has been grappling with.³ In general terms dissatisfaction with the legal system has led to many changes in Australian legal practice.⁴

Mediation and other ADR processes are booming in Australia with every sector of society from courts to business, professions, government and industry providing for ADR methods. These processes often focus on non-legal resolution using non-legal practitioners and methods of resolution, involving parties negotiating together, that are informal as well as cheaper, more efficient and effective and more satisfying to clients than legal 'solutions'. These changes in dispute resolution have occurred so rapidly that Australia could be said to be in a 'post ADR' period where all methods of dispute resolution are being accepted as a normal part of resolution of disputes, legal and otherwise, and have become increasingly institutionalised.⁵ This has led to a rivalry between what might be more broadly called facilitative mediators or dispute resolvers on the one hand, and lawyers using evaluative or settlement methods of mediation on the other.⁶ The professionalisation tensions are also present between legal and non-legal practitioners in the family law area. This has been the focus of recent research findings in the Enhancing Inter-Professional Relationships in a Changing Family Law System Report which found 'significant misunderstandings and tensions between the two groups'.⁷ The Report will be discussed further below.

It is not surprising that for many practising lawyers there has been a reluctance to refer their cases out to mediation and an eagerness to adopt more informal methods of dispute resolution themselves, even though this can create a dilemma and a confusion of roles for them.⁸ This may be less of a dilemma where a law firm can adopt a 'toolbox'

Resolution Journal 234. See generally C Sampford, S Blencowe, and S Condlln (eds), *Educating Lawyers for a Less Adversarial System* (Federation Press, 1999); N Spigel, 'Australian Lawyer Attitudes Towards Mediation; Implications for Training and Education' (Paper presented at the International Association for Conflict Management 10th Annual Conference, Bonn, Germany, June 1997).

² D Spencer, 'Interview with Dr Tom Altobelli, Federal Magistrate' (2007) 9(7) *ADR Bulletin* 121, 121; J Gleeson, 'Should the New South Wales Bar Remain Agnostic to Mediation?' (2007) *Winter Bar News* 38.

³ J Pollard, 'Collaborative Law Gaining Momentum' (2007) 45(5) *Law Society Journal* 68, 72. Pollard notes that 20 000 lawyers have undertaken mediation training since the 1980s, although few practise as mediators.

⁴ H Rhoades et al, *Enhancing Inter-Professional Relationships in a Changing Family Law System*, (Final Report, University of Melbourne, 2008) 3 (hereinafter 'Enhancing Inter-Professional Relationships Report'). The Report notes that behind the reforms in family law were concerns about the apparently high levels of consumer dissatisfaction with the legal system (citing the House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003) (hereinafter 'Every Picture Report'), as well as the damaging effect of conflict on children.

⁵ Ardagh and Cumes, 'The Legal Profession Post-ADR', above n 1, 205.

⁶ N Alexander (ed), *Global Trends in Mediation* (Kluwer Law International, 2nd ed, 2006) 32-4, discusses the professionalisation tension. This tension within the mediation area in Australia may be like the rivalry that grew up in the family area between counsellors and mediators when the Family Court developed mediation options.

⁷ Rhoades et al, above n 4, iv.

⁸ Lawyers' roles in mediation have been canvassed in B Sordo, 'The Lawyer's Role in Mediation' (1996) 7 *Australian Dispute Resolution Journal* 20; Ardagh and Cumes, 'Lawyers and Mediation', above n 1; Ardagh and Cumes, 'The Legal Profession Post-ADR', above n 1; R Charlton, 'Whose Mediation is This Anyway?' (2007) 45(1) *Law Society Journal* 44; M Dewdney, 'Party, Mediator

approach of matching the dispute resolution process to the client, instead of a traditional 'one size fits all' approach. It also gives consumers choice of which method is best for their circumstances which is a key policy objective of ADR.⁹ Collaborative law is a further expansion of lawyer services, with new skills in the lawyer's toolbox and expanded choices for consumers.

Notwithstanding the promotion of collaborative law by the legal profession,¹⁰ there is a need for an assessment of its benefits and shortcomings. This article explores the possible foci for this assessment through a series of questions below that focus on collaborative practice. Although a number of suggestions are canvassed here, a full assessment of these questions requires empirical research about the acceptance and effectiveness of collaborative law in Australia.

A *Is Collaborative Law Further Complicating the Lawyering Role or Clarifying it?*

Collaborative law (commonly known as collaborative practice because the service may involve other professionals) is a dispute resolution method in which the clients and their lawyers agree by way of a limited retainer agreement to negotiate settlement without resort to the courts. The agreement specifies that the solicitor/client relationship is restricted to settlement negotiations and is automatically terminated if the matter proceeds to court. The lawyer and the lawyer's firm are disqualified from litigation representation.¹¹ In the family law area, the lawyers involved work actively to assist the separating couple to reach an agreement in a process of shared problem solving.¹² The collaborative contract commits the lawyers and the clients to resolving disputes in a way that respects their shared goals.¹³ This may be done by way of the parties and the lawyers engaging in interest based negotiation together in round table four way meetings, with a 6 way communication,¹⁴ which means that all parties are talking together. Or it may be done in a team which can include financial, child or mental health specialists. The philosophy and aims of the process are described on the website and associated links of Collaborative Professionals New South Wales where many advantages are described including no court involvement; children's needs are given

and Lawyer-Driven Problems and Ways of Avoiding Them' (2007) *LEADR Update* 5 June, 10-12 <<http://www.leadr.com.au/articles.htm>> at 17 September 2008; S Emmett, 'The Bar in Mediation and ADR' (2001-02) *Summer Bar News* 25, 25-27, extracted in D Spencer and T Altobelli, *Dispute Resolution in Australia; Cases, Commentary and Materials* (Lawbook Company, 2005) 38; P Callaghan, 'Roles and Responsibilities of Lawyers in ADR' (Paper presented at the Negotiation and ADR Skills for Lawyers, The University of New South Wales, Faculty of law, Centre for Continuing Legal Education, Sydney, 1 December 2006).

