Evaluating collaborative law in the Australian context

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Collaborative law as a method of resolving family law disputes is a relatively recent development in Australia. Originating from the United States, collaborative law has become increasingly widespread in Australia since 2005. This article evaluates the advantages and disadvantages of collaborative law in resolving family disputes in the Australian context. A background and history of the operation of collaborative law in Australia will be presented. It shall be argued that despite the innovation offered by collaborative law, there are a number of challenges associated with the Australian system of collaborative law. In particular, this includes the cost of the collaborative law process and issues associated with the mechanism of this type of dispute resolution.

INTRODUCTION

Alternative dispute resolution (ADR) has played a significant role in conflict resolution, particularly influencing the legal practice of Australian family law in the past 30 years. The nature and practice of family law has changed from a traditional adversarial legal process to emphasis on producing non-legal procedures and results. Collaborative law is a method of ADR where clients and their lawyers agree to negotiate a settlement with the other party and lawyer without going to court. All parties agree to negotiate in good faith and with full disclosure. Furthermore, the lawyers agree in writing not to represent their clients if the collaborative law process fails to produce a mutually agreed resolution.

This article will focus on the recent developments of collaborative law in Australia; in particular, whether it provides a viable option to resolve family law disputes. The article will also recommend the introduction of some guidelines to regulate the practice of collaborative law. Collaborative law has provided a useful alternative for resolving family disputes in some circumstances. However, the issues of accessibility, the adverse consequences of parties failing to make a resolution, and the absence of professional guidelines have limited its effectiveness in Australia.

BACKGROUND

ADR has existed in Australia since the 1980s. Anne Ardagh and Guy Cumes have identified that the evolution of Australian ADR can be divided into three distinct stages.[1] The first stage was its nascent period in the 1980s and early 1990s. The second stage was its growth period in the 1990s and early 2000s. During this period, the legal community was open towards law reform and the process of adapting non-legal processes to resolve disputes. The third stage can be described as the post-ADR period running since the 2000s to now, whereby ADR is an institutionalised and normalised part of conflict resolution. In the present stage, ADR has expanded to include the relatively new area of collaborative law in Australia. In 1990, collaborative law was created by Stuart Webb, an American family lawyer from Minnesota.[2] In 2005, collaborative law was introduced to Australia when Justice Robert Benjamin invited Webb to train and educate Australian lawyers in the practice of collaborative law.[3] In 2006, the *Family Law Act 1975* (Cth) was amended to make the ADR process

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[1] Anne Ardagh and Guy Cumes, "The Legal Profession Post-ADR: From Mediation to Collaborative Law" (2007) 18 ADRJ 205.

[2] Linda Fisher and Mieke Brandon, *Mediating with Families* (Thomson Reuters, 2009) p 37.

[3] Family Law Council, *Collaborative Practice in Family Law: A Report to the Attorney-General* (2006) p 29.

compulsory in cases that involved children.[4] Collaborative law in Australia has been driven by legal practitioners rather than by clients, and has grown considerably.

There is scant research on collaborative law in Australia, particularly empirical research, but there has been some theoretical and practical research. The 2006 Family Law Council report to the Attorney-General provides a comprehensive description of the theory and practice of Australian collaborative law,[5] with some insight on the Commonwealth government's position. Anne Ardagh has produced considerable literature on the operation of collaborative law in Australia, most notably an empirical research project on the theory and practice of collaborative law in the Australian Capital Territory (ACT).[6] Marilyn Scott has analysed Australian collaborative law in its theoretical context with therapeutic jurisprudence in mind.[7] She is concerned with the evaluation of negotiation theory and practice, collaborative law as a self-determination model for clients, and the rise of the "new advocacy" of lawyers. Lisa Di Marco presents the most favourable account of collaborative law or "therapeutic divorce".[8] Her major research concern is synthesising Australian collaborative family law practice and theory in the ideological framework of therapeutic justice. Her positive findings of collaborative law are not primarily reliant on qualitative evidence, but on demonstrating how the theory of collaborative law fits within the discourse of therapeutic justice. Di Marco argues collaborative law promotes self-determination, and encourages a less litigious and more harmonious divorce process.

