



Collaborative Law in Relation to Family Law

[The following material is extracted from the Collaborative Law Guidecard in the LexisNexis Australian Family Law Service, please refer to the Guidecard for the full text of the Guidecard. This Guidecard was written by Lorraine Lopich, Collaborative Lawyer and Mediator, Solicitor of the Supreme Court of NSW, Board Member of the IACP]

Collaborative Law in Australia

Collaborative practice was recently introduced to Australia and is rapidly expanding. In less than two years it has been adopted in four States and the Australian Capital Territory.¹ It is developing organically to meet the needs of each community that adopts the process. The common principles are however, that the participants must sign a participation agreement that provides that the lawyers must not continue to act for their respective clients in any future litigation of the dispute, and that the clients and the lawyers enter into interest based negotiation to resolve the dispute.

Although collaborative practitioners need training in mediation skills, collaborative practice has some very distinctive features that distinguish it from the broadest definition of mediation. It is fundamental to the collaborative process that the collaborative lawyers are not neutral or impartial third parties in the process. On the contrary, they are their client's allies.² Their alliance with their client is however, very different from the usual lawyer/client relationship. The legal advice that collaborative lawyers give to their clients is acknowledged to be simply one facet of the dispute to be taken into account as the clients work toward a resolution that meets their needs.

The New Family Law System

On numerous occasions the Attorney-General Philip Ruddock has stated the Government's aim to bring about cultural change in the family law system. The aim is to actively encourage the parties to make the transition from a family living together to a family that are separated whilst preserving the relationship between the children and each of their parents.

The Family Law Amendment (Shared Parental Responsibility) Act 2006 (SPR Act) commenced on 1 July 2006. From 1 July 2007 an application under Part VII of the Family Law Act 1975 (Family Law Act) must be accompanied by a certificate from a registered family dispute resolution practitioner (FDRP). The aim of the reforms is to encourage parents to reach agreements about parenting arrangements that ensure that their children will have an ongoing meaningful relationship with both of their parents without the intervention of the court. Collaborative law is a process that facilitates the aim of the reforms and the cultural change that the Government wishes to achieve.

Since August 2005, when the first Australian lawyers attended collaborative law training, the Attorney-General has given his and the Government's support to the promotion of collaborative law in Australia.



Collaborative Law – the participation agreement

In a Collaborative Family Law matter the parties and their respective lawyers sign a participation agreement contracting to:

- Seek a resolution of the parties' family law matters without the threat of litigation.
- Protect the children from conflict.
- Negotiate an agreement in which the best interest of the children is paramount.
- Provide all of the information that is relevant to the negotiation of a settlement, whether it is specifically requested by the other party or not.
- Seek to find a resolution that meets the needs of all of the members of the family.
- Not take positions regarding parenting arrangements as a strategy in the negotiations.
- Not make economic threats.
- Jointly engage neutral experts.
- Deal openly and honestly with each other.
- Communicate in a respectful manner.
- Maintain confidentiality of all communication within the collaborative law process.
- Have the process terminated by the lawyers if either of the parties violates the terms or the spirit of the participation agreement.
- The lawyers withdraw from acting for the parties if, despite the best efforts of the parties and the lawyers, the negotiations fail.

A number of models of collaborative law, or collaborative practice as it is often referred to, have evolved since 1990 but the keystone remains that the collaborative lawyers must withdraw from acting for the parties if the interested based negotiations fail and the parties proceed to litigate.

Why collaborative law training is essential?

Collaborative practice requires skills that are not currently taught at law school. They are not learnt in court, and are only partially taught in mediation trainings. The collaborative lawyer has a different working style with their clients and their colleagues.

| Adversarial | Collaborative |
|--|--|
| Limited time for client; emphasis on getting legal work done | Time with client central to the process |
| Focus on legal analysis | Focus on interests and needs of client |
| Aligns with clients view on facts | Understands client's inevitable subjective view on facts |
| Conducts conference with client listening for relevant facts | Actively listens for clear comprehension of situation, history, goals, priorities, fears etc |
| Asks closed questions to fit facts into legal framework | Asks open questions to gain full understanding of the dispute |
| Views clients emotions as a distraction from the resolving the dispute | View emotions as an important element that must to be acknowledged and appropriately managed |
| Sits behind a desk | Sits face to face with the client away from the desk |
| Categorizes the case | Listen to client individual story with an unknown potential outcome |
| Relies on prepared standard questions | Ask questions that arise from the communications with the client |



Informing the client of their options and assessing their suitability for the collaboration

The collaborative lawyer has a heightened responsibility to inform the client of the options available to them to reach an agreement. The client must be made aware of the possible disadvantage they may suffer if the matter does not settle and they must retain another lawyer to commence proceedings.

