

Submission to the ALRC Enquiry into the Family Law System

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Introduction

Collaborative Law in Australia

The history of Collaborative Law (also referred to as Collaborative Practice) is well canvassed in the 2006 Family Law Council's report to the Attorney General's Department and therefore not detailed in this submission.

Currently, there are the following known Collaborative Practice entities in Australia:

ACT:	one practice group;
NSW:	one incorporated body and nine practice groups;
QLD:	one peak body and five active regional practice groups;
SA:	three practice groups;
Tasmania:	one practice group;
Victoria:	one incorporated body, one executive committee and one practice group;
WA:	one formal body and one practice group

The Australian Association for Collaborative Professionals ('AACP') has also recently been created.

Collaborative Practice Canberra

Collaborative practice has been practiced in Canberra since 2005. The Collaborative Practice Canberra ('The Practice Group') is made up of lawyers, psychologists, counsellors and financial experts. The Practice Group meets monthly to discuss best practice, training and development and peer support.

Members

Members of the Practice Group include lawyers from the following firms at the time of this submission;

1. Alliance Family Law
2. Baker Deane & Nutt Lawyers
3. Campbell & Co Lawyers
4. Canberra Legal Group
5. Capon & Hubert Lawyers & Mediators;
6. Farrar Gesini Dunn
7. Mazengarb Family Lawyers
8. Neilan Stramandinoli Family Law
9. Phelps Reid Foster Johnson
10. Robinson + McGuinness Family Law
11. Watts McCray Lawyers
12. Yeend & Associates

Reason for Change

In 1992, the *Submission to the Joint Standing Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, Terms of Reference* determined that 75% of cases that were filed in the Family Court were at least partially resolved during mediation. In 2014, it was reported in *The Age* that over 95% of family law cases settle along the litigation continuum and before the final hearing.

Due to this, the question missing from the ALRC Issue Paper is “*What changes are required in the Family Law system to enable the 95% of cases that settle before Final Hearing to do so before they commence proceedings*”. This is the biggest issue and what needs to be addressed before an effective reform can be achieved.

Without implementing a system that *reduces* the amount of matters initiated in court, we will never be able to have a functioning system that enables those 95% of cases to settle without ever needing to enter a court room.

The practice of Collaborative Law in this area is crucial to achieve this as it provides a rigorous settlement process akin to the litigation pathway and at the same time changes the mindset of both the parties involved. The parties understand that the responsibility to resolve the conflict lies with them, not the Court as Collaborative Law does not permit any threat of litigation or any underhand strategising and does not focus on the clients’ entitlement. Instead, Collaborative Law builds its foundation on interest based negotiation and open communication where the parties’ legal rights form part of the negotiation and are explored in an open and transparent way rather than as an adversarial negotiation tool. It is a process option suitable for difficult matters.

Therefore, the *Family Law Act* requires amendments to ensure that only those cases which are intractable for whatever reason come before the Court. All other cases should instead be diverted to a rigorous, dedicated, systemised settlement pathway which stands alone, entirely separate to the court system. The court system should purely play the role of being a decision-making forum. Currently, the court system is attempting to undertake a number of roles:

1. Provide hearing time for matters requiring a decision on a final basis;
2. Managing cases which arguably should never have been filed in the court system through to a settlement by way of a process which might broadly be called “therapeutic” judicial decision-making or case management;
3. Vexatious or otherwise trivial matters which should not be allocated court time.

Currently, the judicial pathway provides that once a matter is started in either the FCC or FCA, the Courts actually anticipate a series of events attempting settlement before the case is allocated hearing time. This is causing the court system to be overwhelmed with cases which it is under-resourced to manage. 95% of cases filed settle. We say a large percentage of these cases should never have commenced proceedings at the outset.

The Court is now failing to keep anywhere close to its key performance indicators regarding the acceptable timeframe between filing and first return date, between filing and final hearing, and between final hearing and when judgment is delivered. To overcome this problem and to allow those cases that require a decision to be made and for that decision to

be made promptly, and expeditiously means that a system must be created which is a dedicated settlement pathway outside the court process, a pathway which is as rigorous as the litigation pathway. Currently, ADR is seen as a “soft” option, as an “alternative” to the primary dispute resolution process which is judicial decision-making. What is required is an entire change in mindset wherein the settlement pathway is seen as the primary process in which decisions are reached and judicial decision-making is seen as the alternative. Therefore, matters are only ‘tipped into the court system’ once they have exhausted all alternatives to reaching a negotiated agreement.