Is collaborative law an innovative and effective method of ADR in Australian family law?

The advent of collaborative law in Australia was given a largely positive reception by the legal community,[9] and is now accepted as a legitimate form of ADR, where it is currently in the process of development and adaptation amongst legal practitioners. The Family Law Council's report recommends developing and disseminating information about collaborative practice. The report also advocates the introduction of national guidelines for collaborative law. Moreover, it recommends amendments to the *Family Law Act* to enforce the confidentiality of collaborative law meetings (similar to ss 10H and 10J), and to recognise the collaborative law process as a form of ADR in considering whether to grant a s 60I certificate.[10] This has yet to be implemented, and appears to be the next step for the development of collaborative practice in Australia.

Although collaborative law has generated mixed results, there are various noteworthy advantages. If the process is successful, collaborative law can be faster, less costly, and it can empower parties to make decisions about the future. Di Marco argues that collaborative law can generate creative solutions that otherwise would not be possible in court and provides self-determination for parties involved, which is particularly important for Indigenous Australians.[11] The underlying rationale behind this argument is therapeutic jurisprudence. Indeed, collaborative law shifts the dispute resolution process away from the adversarial system of lawyers and towards a greater self-determined

[4] *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

[5] Family Law Council, n 3.

[6] Anne Ardagh, "Evaluating Collaborative Law in Australia: A Case Study of Family Lawyers in the ACT" (2010) 21 ADRJ 204 at 208. See also Anne Ardagh, "Repositioning the Legal Profession in ADR Services: The Place of Collaborative Law in the New Family Law System in Australia" (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 238; Ardagh and Cumes, n 1.

[7] Marilyn Scott, "Collaborative Law: Dispute Resolution Competencies for the 'New Advocacy'" (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 213.

[8] Lisa Di Marco, "Therapeutic Divorce: The Scope and Means of Implementing Collaborative Practice in Australia" (2010) 3 *Queensland Law Student Review* 25.

[9] Catherine Gale, "Collaborative Law in Lawyers' Hands", *Lawyers Weekly* (20 July 2011), http://www.lawyersweekly.com.au/the-new-lawyer/comment-debate/collaborative-law-in-lawyers-hands. See also Lawrence Maxwell, "The Development of Collaborative Law" (2007) (Summer/Fall) *Alternative Resolutions* 22 at 25.

[10] Family Law Council, n 3, pp 2-3.

[11] Di Marco, n 11 at 29-30.

process for clients. Clients are encouraged to make realistic offers, and they feel a sense of empowerment by exercising a degree of control in the process. For lawyers, it is a significantly less stressful process, where the number of "litiogations" is reduced.[12]

There are three defining features of collaborative law. The first is the collaborative contract, including a disqualification clause that prohibits parties from litigating or threatening to litigate during the collaborative process. The parties agree that their lawyer will not represent them in court if the collaborative process fails. The motivation behind the disqualification clause is to strongly encourage the parties to resolve their issues outside of court, and to get rid of the acrimony associated with protracted family disputes. Moreover, parties agree to negotiate in good faith and participate with integrity. This means the parties are expected to make full disclosure and to respectfully communicate – this is to discourage parties from engaging in a "fishing expedition" for information.[13] The lawyers are expected to respect client confidentiality throughout the entire collaborative proceedings. The parties also agree to focus on making a resolution that factors in the future wellbeing of themselves and the best interests of the child.

According to Pauline Tesler, anecdotal evidence from American collaborative lawyers "report significant improvement in the quality of professional life".[14] This is largely due to the non-litigious nature of the collaborative contract. In Australia, the experience has been mixed. Catherine Gale, former President of the Law Council of Australia, provides positive anecdotal accounts of collaborative law that are congruent with the experience expressed in Tesler's anecdotal American accounts.[15] However, the empirical evidence from the ACT suggests otherwise. Ardagh states that "collaborative law has complicated lawyering in the ACT to the extent that … few cases are being commenced".[16]

The second defining feature is the four-way meeting, comprised of the two opposing parties and their respective lawyers. The Family Law Council's report identified three main advantages to the four-way meeting process.[17] First, it avoids the arm's length bargaining dynamic of adversarial negotiations. Second, it creates a co-operative environment. Third, it encourages parties to produce both legal and fair outcomes. Macfarlane states that collaborative family law "offers a chance for separating spouses to negotiate durable, realistic and creative outcomes that they deem 'fair'".[18] The four-way meeting provides an opportunity for disputing parties to work co-operatively and gives clients a sense of self-determination.