⁹ J Lande, 'Principles for Policymaking About Collaborative Law and Other ADR Processes' (2007) 22 *Ohio State Journal on Dispute Resolution* 619, 622.

¹⁰ The New South Wales website lists five pages of collaborative professionals, mainly lawyers: Collaborative Professionals (NSW) Inc <<http://www.collabprofessionalsnsw.org.au>> at 4 April 2008. For Australian Capital Territory practitioners see Collaborative Practice Canberra <<http://www.collaborativepracticecanberra.com.au/>> at 27 August 2008. Websites for Queensland, Victoria and Western Australia are linked on the New South Wales website.

¹¹ P Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (American Bar Association, 2001), gives a detailed account of the collaborative process.

¹² J Ford, 'Collaborative Law; Family Lawyering in the 21st Century' (2006) 18(4) *Australian Family Lawyer* 20, 20.

¹³ M Scott, 'The Connection between Mediation and Collaborative Law' (Speech delivered at the Mediation Conference for Chairpersons, Legal Aid NSW, Sydney, 29 November 2006).

¹⁴ See Pollard, above n 3, 71-2. See also Tesler, above n 11.

priority; the discussions occur in a respectful environment; and there is a full disclosure of information.¹⁵

Collaborative law is relatively new in Australia.¹⁶ However it is being vigorously promoted with training sessions being conducted by commercial establishments and Universities and collaborative firms being established in several States of Australia, including New South Wales, Australian Capital Territory, Victoria and Queensland. There are 300 trained lawyers and other professionals in Australia.¹⁷ In some jurisdictions, for example the Australian Capital Territory, which was a pioneer of collaborative law in Australia, it has been widely advertised to the community. Collaborative practice commenced and is most usually practised in the family law area, although collaboration can be used in many other areas of legal practice.¹⁸

Collaborative law is a natural progression in legal services in that it allows lawyer-mediators the opportunity to more closely integrate mediation skills into legal practice, although it also poses a range of dilemmas and challenges for the lawyering role. The commitment it embodies to non-positional bargaining is similar to the facilitative mediation model. However in terms of process it is notable that the negotiations in collaborative law are not facilitated by a third person neutral. Such a person (mediator) in the mediation process equalises the power balance between the parties and controls the process, but not the content. This raises a dilemma concerning who in the collaborative process is responsible for equalising power. Normally it is a lawyer's duty to represent their client, not to empathise or raise questions about the interests of the other party. Although collaborative law is generally considered inappropriate where there are extreme power imbalances,¹⁹ there is a potential for conflict of interest for lawyers in those cases where one or other of the clients begin to adopt a positional stance in negotiations or where they are reaching a stalemate. These are areas where a specially trained mediator who is independent of all the parties (clients and solicitors) is able to progress a negotiation in mediation. Proponents of collaborative practice maintain that differences in bargaining power are addressed because of the retention of lawyers by each party.²⁰ However 'a particularly domineering or manipulative party may still be able to exert influence over their former spouse in four-way meetings'.²¹ In the absence of a third person neutral, other complications in the collaborative process for the lawyer's role may include: handling threats as well as determining who controls the process and how this is done; who controls the content as well as the flow of communication; and who determines the equalisation of time in the negotiations.

¹⁵ See Collaborative Professionals NSW <<http://www.collabprofessionalsnsw.org.au/commercial/collaborative-law-process.html>> at 27 August 2008.

¹⁶ Ibid. The earliest training listed for New South Wales is August 2005. This closely followed the training in the Australian Capital Territory.

¹⁷ Ibid.

¹⁸ Collaborative law techniques can be used in any matter which may lead to civil litigation including: commercial law; employment law; corporation's disputes; estate planning and wills; and franchise and construction disputes to name some examples.

¹⁹ Family Law Council, *Collaborative Practice in Family Law: A Report to the Attorney-General* (2006) 55 (hereinafter 'Family Law Council Collaborative Practice Report').

²⁰ Ibid 57.

²¹ Ibid.