Historically, ADR has been an ‘add on’ to the court process as it is recognised that it is preferable for parties to reach an agreement rather than engage in adversarial proceedings. However, the court’s primary role, and the manner in which the adversarial system operates (‘the rules of the game’), is founded upon a set of principles which are incoherent when applied towards the set of principles which must be or should be applied when parties are being prepared to engage in a negotiated settlement.

In essence, the rules of the game of the adversarial process are antithetical towards supporting parties to reduce the conflict between them and find common ground - what one would consider the appropriate rules of the game to facilitate parties having the best opportunity to reach a negotiated outcome. For example, if it is recognised that to reduce conflict, it is preferable to encourage parties to find areas of agreement rather than disagreement, then the last thing you would require parties to do is complete competing affidavits which require parties to do the direct opposite. That is, to highlight the areas of disagreement and distrust and differences of opinion.

The creation of a dedicated settlement system is directly in line with and supports propositions widely accepted such as:

1. It is in the best interests of children that their parents reach an agreement as to their care, welfare and development;
2. That the reduction of children being exposed to conflict is in their best interests;
3. The role-modelling for children of their parents managing conflict and reaching an agreement in relation to their care is an important principle for children to learn;
4. Allows for a process which is more dignified and bespoke to the needs of the family, rather than being matter number ‘31’ in a list of 40 matters on a particular day in court.
5. Such a system can provide the safety of parties who are at risk of family violence or have suffered family violence;
6. Allows for financial matters to be resolved in a timely way with the likelihood of saving fees and more bespoke agreements achieved.

It is broadly accepted that agreements reached are more likely to be followed by the parties involved, rather than orders imposed upon them, which again ensures that the family, however redesigned, will be more functional.

With this focus, we address specific questions in the Issue paper with the limited scope of incorporating Collaborative Law as a primary dispute resolution process into the Family Law

system to ensure that the 95% of cases that settle during the litigation pathway, do so without first having to commence contested court proceedings.

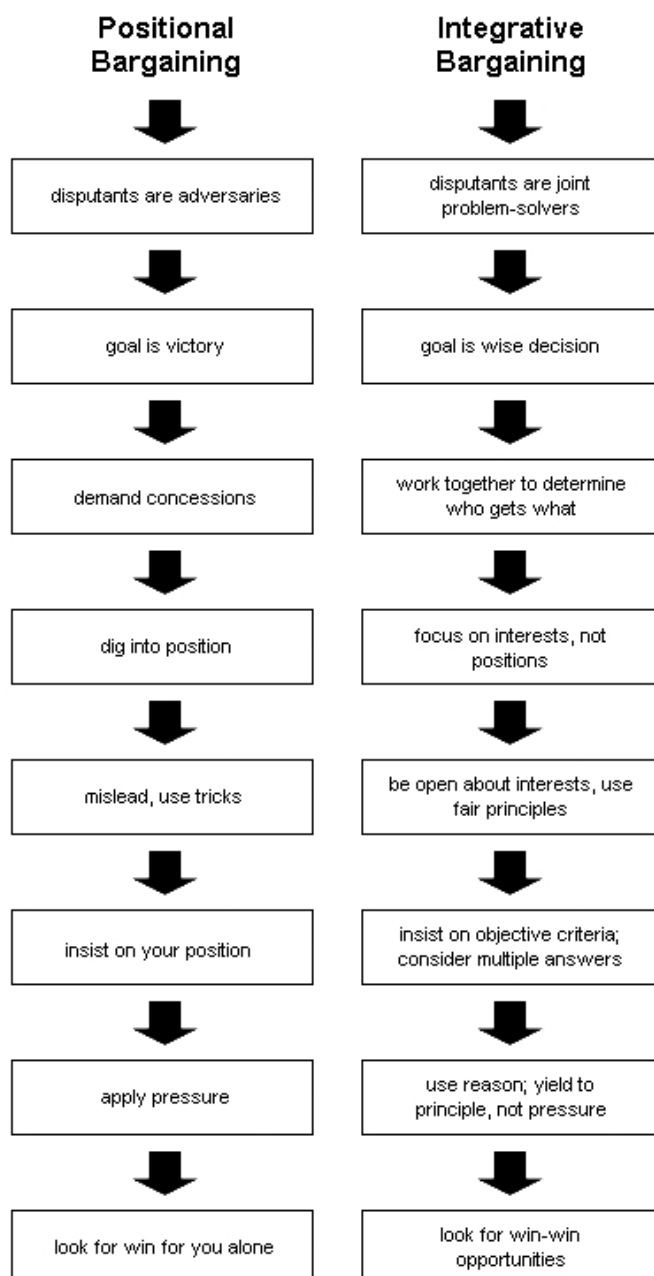
Question 2

“What principles should guide any redevelopment of the family law system?”