The third defining feature is the philosophy of interest-based negotiations as the basis of the collaborative process, rather than positional bargaining. This is derived from the negotiation theory in *Getting to Yes*.[19] Rather than the typical expectation of each party defining their *positions* as commonly seen in the court process, parties are instead expected to define and identify their *interests*. By doing so, the parties seek a resolution by using an objective criteria. This is the most effective and innovative feature of the collaborative process. Di Marco notes that this "paradigm shift" towards ADR and the focus on parties' interests and needs fosters mutually satisfying creative solutions.[20] From the perspective of therapeutic jurisprudence, an interest-based solution creates a culture of co-operation rather than combativeness, creativity rather than rigidity, and objectivity rather than

[12] "Litiogations" is a portmanteau of "litigation" and "negotiation": Scott, n 10 at 217.

[13] Scott, n 10 at 217.

[14] Pauline Tesler, "Collaborative Law: A New Paradigm for Divorce Lawyers" (1999) 5(4) *Psychology, Public Policy and Law* 967 at 990.

[15] Gale, n 12.

[16] Ardagh, n 5 at 215.

[17] Family Law Council, n 3, p 25.

[18] Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* (Family, Children and Youth Section, Department of Justice, Canada, 2005) p xiv.

[19] Roger Fisher, William Ury and Bruce Patton, *Getting to Yes* (Penguin Books, 2011).

[20] Di Marco, n 11 at 28-29.

subjectivity. From a practical perspective, an interest-based negotiation fosters a more positive ADR environment and encourages creativity and innovation. According to Ardagh's interviews of collaborative lawyers in the ACT, all interviewed lawyers strongly supported the interest-based model and expressed their dislike of the traditional adversarial court process found in family law.[21] In particular, practitioners experienced "added value" to their provision of client service and the ability to do things that would have been impossible to do in court. Although the interest-based model of collaborative law demonstrates innovation, there are significant problems associated with the disqualification clause and the four-way meeting. This has marred the overall creativity of collaborative law as a method of family dispute resolution.

WHAT ARE THE PROBLEMS WITH COLLABORATIVE LAW?

General issues

Although the therapeutic jurisprudence underlying collaborative law presents an innovative option of ADR, there are serious practical issues with the process. One major problem is the fact that collaborative law appears to be restricted to wealthier clients with a balanced power dynamic. Power imbalances do occur when a cynical party participates in hard bargaining. The House of Representatives inquiry into child custody arrangements identified this problem:

> It does not provide any way to prevent a vindictive party from dragging the process out and still proceeding to litigation at more cost to themselves and, more importantly, to the other party.[22]

Collaborative law is also inappropriate where there is a history of mental health or issues of domestic violence.[23] Interestingly, most of the ACT clients identified in Ardagh's research are highly educated and wealthy clients. The research suggests that many of the clients tended to be public servants who sought to minimise costs with more open-mindedness to new ideas.[24] This contrasts with Macfarlane's research on collaborative law in Canada. Macfarlane's findings indicate collaborative law has been used to resolve family disputes across the socio-economic spectrum, such as the low-income area of Medicine Hat and the higher income area of Vancouver.[25] There has been no empirical research on Australian collaborative law outside of the ACT; therefore, it is hard to accurately assess the client demography across Australia. Nevertheless, it is possible to argue that collaborative law has not permeated across the wider Australian community, because it has only existed for about a decade, whereas Canada has had collaborative law since 1999 and it has had more time to mature and develop. Macfarlane has also flagged the concern that collaborative family law has been used by wealthy Canadian clients to avoid the rigorous accounting and valuation procedures.[26] However, there is no evidence to suggest that this is a reason why most Australian collaborative law clients come from wealthier backgrounds. The future of collaborative law in Australia is uncertain. Indeed, there are signs of growth in the development of professional bodies of collaborative law in all States and Territories, except for Tasmania and the Northern Territory.[27] However, it appears the collaborative law experiment in the ACT is over, as fewer lawyers are taking a collaborative approach.[28]

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[21] Ardagh, n 5 at 210.