Gender bias has also been raised as an issue in bargaining power in collaborative practice.²²

A related consideration is the ability of the lawyer of a weaker client to be able to advocate strongly for their client in a collaborative law process. Some see collaborative law as violating a lawyer's duty of zealous advocacy.²³ However, researchers of the collaborative process refer to a 'new advocacy'²⁴ and point to a different form of non-adversarial advocacy in response to changing legal practice. The Enhancing Inter-Professional Relationships research found that the family lawyers practising their advocacy role in a non-adversarial way was important to good inter-professional relationships in the new family law system.²⁵

Other complications for the lawyering role include the recognition of issues of vulnerability and their effects on parties' negotiations, particularly domestic violence,²⁶ mental health, and drug or alcohol dependence, in the initial intake, or if such issues arise in relation to one or other of the clients during the collaborative negotiations. In family dispute resolution organisations considerable assessment time is spent isolating such issues when making the determination concerning suitability for dispute resolution, as well as preparing parents concerning the effect of conflict on children. The Family Law Council Collaborative Practice Report notes the need for an effective screening process in collaborative practice.²⁷

The issues raised in this section highlight the need for specialised training, guidelines and perhaps accreditation of collaborative practitioners. Although training sessions are available to lawyers to prepare them for collaborative practice, they are not a requirement. This may disadvantage clients.²⁸ This feature may be similar to mediation where some legal practitioners who claim to be mediators have had no specialised training.²⁹ The need to consider specialist accreditation was recommended by the

²² See P E Bryan, 'Collaborative Divorce: Meaningful Reform or Another Quick Fix?' (1999) 5(4) *Psychology, Public Policy and Law* 1001.

²³ W H Schwab, 'Collaborative Lawyering: a Closer Look' (2003-2004) 4(3) *Pepperdine Dispute Resolution Law Journal* 351.

²⁴ J Macfarlane, 'The New Advocacy' in A Kupfer Schneider and C Honeyman (eds), *The Negotiator's Fieldbook* (2006) 513, 513-522.

²⁵ The Report found that 'whilst the task of advancing a client's interests ... while also discouraging the escalation of conflict will sometimes be difficult to manage ... the data from this project indicate that poor advocacy practices, such as "bullying tactics" on behalf of a client are not conducive to successful collaboration with family dispute resolution practitioners and contribute to the lack of respect for lawyers' client advocacy role': Rhoades et al, above n 4, 52.

²⁶ Rhoades et al, above n 4, viii, found 'some indication although not supported by strong evidence that some family lawyers may not be identifying cases involving violence'. It recommended that further research be considered to assess this and related issues.

²⁷ See Family Law Council, above n 19, 55.

²⁸ The Family Law Council Collaborative Practice Report *ibid* 57, warned that one party could be disadvantaged by retaining a lawyer with limited or no training or experience in collaborative practice.

²⁹ L Boule, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 2nd ed, 2005) 29, notes that in settlement and evaluative mediation processes the mediators have no necessary skills or qualifications in mediation techniques. Sir Laurence Street has observed that 'there are a lot of charlatans who claim to be mediators, including judges, who have no training', 'Introduction to the day' (Speech delivered at the Australian Dispute Resolution Association Conference, Sydney, 22 June 2007).

Family Law Council Collaborative Practice in Family Law Report.³⁰ The Council's call for guidelines is further discussed below.

B *Is Collaborative Law Quicker and Cheaper than Traditional Legal Processes or Mediated Outcomes?*

Collaborative law practice which has arisen particularly in the family law area is in keeping with the legislative demands of the *Family Law Act 1975* (Cth) for non-adversarial processes of dispute resolution.³¹ Some of the claimed advantages of collaborative law are that it is a timely and inexpensive resolution because there is no lengthy correspondence between the lawyers involved and between the lawyers and their clients, no discovery procedures to find documents, and no court proceedings. There is no empirical evidence that collaborative law is less costly than litigation or negotiated family law files,³² nor quicker,³³ although anecdotal evidence suggests this is the case in the United States where divorce proceedings are lengthy, complex and highly adversarial.³⁴ Claims of timely and inexpensive resolution for Australian consumers are also questionable given that similar alternative dispute resolution services may be found elsewhere more cheaply including community based programs which are discussed below. However it would be a lawyer's obligation to explain these alternatives to the client.³⁵

Collaborative family law sessions normally require four to seven sessions.³⁶ Apart from the face to face sessions, there may be numerous telephone conferences between the professionals involved as to how to progress the matter. These meetings as well as the costs and the involvement of all the other professionals in a team based approach may have a substantial effect on the overall cost of the process as well as the time taken. The multidisciplinary approach has been said to be popular in Vancouver, British Columbia 'because a large number of clients can afford to hire a team of collaborative professionals' (which might include divorce coaches, financial advisors or child specialists).³⁷ Additionally, intake procedures to assess the suitability of collaborative law for the particular parties could be time consuming and costly. Anecdotal evidence suggests that negotiations can get bogged down or that parties tire of the process and revert to mediation or to traditional legal representation where lawyers do the

³⁰ Family Law Council, above n 19, 2.

³¹ Reforms have been instituted over more than a decade and have culminated in amendments to the *Family Law Act 1975* (Cth) introduced by the *Family Law Amendment (Shared Parenting Responsibility) Act 2006* (Cth).

³² *McFarlane Research Report*, cited in the Family Law Council Collaborative Practice Report, Family Law Council, above n 19, 24.

³³ *Ibid* 55.

³⁴ Pauline Tesler gave the following description: 'You prepare aggressively. You maintain maximum control over all the information and shape a theory of the case in which your client is all good and (the opposing client) is all bad. You know that family law judges will never give 100 percent of what the client asks for, so you have to ask for more' in D Curtis, 'Collaborative Law - Solving Disputes the Friendly Way' (2005) *California Bar Journal* 1, 1.