At the first meeting with the client the collaborative lawyer must assess whether the matter is suitable to be handled as a collaborative law matter.

Some clients may only require information for them to negotiate their own agreement and maybe assistance to draft consent orders. Some clients are low functioning high conflict clients who are incapable of reaching or holding agreements and need a court to make a determination. In between there are a large number of clients who can benefit from, mediation, the collaborative process or a lawyer negotiated settlement.

Power imbalance is more easily addressed in the collaborative process than it is in mediation because the parties are individually represented and both lawyers have an obligation to ensure that terms of the participation agreement are adhered to.

If there is a history of domestic violence however, the matter is not suitable to proceed as collaborative matter.

A list of Collaborative Associations in Australia

Collaborative Professionals (NSW) Inc www.collabprofessionalsnsw.org.au Lorraine Lopich, Secretary, Postal Address: Lopich Lawyers, PO Box 245 Shellharbour Square, NSW 2529, Australia, Tel: +61 +2 4297 5524, Fax: +61 +2 4297 5565, Email: lorraine@lopichlawyers.com.au

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Queensland Collaborative Law www.qldcollablaw.com.au Cassandra Pullos, Adamson Bernays Kyle and Jones, Solicitors, Postal Address: PO Box 1046, Southport QLD 4215, Australia, Tel: +61 +7 55323199, Fax: +61 +7 55 913402, Email: CJP@ABKJ.com.au

Collaborative Professionals Victoria www.collaborativelaw.asn.au Catherine Gale, Kennedy Wisewoulds, Lawyers, Postal Address: Level 29, 459 Collins Street, Melbourne, VIC 3000, Australia, Tel : +61 +3 96187300, Email: cathy.gale@wfl.com.au

Collaborative Practice Canberra www.collaborativepracticecanberra.com.au Kathryn Heuer, Postal Address: Farrar Gesini & Dunn, GPO box 2990, Canberra ACT 2601 Australia, Tel: +61 +2 62576477, Fax: +61 +2 62574382, Email: k.heuer@fgd.com.au

"It is the way a case is settled in collaborative law practice that makes collaborative law different"

"collaborative law is a dispute resolution process in line with current law reform ie Less adversarial trials"

"collaborative law uses interest based negotiations but remains an advocate for client. A mediator does not give client advice."

"No longer are negotiations done in the shadow of the court"

"The Lynchpin of collaborative law is the collaborative law contract" ie the participation agreement

"Collaborative law crosses different legal systems eg Czech Republic, Italy, USA, Australia"



An introductory list of further reading

- **LexisNexis** Australian Family Law Service
- Bernard S Mayer, *Beyond Neutrality -- Confronting the Crisis in Conflict Resolution*, Jossey-Bass, San Francisco 2004
- Stuart G Webb and Ronald G Ousky, . *The Collaborative Way to Divorce -- The revolutionaly method that results in less stress. Lower costs and happier kids -- without going to Court*, Hudson Street Press, New York 2006
- Pauline Tesler, *Collaborative Law*, The American Bar Association 2000,
- Lauren Alexander, Mark Hill, Andrew Hoffman Vicky Carpel-Miller, Janis M Pritchard, George Richardson, Nancy Ross and Tamara Rounds *Introductory Team Training*, Collaborative Divorce Team Trainings LLC, Canberra, 2006.
- Marion F Korn, *Advanced Training Collaborative Practice*, University of Technology of Sydney, Sydney 2006
- George Richardson and Brad Hunter, *Collaborative Lawyer Handbook for Use in Collaborative Divorce*, Collaborative Divorce Team Trainings LLC, Canberra 2006
- Stuart G Webb and Marion F Korn, *Introduction to Collaborative Practice*, University of Technology of Sydney, Sydney 2005.
- The Family Law Council, *Collaborative Practice in Family Law -- A report to the Attorney General prepared by the Family Law Council*, The Commonwealth of Australia, Canberra 2006.

Footnotes:

1 New South Wales, Queensland, the Australian Capital Territory, Victoria and Western Australia.

2 Bernard S Mayer, *Beyond Neutrality -- Confronting the Crisis in Conflict Resolution*, Jossey Bass, San Francisco, 2004.

"The LexisNexis Australian Family Law Service is an essential, practical and time saving tool, this four volume work contains all the information necessary to prepare a family law case. It includes legislation, commentary and precedents. It can be purchased in hardcopy or online. Feel free to check out the product catalogue on our website: www.lexisnexis.com.au"