[22] 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* (2005) p 79.

[23] Ardagh, n 5 at 213.

[24] Ardagh, n 5 at 208-209.

[25] Macfarlane, n 21, p 14.

[26] Julie Macfarlane, "What is Beneath the Hype of Collaborative Family Law?", *The Lawyers Weekly* (Canada) (23 September 2005) p 57, http://www.lawyersweekly.ca/index.php?section=article&articleid=158.

[27] Collaborative Law in Australia, *Home Page* (2015), http://www.collaborativelaw.asn.au.

[28] Ardagh, n 5 at 215.

Collaborative contract

The collaborative contract has also been subject to criticism by lawyers and clients alike, especially the disqualification clause. The main problem is the prohibition of collaborative lawyers representing their clients after the failure of the collaborative process. This means that the family law process is ironically more expensive for clients, since they will need to go to the trouble of finding a new lawyer if the process fails and the matter proceeds to court. Some ACT collaborative lawyers were unhappy with this strict requirement that was lambasted as "process evangelism",[29] and are fearful of losing long-term clients in the event of a failed collaborative process. For their part, clients have a large investment in the relationship with their lawyers.[30] Hence, some collaborative lawyers have significantly altered the original model of collaborative practice to the extent of unravelling the whole collaborative process. This means a collaborative process can involve no disqualification clause, and bits and pieces of the original model can be mixed and matched to suit the client.

Tesler argues that the disqualification clause builds a collaborative lawyer's professional reputation as an honourable and ethical practitioner amongst other lawyers and clients.[31] Collaborative lawyers have chosen to engage in a less stressful and non-litigious legal environment. For the collaborative lawyer to go to court would be counter-intuitive and generate unwanted stress, something that Stuart Webb discovered as he was developing collaborative law.[32] Developing the culture and distinct reputable practice of collaborative law necessitates the inclusion of the disqualification clause in collaborative contracts. Expediency and quick profit-making of collaborative lawyers continuing to represent their clients after a failed collaborative process would diminish the character of the collaborative law process that has been the experience in the ACT.

Another problem associated with collaborative law is the cost and accessibility. The costs clauses have been a problematic feature in the collaborative contract. The main issue is the inclusion of a penalty provision against the opposing party who is required to reimburse the costs of the other party for withdrawing from the collaborative process. ACT collaborative lawyers have found that the penalty provision is punitive, and causes unhelpful positional arguments over who broke the collaborative contract first and consequently who should pay.[33] Notwithstanding this problem, collaborative law is generally more time efficient and less costly if the process is successful. However, the collaborative process can sometimes be tedious. The client would be required to pay the lawyer's consultation fees to prepare for the collaborative meeting and for the numerous collaborative meetings. If the collaborative process fails, it ends up being more costly for the client who would also have to pay for the costs of litigation.

Overcharging and over servicing is a serious ethical and financial issue. For example, if a client has already formed a mutually shared opinion on how to settle a family dispute with the client's former partner, it would be unethical for the lawyer to demand their client attend and pay for further collaborative meetings. This was the situation experienced by some ACT collaborative lawyers who suffered a loss of income in swiftly resolved collaborative cases.[34] Another concern with collaborative law is the development of a two-tiered system of access and affordability. As previously mentioned, the Australian client demographic for collaborative law is skewed towards the more educated and wealthy side of society. Clients from a lower socio-economic background would be able to access Legal Aid. In the event of the failure of the collaborative process, all Legal Aid lawyers would be disqualified from continuing to represent their client as a result of the disqualification clause. National Legal Aid has identified this issue and has stressed that Legal Aid clients would be financially

[29] Ardagh, n 5 at 211.

[30] Scott, n 10 at 221-222.

[31] Tesler, n 17 at 976-978.

[32] Tesler, n 17 at 977.

[33] Ardagh, n 5 at 212.