³⁵ D Spencer, 'Liability to Advise on Alternative Dispute Resolution Options' (1998) 9 *Australian Dispute Resolution Journal* 292. The draft guidelines of the Family Law Council, above n 19, 71 provide that in collaborative practice the giving of advice in relation to the various processes available for dispute resolution 'is as important as advice on substantive issues'.

³⁶ Pollard, above n 3, 72.

³⁷ *McFarlane Research Report*, cited in the *Family Law Council Collaborative Practice Report*, Family Law Council, above n 19, 20.

negotiating for the parties in their absence. In the latter event new legal representatives have to be retained because of the original participation agreement that the settlement lawyers will not continue to represent the clients if negotiations fail. The disillusionment of the ‘softly’ approach may also be an incentive to clients to hire the most litigious lawyer.

Additionally if collaborative law sessions do not produce a satisfactory outcome in both parenting and financial cases, parties will need to participate in further dispute resolution processes before they are permitted to file for court proceedings unless their case falls within one of the exceptions (for example cases involving violence or abuse).³⁸ This means that parents must attend a mediated family dispute resolution process with a registered family dispute resolution practitioner (FDRP) to attempt to resolve parenting disputes.³⁹ FDRPs are authorised to issue s 60I certificates which certify if a good faith attempt has been made to resolve the dispute.⁴⁰ This method of family dispute resolution which requires mandatory pre-filing ‘mediation’ (as of 1 July 2007) has been described by Federal Magistrate Tom Altobelli as ‘the single most important event in family law—10 on the Richter scale’,⁴¹ as it fundamentally shifts the onus to parents to resolve parenting disputes by way of mediation rather than through court processes.

C *Is Collaborative Law Creating a Two-Tiered System in Terms of Affordability, Access and Process?*

When compared with mediated outcomes collaborative law could result in a two-tiered method of dealing with family law disputes in terms of access and affordability as well as process.⁴² On the one hand are those consumers who are limited to a free or low cost service through community based mediation, Legal Aid or Family Relationship Centres and on the other hand are those who can afford to retain legal practitioners for collaborative law meetings. Information and preparation (such as attendance by parents at sessions on the effect of conflict on children), referral and individual sessions at Family Relationship Centres are free of charge. These centres also provide ‘up to three hours of joint sessions free of charge, or up to six hours where an interpreter is required, but may charge fees after that, depending on the clients’ circumstances’.⁴³

Clients who use collaborative law processes ‘tend to be professionals, such as doctors, lawyers, teachers, business owners and consultants, mental health professionals and religious leaders who are sophisticated, educated with the capacity to be informed and

³⁸ *Family Law Act 1975* (Cth) s 60I(1). In financial cases the provisions can be satisfied by negotiation between lawyers. D Cooper, ‘The Family Law Dispute Resolution Spectrum’ (2007) 18 *Australasian Dispute Resolution Journal* 234, 236.

³⁹ For information about family dispute resolution providers and the new accreditation requirements being phased in as of 1 July 2007 see Australian Government, Attorney-General’s Department, *Family Dispute Resolution* <<http://www.ag.gov.au/fdrproviders>> at 10 March 2008.

⁴⁰ *Family Law Act 1975* (Cth) s 60I.

⁴¹ Comments made to the Australian Dispute Resolution Association Conference, Sydney, 22 June 2007.

⁴² Ardagh and Cumes, ‘The Legal Profession Post-ADR’, above n 1, 210.

⁴³ See Australian Government, Attorney-General’s Department, *Family Relationship Centre Resources* <http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyRelationshipServicesOverviewofPrograms_ForFamilyRelationshipServicesPractitioners_FamilyRelationshipCentreResources> at 1 April 2008. There will be 65 Commonwealth Family Relationship Centres throughout Australia by July 2008.

who demonstrate civil values'.⁴⁴ In discussing Australia, Scott predicts that it is clients with these attributes and 'possibly those who have sophisticated financial structures and complex multiple issues' who are the potential clients for collaborative law.⁴⁵

In terms of access, collaborative law may not be available in many areas of Australia (particularly rural and regional parts) where there are few, if any, collaborative lawyers. If a client chooses collaborative processes and retains a collaborative lawyer, there must be another collaborative lawyer available to represent the other client. Generally this is proving to be a problem in the acceptance of collaborative practice in Australia,⁴⁶ as it is in California.⁴⁷

One of the advantages of the collaborative law process over mediation is said to be the assistance of lawyers to give advice to the parties.⁴⁸ However dispute resolution for parties in community based mediation, Legal Aid schemes or Family Relationship Centres are not exclusive of legal advice. The parties in non-legal dispute resolution processes may be required to seek legal advice before commencing mediation or other dispute resolution process and encouraged to follow up with legal advice.⁴⁹ In the New South Wales Legal Aid Family Law Conferencing scheme the parties normally have legal advisors present. This is always the case if both parties are legally aided. Where only one party is legally aided, the other may choose to pay for their own legal advisor or be unrepresented, for example in family law conferences concerning parenting plans.