The principles of interest based negotiation and collaborative law (in essence focusing on a rigorous dedicated settlement system) should guide the redevelopment of the family law system as only a fraction of matters commenced in the Family Court proceed to judgement. We can best assist those who enter the family law system by managing and reducing conflict, not inflaming it by virtue of the rules of the adversarial system. The Court has in place limited procedures to assist parties to reach a negotiated which sit uncomfortably within the litigation pathway (for example Conciliation Conferences in property matters, the use of family consultants in parenting matters). Currently, these measures rely on a third party to assist parties to reach a negotiated outcome. Using a third party is entirely appropriate for self-represented litigants, however, there is a large proportion of litigants who do have legal representation. Therefore, the role of the lawyer in assisting parties to reach a negotiated outcome should not be overlooked and should be a focus in redeveloping the Family Law system.

The question needs to be asked of family lawyers *‘How are they negotiating?’* and *‘How can they negotiate better?’* Lawyers are conflict resolution specialists. Most of their work occurs outside Court. They are however required to protect their client’s interests in accordance with the adversarial process whilst at the same time negotiate a settlement which requires by definition compromise and the identification of joint interests. Their skill set is required because they understand the law and the rights and entitlements of the parties. Their intellectual rigour and ability to deal with more difficult cases is needed to give those cases the opportunity to resolve with commencing proceedings in the first place. Lawyers skills as negotiators needs to be recognised and privileged over their skill set as traditional advocates in Court.

In Collaborative Practice, the lawyer is retained as a specialist settlement lawyer. Their retainer is limited to assisting their client to reach a settlement and to formalising the agreement. To some extent, the lawyer has an interest in the client reaching an agreement/negotiated outcome



because if they do not then the lawyer's retainer with the client ceases. The fundamental skills of a

collaborative lawyer are interests based negotiation. This is because interest based negotiation is more likely to lead to a negotiated outcome than positional negotiation. Further, an outcome reached using interest based negotiation is more likely to be a lasting outcome rather than one that falls apart at a later date.

Recommendation: Integrate Collaborative Law and interest based negotiations as a guide for the redevelopment of the Family Law System and integrate it through the CPD training requirements for Family Lawyers. By making the training in these dispute resolution processes a requirement for all family lawyers, it will have the effect of changing the culture from positional negotiation to interests based negotiation.

Question 3

"In what ways could access to information about family law and family law related services, including family violence services, be improved?"

Training

Family lawyers are a significant access point for information about family law and related services. Lawyers are required to advise their clients about alternatives to Court including alternative dispute resolution options. However, we note again that there are many lawyers who are not trained in nor have a detailed understanding of Collaborative Law. The Best Practice Guidelines for lawyers doing family law work ('the guidelines') is one available resource for those with limited knowledge of or understanding about Collaborative Law.

The guidelines were last updated in 2017. They define collaborative law as follows:

At 1.17:

Collaboration is a process where both parties, their lawyers and any other required professional advisors, such as child welfare experts or financial experts, commit to resolve the dispute between the parties in dedicated meetings. The focus is on the parties underlying "interests", rather than positional bargaining. An important aspect is that at the beginning of the collaboration the parties sign a contract and agree that if their dispute is not resolved and one of them takes the matter to court, each party must retain new lawyers.

At 7.1 and 7.2:

Collaboration works best where neither party has any fixed view or position at the beginning of the collaboration about the outcome that they want to achieve. It is thus best suited to cases where there have been no other formal negotiations between the parties and where parties have not, at the outset, received advice about likely entitlements.

There are a number of trained collaborative lawyers (and other professionals such as child welfare experts and financial planners) across Australia. Practice groups of collaborate professionals exist in most states and territories. A collaboration should only take place involving professionals trained in collaborative practice. The International Academy of Collaborative Professionals maintains a list of qualified practitioners, including those members located in Australia (see www.collaborativepractice.com).

Recommendation: It is our submission that this description of the collaborative law process, the benefits of it as a dispute resolution process option and the suitability of it for clients is inaccurate and inadequate. The guidelines need to be amended in order to ensure that lawyers who do not practice collaborative law and therefore are relying on the guidelines, are providing their clients with accurate and quality information.

Court Publications

Court publications are also a valuable resource and often one of the first places that people who have separated go. There are still many lawyers in the family law jurisdiction who are

not trained in or do not practice collaborative law. Our concern is that clients seeking advice from those lawyers are not being advised about collaborative law as a process option. It is therefore

important that independent material be available for parties with information about collaborative law. This could be included in the prescribed Marriages Families and Separation publication and further within a Court brochure.