A myriad array of dispute resolution options is now available to family law clients in Australia.⁵⁰ This is further illustrated in Figure 1 below which shows the complex interlocking nature of family dispute resolution with collaborative processes sitting between mediated outcomes and traditional legal processes. Figure 1 also illustrates the radical changes that have been made in the family law system in Australia over the course of the last decade. Reforms have meant that lawyers, mediators and family dispute resolution practitioners operate in the same environment, although with different roles and responsibilities and this has led to significant inter-professional tensions.⁵¹ The two primary aims of the family law reforms are to bring about a cultural change in how family separation is managed—away from litigation and towards cooperative and shared parenting. This means that the traditional adversarial methods of resolution are to be avoided with the parents cooperatively developing parenting plans with family dispute resolution practitioners and negotiating together in the 'best interests' of the children.⁵² Collaborative law may be a way of recapturing ADR by the legal profession, particularly in the family law area where family dispute resolution is now mandatory

⁴⁴ Scott, above n 1, 208, quoting G Cox, *Collaborative Law: A Path Beyond Winning* (2002) Mediate.com <<http://www.mediate.com/pfriendly.cfm?id=1062>> at 27 August 2008.

⁴⁵ Scott, above n 1, 208-9.

⁴⁶ J Thomson, 'A true collaboration' (2007) 45(5) *Law Society Journal* 22, 22.

⁴⁷ Curtis, above n 34, 7.

⁴⁸ Ford, above n 12, 20.

⁴⁹ Legal advice may be needed in a range of areas, including the content of the law, protective provisions, the application of the law to their situation, complex property issues and so on. See Rhoades et al, above n 4, 51.

⁵⁰ Cooper, above n 38, provides a framework for understanding the available options.

⁵¹ See generally Rhoades et al, above n 4.

⁵² Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), Revised Explanatory Memorandum (2006) 1.

under the 2006 amendments to the *Family Law Act* for separating couples with children,⁵³ or it may be viewed as complementing it.⁵⁴

Collaborative law has been a big ‘training opportunity’ to prepare lawyers for a repositioning of their role in the new family law system.⁵⁵ Some see it as ‘over-rated’ with very few people so far choosing to use collaborative processes in Australia.⁵⁶ It remains to be seen what the future demand will be. However the interest in collaborative practice demonstrates a further shift in legal culture away from traditional adversarial processes and it has been endorsed by the Australian government.

⁵³ Ardagh and Cumes, ‘The Legal Profession Post-ADR’, above n 1, 211.

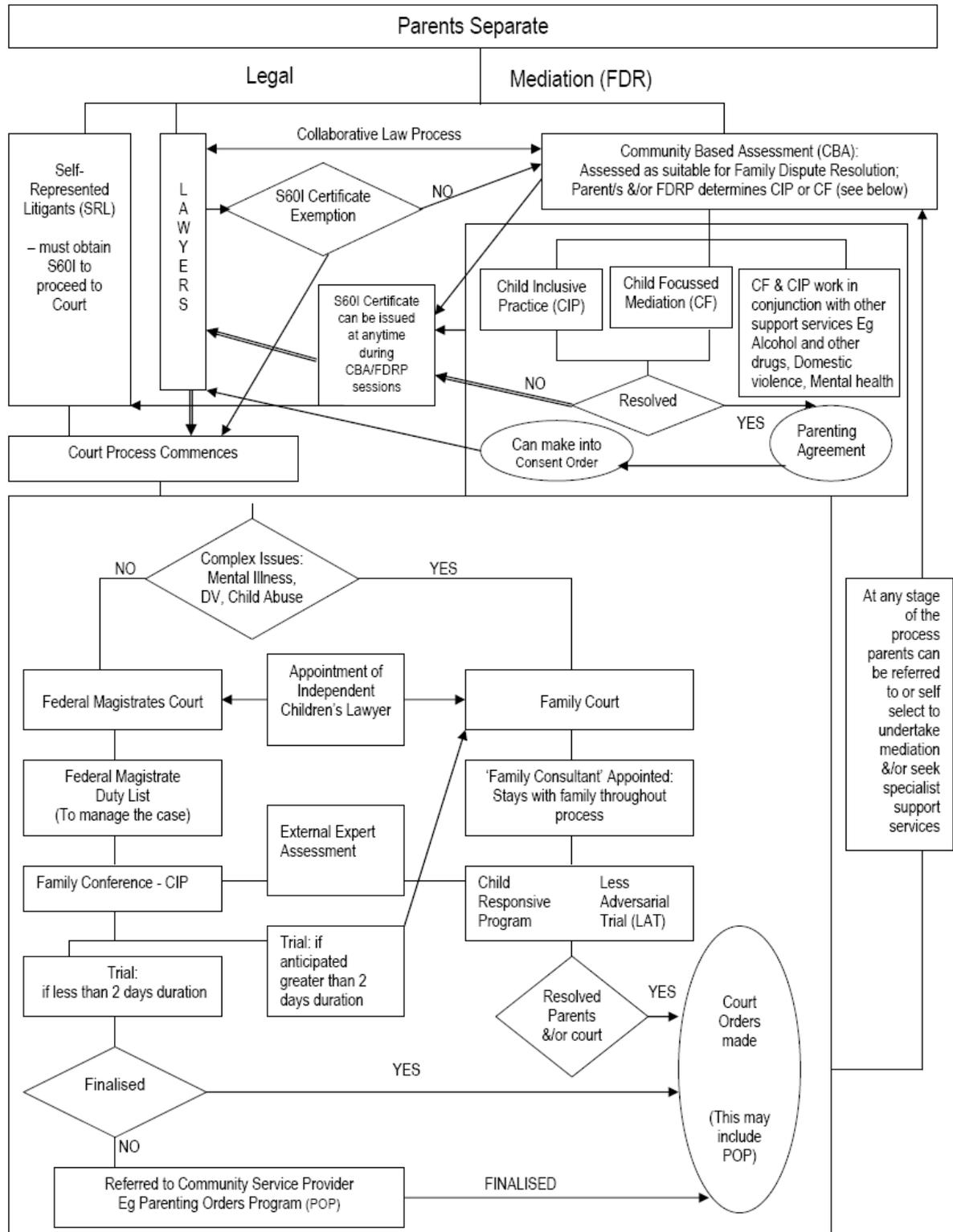
⁵⁴ Ford, above n 12, 24. The Family Law Council, *Report on Collaborative Practice in Family Law*, above n 19, regards collaborative law as complementing the new family law system.

⁵⁵ The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) followed the House of Representatives Standing Committee on Family and Community Affairs 2005 *Every Picture Report* where the committee expressed its preference for keeping ‘separating families away from lawyers as much as possible’, above n 4, 79. Pollard, above n 3, 69, notes that over 400 professionals (mainly lawyers) have completed two-day basic training courses in collaborative practice throughout Australia between the years 2005-2007 with courses proliferating all over Australia.

⁵⁶ J Thomson, above n 46, 22. John Pollard, then President of Collaborative Professionals NSW Inc, confirmed that the uptake had been slow with an average of only 3 or 4 cases completed by lawyers in New South Wales in the last 18 months to 2 years; (Speech delivered to LEADR (Association of Dispute Resolvers), Sydney, 8 May 2008).

Figure 1

PATHWAYS TO CREATING PARENTING ARRANGEMENTS POST SEPARATION



Source: ACT Family Pathways Network 2008.

D *Is There a Need for Guidelines to Address Ethical and other Considerations?*

The Family Law Council Report *Collaborative Practice in Family Law*⁵⁷ recommended to the federal Attorney-General that National Guidelines for Collaborative Practice in Family Law be developed. Some of the issues concerning the lawyer's role that need to be covered by guidelines have already been canvassed above. Ethical issues also need to be addressed in the guidelines. Protocols need to be developed by collaborative practice groups to address questions such as 'when should lawyers advise clients to withdraw from the collaborative process?' and 'how can lawyers make sure that a client has given their informed consent to participate in collaborative law?'⁵⁸ The need for national guidelines has not been accepted by Collaborative Professionals NSW.⁵⁹ Lande argues that new practices can be hampered by regulation as opposed to allowing practices to grow unimpeded.⁶⁰ However there are ethical issues that continue to be raised by lawyers and others. Among these are:

the idea that collaborative law will violate a lawyer's duty of zealous advocacy, that practice groups of collaborative lawyers may violate conflict of interest rules, that full and open disclosure rules of collaborative law violate client confidentiality and that withdrawing from litigation violates the need not to impose material adverse effect on the interests of the client.⁶¹

Many practitioner groups have adopted guidelines and ethical standards, including the International Academy of Collaborative Professionals.⁶²

Several of the ethical issues surround the nature of the Participation Agreement and whether it creates a conflict of interest. Apart from the retainer agreement between the solicitor/client, referred to above, limiting the relationship to settlement negotiations, a further contract, known as the Participation Agreement, is signed by each lawyer and each client. It reiterates the provision that neither lawyer, nor any member of their respective law firm can act for the client in the event that *either* client withdraws from the process and pursues litigation. This is a distinguishing feature from mediation, where court proceedings can run parallel to mediation.

In February 2007 a decision by the Colorado Bar Association Ethics Committee⁶³ found that the Participation Agreement, as a species, creates a 'per se impermissible and

⁵⁷ The December 2006 report released in February 2007 is available at: Family Law Council, *Collaborate Practice in Family Law* (2006) Australian Government, Attorney-General's Department <[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~334NEWCollaborative+Law+Report+Final.pdf/\\$file/334NEWCollaborative+Law+Report+Final.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~334NEWCollaborative+Law+Report+Final.pdf/$file/334NEWCollaborative+Law+Report+Final.pdf)> at 9 September 2008.

⁵⁸ Pollard, above n 3, 74.

⁵⁹ Lewis, above n 46, 18, referring to comments of Lorraine Lopich, the Secretary of Collaborative Professionals NSW Inc.

⁶⁰ See Lande, above n 9.

⁶¹ Schwab, above n 23.

⁶² A range of guidelines are referred to in the Family Law Council, *Collaborative Practice Report* above n 19, 68.