Recommendation: Amend the Marriages, Families and Separation brochure to specifically provide information on collaborative law/option of retaining lawyer on a limited settlement retainer.

Recommendation: Create a court brochure with information about collaborative law and option of engaging a lawyer on a limited retainer.

Question 10

“What changes could be made to the family law system including to the provision of legal services and private reports, to reduce the cost to clients of resolving family law disputes?”

The legal aid grants policy is restrictive in that it only provides funding for clients to mediate or litigate. It does not provide a collaborative law funding arm, which in essence rules out another form of alternative dispute resolution and means that collaborative law solutions can only be accessed by clients who have reasonable financial means.

If there was legal aid funding for collaboratively resolved matters, then it is expected that more parties would utilise that method which would likely resolve in more out of court settlements.

Currently, the grants provide for a one-off FDR, at the conclusion of which, the only option is to litigate. If parties were provided with funding for say up to three collaborative meetings, with collaboratively trained professionals, then it could be said there is a greater chance of resolution, particularly in more complex cases which require more than one ‘session’ to resolve all issues.

Recommendation: Enable the collaborative law process to be legal aid funded, even if for a capped period.

Question 20

“What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?”

In our view consideration, all need to be given the use of Collaborative practice, including for those matters where proceedings have commenced. A mechanism could be used whereby parties are referred to independent Collaborative practitioners to try to resolve their matter. If the Collaborative practitioners report back to the Court that a genuine attempt was made but the process was not successful, then the matter could have a preferential hearing date. Particularly so if the Collaborative process was able to narrow the issues in dispute and so a short, specific-issues hearing could be allocated quickly to determine any remaining issues.

Recommendation: Introduce of a dedicated settlement process as rigorous as the litigation process.

Question 21

"Should courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?"

The current requirement of a s60I certificate before commencing proceedings in relation to parenting requires parties to partake in a dispute resolution process. However, as Professor Patrick Parkinson AM concluded in *"Can There Ever Be Affordable Family Law"*, (May 2017), almost a third of the s60I certificates that he studied were issued due to the fact that the other party did not attend mediation. In addition, more than half of those in the study attended court without a s60I certificate and sought to instead rely on an exception. This means that the majority of those in this study attended court without actually complying with the s60I requirement. As Parkinson notes, no good setting up a system for it not to be enforced.

We see no reason why an equivalent s60I certificate for property proceedings could not be implemented. The reality is that Judges usually order parties to participate in alternate dispute resolution prior to listing the matter for trial. We therefore propose that the pre-filing action required should be attendance at mediation or engagement by both parties in collaborative law. Of course, exceptions would be required as with the current s60I certificate requirements.

Recommendation: Require parties to have attempted, or first engaged in, alternative dispute resolution (ie. a s60I certificate or equivalent) prior to the filing of initiating applications seeking financial orders.

Question 24

“Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?”

Yes, and in our view consideration, there also needs to be more emphasis on legally-assisted family dispute resolution processes with further training in the area for lawyers, which ideally would include the participation or input of a family consultant with experience in the area. Many people who have experienced violence talk about the benefit of processes that allow them to advocate for themselves and participate in dispute relationship, with proper support. It is for many an opportunity to change the dynamic and to show their strength. Collaborative practice, and particularly interdisciplinary Collaborative practice, is particularly well suited to this work especially if any remaining areas of dispute can be returned to the Court system with a preferential listing and determination as suggested above.

Recommendation: Engage family consultants, and seek their support, where able.

Summary of Recommendations

In its submission, the Collaborative Practice Canberra has restricted its recommendations to the inclusion and development of Collaborative Law.

Recommendation 1: Training

Collaborative law and/or interests based negotiation training as part of CPD requirements for Family Lawyers

Recommendation 2: Best Practice Guidelines for Lawyers Doing Family Law Work

Review definition of collaborative law in the current best practice guidelines for lawyers doing family law work.

Recommendation 3: Court publications

Marriages, Families and Separation brochure to specifically name collaborative law/option of retaining lawyer on a limited settlement retainer and creation of a court brochure about collaborative law.

Recommendation 4: Legal Aid

Enable the collaborative law process to be legal aid funded, even if for a capped period.

Recommendation 5: Procedure

Introduction of a dedicated settlement process as rigorous as the litigation process.

Recommendation 6: Procedure

For property proceedings requirement to engage collaborative lawyer or attend mediation prior to filing application. Exceptions permitted.

Recommendation 6: Procedure

Engage family consultants, and seek their support, where able.