⁶³ Colorado Bar Association Ethics Committee, *Formal Opinion 115: Ethical Considerations in the Collaborative and Cooperative Law Contexts* (2007) Colorado Bar Association <<http://www.cobar.org/index.cfm/ID/386/subID/10159/CETH/Ethics-Opinion-115:-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts-02/24/>> at 27 August 2008.

unwaivable conflict of interest for lawyers⁶⁴ under the Colorado Rules of Professional Conduct. In contrast, other American States and the American Bar Association found that the same species of agreement did not violate conflict principles.⁶⁵ Many issues of interpretation have been raised by Peppet including who is the agreement between, ie who of the signatories to the agreement is in privity? Is it a binding contract? Who is bound? Who may enforce it? Do lawyers obtain informed consent to limit their representation prior to signing a four-way agreement?⁶⁶

There are many different practices and agreements in the United States and elsewhere reflecting jurisdictional needs and therein lies the problem. The question to be put here is whether Australian practices are as diverse. Which issues are problematic for practice and how should they be addressed? Additionally, as Australia has only one family law federal jurisdiction it is unlikely that there are such varying jurisdictional needs. However the Australian system of family dispute resolution which involves lawyers and family dispute resolution practitioners presents different considerations.

The Family Law Council report has noted that a slightly different paradigm called 'cooperative law' could be considered for Australia. This may allow other features of the collaborative process to be used by the Legal Aid system,⁶⁷ because it would overcome some of the problems and limitations of the collaborative law Participation Agreement. The Legal Aid Family Law Conferencing scheme which currently uses a model of family dispute resolution similar to collaborative law (but with chairpersons/mediators), could not use collaborative law processes because in the event that the process was not successful the Legal Aid Commission would be disqualified from further representing the legal aid client. In cooperative law four-way meetings are conducted, as in the collaborative process, using interest based negotiations, but without the limited retainer agreement and the Participation Agreement restrictions.⁶⁸ In other words there is no written guarantee that the lawyers (and their firms) will be disqualified, as in the collaborative process. What effect the removal of this disqualification restriction would have on the bargaining process is uncertain, as it is usually regarded as a key incentive to settlement. However cooperative law is said to be more suitable for civil lawyers whose firms do not want to lose the client if collaborative settlement processes fail.⁶⁹

In the United States the National Conference of Commissioners on Uniform State Laws is in the process of drafting a Uniform Collaborative Law Act; its purpose being 'to support the continued development and growth of collaborative law by making it a more uniform, accessible dispute resolution option'.⁷⁰ Substantive provisions cover the Participation Agreement; Disclosures Concerning the Appropriateness of Collaborative

⁶⁴ S Peppet, 'The (New) Ethics of Collaborative Law' (2008) *Winter Dispute Resolution Magazine* 23, 23.

⁶⁵ ABA Committee on Ethics and Professional Responsibility, *Formal Opinion 07-447* (2007).

⁶⁶ S Peppet, 'The Ethics of Collaborative Law' (2008) *Journal of Dispute Resolution* 131. See also webcast video on the same topic presented at the William S Boyd (21 September 2007) School of Law, University of Nevada <http://www.law.unlv.edu/media_events.html> at 1 April 2008.

⁶⁷ Family Law Council, above n 19, 49-54 discusses collaborative law and the legal aid system.

⁶⁸ See Lande, above n 9, 632, note 62 for citations on Cooperative Law.

⁶⁹ Curtis above n 34, 7, quoting California lawyer Gary Weiner.

⁷⁰ See comments on the Act by L Wray, an observer to the National Commission Drafting Committee <<http://www.collaborativelaw.org/res/documents/UNIFORM%20COLLABORATIVE%20LAW%20OACT.pdf>> at 15 April 2008.

Law (Informed Consent); Domestic Abuse; Collaborative Law and Low Income Clients; Privilege against Disclosure for Collaborative Law Communications; Admissibility and Discovery.⁷¹

As well as providing regulation of collaborative law practice, even if minimal, the adoption of guidelines provides the means for consumers and other family dispute resolution providers to know what the collaborative practice product comprises and also to have input into what are best practices. Furthermore, guidelines make the practice consistent and a national approach to collaborative practice is in keeping with Australian family law practice in general.⁷² The Family Law Council Report Draft Guidelines for Collaborative Practice in Family law cover principles for practice in family law; the role and responsibilities of the collaborative lawyer; and suggestions for the conduct of collaborative law matters. The Council recommended that the guidelines be discussed and developed by members of the Family Law Council and the Law Council of Australia in consultation with representatives from each State and Territory together with community-based service providers involved in the new family law system.⁷³

E *Does Australia need North American Methods?*

Collaborative practice in family law developed in the United States in response to the adversarial nature of American divorce proceedings, contested custody, the years that divorce proceedings can take in court and the high cost of legal representation which the 'majority of Americans cannot afford'.⁷⁴ The initial training of collaborative lawyers in Australia in 2005 was done by Stu Webb a divorce lawyer from Minnesota who started the collaborative law process.⁷⁵ Australia may need to be cautious about adopting American practices without reflecting on the differences between legal cultures and traditions. Australia has developed national legislative alternatives to adversarial family processes, whereas the United States (where family law is State law) has not. The Australian family law system incorporates shared parental responsibility, shared care arrangements, child focussed, mandatory pre-filing dispute resolution and family dispute resolution practitioners who are becoming more specialised and professionalised with the need to satisfy new accreditation requirements. It can be argued that there is no need for a new type of legal practice called collaborative law if the legal profession can practice within the non-adversarial dispute resolution methods, based on mediation and conciliation as part of the current framework of dispute resolution developed by courts and the broader legislative system, particularly in the family law system.⁷⁶ However for complex cases involving business interests and complicated division of property collaborative law could have the claimed benefits (as outlined above) for couples who

⁷¹ Ibid. The Drafting Committee noted the need to make the collaborative process available to low income clients who are not using the process; a situation that is 'unlikely to change without a modification of the withdrawal requirement', 6. The draft Act is available at National Conference of Commissioners on Uniform State Laws, *Collaborative Law Act* (2008) University of Pennsylvania Law School <http://www.law.upenn.edu/bll/archives/ulc/ucla/2008_amdraft.htm> at 15 April 2008.

⁷² See Family Law Council, above n 19, recommendation 1, 31. Draft Guidelines are attached in Appendix A to the Report.

⁷³ Ibid.

⁷⁴ 'In 2005, only one in eight family law litigants had a lawyer' according to Jeff Bleich (President, State Bar of California) in 'The Neglected Middle Class' (2008) *California Bar Journal* June 9

⁷⁵ Canadian lawyer Marion Korn has also been a leading trainer in Australia.

⁷⁶ Ardagh and Cumes, 'The Legal Profession Post-ADR', above n 1, 211.

are able to negotiate together in fours with their lawyers and have the commitment and the means to do so. Little research has been done in Australia to date on collaborative practices. However we may be nearing the stage of determining which collaborative law models suit Australian circumstances, and which do not. The multi-disciplinary team model (used in some North American models) may not be as suitable in Australia because of wider public provision of specialist services and referrals as well as the costs associated with such teams. Collaborative Practice in the Australian system must also involve collaborative arrangements with FDRPs. The Enhancing Inter-Professional Relationships Report, although not specifically dealing with collaborative practices in family law, pointed to the need for family lawyers and family dispute resolution practitioners to collaborate effectively in order for the new non-court based methods of family dispute resolution to be successful.⁷⁷ The limitations of the Participation Agreement may also be unsuitable in the Australian family law environment, particularly given the role of the Legal Aid Commission discussed above, as well as the limited availability of law firms in parts of Australia.

II CONCLUSION

A truer assessment of collaborative law can be made by gathering empirical evidence from practitioners. What seemed to have started with enthusiasm is being viewed more cautiously and critically. Some who were initially excited about its prospects are no longer recommending it to clients; there has been a backing away with no new cases being taken on for the time being until a fuller assessment can be made about the processes, benefits, suitability and costs. Collaborative law is still in its experimental stage. Some have found that, at least in the family law area, the team approach is costly and lengthy and perhaps unnecessary to the needs of the parties (and their pocketbooks). More research needs to be done to uncover and distinguish between the models that have worked in Australia and those that have not, and the types of cases where collaborative law has been successful and those where it has not. Analysis is also needed about what were the 'tough' issues in the cases requiring a collaborative law approach in the first place as opposed to a quicker, simpler mediated alternative including legal advice.

An evaluation needs to be done and a model or models adopted that suit Australian law, legal practitioners and consumers.⁷⁸ This may lead to a new partnership between dispute practitioners generally. This could include mediation processes as the first stage dealing with relational aspects and children (parenting plans, child focussed or child inclusive practice) followed by collaborative law processes dealing with financial matters (for example property, superannuation or business interests). Throughout the Enhancing Inter-Professional Relationships Report the different roles and different responsibilities of family lawyers and family dispute resolution practitioners in the new family law system in Australia are discussed. Although lawyers have varying responsibilities, their advocacy responsibility is to an individual client. The family dispute resolution practitioner's role involves both parents and includes an advocacy responsibility for children. There are varying differences in relation to education, training and expertise,

⁷⁷ Rhoades et al, above n 4. The Law Council Collaborative Practices Report also recommended that a working group 'explore how cross-sector professional relationships may be strengthened to facilitate collaborative practice' and suggested that lists of collaborative practitioners be provided to Family Relationships Centres to facilitate referrals, Family Law Council, above 19, 80.

⁷⁸ Different models are being used in New South Wales, Queensland, the Australian Capital Territory and Victoria; this being a function of the particular overseas trainer that has been used.

although inter-professional conflict can arise from the diverse and overlapping nature of each group's professional responsibilities.⁷⁹ The Report recommended that these roles need to remain separate; that although more familiarity and appreciation is needed of the others role, FDRPs do not need to be legal experts and lawyers do not need to be child or relationship experts. It found that successful collaborative relationships 'were based on a clear division of expertise.'⁸⁰ This involves a complementary services approach 'in which practitioners valued and respected the different (relationships versus advocacy) skills and expert (child development versus legal) knowledge base of the two professions'.⁸¹ Whether these professional lines are further blurred in collaborative law may be a topic for further research.

With the adoption and spread of collaborative law in Australia it can tentatively be said that legal culture is further responding to the move towards more consensual resolution of disputes. Although questions remain unanswered about its successful integration in the new family law system, there are other areas of dispute where collaborative or cooperative practice may also bring more satisfactory outcomes for clients and lawyers alike than traditional adversarial processes.⁸²

⁷⁹ Rhoades et al, above n 4, 4.

⁸⁰ Ibid 54.

⁸¹ Ibid 27.

⁸² J Macfarlane discusses changes in the legal profession, an alternative conception of advocacy and a new lawyer-client relationship/partnership in *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, 2008).