[34] Ardagh, n 5 at 212-213.

disadvantaged in affording the more costly services of a private legal practitioner.[35] Di Marco has identified that this would be particularly disadvantageous towards clients living in rural and remote regions, where there is limited availability of legal practitioners.[36] Therefore, collaborative law may not be an appropriate method of ADR for less wealthy clients and clients, especially those who live in regional and remote areas. The provision of collaborative law in Australia is unequal and this can lead to injustice.

Four-way meeting

The four-way meeting presents a unique method of bargaining and an interesting power dynamic. Penelope Bryan has reported that there are gender bias issues of bargaining power in the collaborative four-way process.[37] Bryan argues that procedure, emotions and relationships take precedent over substance, and women have the weaker bargaining position due to the stereotype of women as homemakers. Her research is based on the American context, but it does not reflect the Australian experience. There is no evidence that women in Australia have been prejudiced by the collaborative process due to their gender. The interest-based focus of collaborative law is designed to rectify the very issues that Bryan is concerned about. Her American anecdotal evidence predominantly describes women of lower socio-economic background, whereas in Australia collaborative law is dominated by wealthier clients. Therefore, it is the socio-economic factors rather than gender that play the most significant role in the cause of power imbalance in the collaborative process.

Admittedly, the four-way meeting is certainly problematic in a situation where there is a significant power imbalance. In these circumstances, "a particularly domineering or manipulative party may still be able to exert influence over their former spouse in four-way meetings".[38] There is also no independent third party in four-way meetings. Although each client is legally represented, there can still be a power imbalance or considerable friction. It appears that the four-way meeting is best employed when all parties are more or less equal. Furthermore, the four-way meeting can be burdensome on clients, since they may need to travel far distances and multiple meetings can quickly become very costly. Collaborative law is not for everyone. The four-way meeting is best where the power balance is not skewed one way or another, and where parties are in close geographical proximity from each other.

SHOULD COLLABORATIVE LAW COME UNDER CODIFIED REGULATIONS AND GUIDELINES?

At present, collaborative law is not a legislated area of law in Australia. There are strong reasons to recommend legislating collaborative law in Australia, particularly to improve training and education of collaborative lawyers, prevent time delaying tactics, and to regulate the ethical conduct of collaborative lawyers. In 2011, the Law Council of Australia published the *Australian Collaborative Practice Guidelines for Lawyers*, including guidelines in relation to confidentiality, charges for services, and ethical conduct. The guidelines provide a helpful way of giving professional standards to collaborative lawyers – but they are not enforceable. In 2001, Texas was the first jurisdiction in the world to enact legislative provisions for collaborative law in family disputes.[39] The legislation was necessary in Texas to stay statutory court time limits until the conclusion of the collaborative process. Di Marco notes that the absence of time restrictions in Australia leaves parties vulnerable to

[35] National Legal Aid, *Collaborative Law and the Legal Aid System, Submission to the Family Law Council* (7 July 2006) pp 5–6.

[36] Di Marco, n 11 at 34.

[37] Penelope Bryan, "Collaborative Divorce: Meaningful Reform or Another Quick Fix?" (1999) 5(4) *Psychology, Public Policy and Law* 1001.

[38] Family Law Council, n 3, p 57.

[39] Family Law Council, n 3, pp 18-19; *Family Code of Texas*, ss 6.60340 and 153.007241.

manipulation and delaying tactics.[40] If Australia were to adopt a provision similar to the *Family Code of Texas*, it would remove the risk of delaying tactics in the collaborative process and provide further legitimacy to the practice of collaborative law.

Formalised compulsory education and training would assist in the development of collaborative law. The Family Law Council has flagged that a formal national approach would be desirable and it has warned that insufficient collaborative law training may place clients at a significant disadvantage.[41] There is also a need to increase awareness and education of collaborative law at a tertiary level to undergraduate and postgraduate law students. Scott has highlighted the worrying development of law graduates lacking basic understanding of ADR and knowledge of how to prepare for a negotiation.[42] A codified collaborative law in Australia would help to build awareness among law students, and encourage further education and training of collaborative law in tertiary institutions.

There is no third party in the collaborative process and some academics have suggested the introduction of an independent coach. Scott is a proponent of introducing an independent coach in the collaborative process. An independent coach is a third party expert who coaches clients to participate in the collaborative process by guiding the clients to deliver effective communication and to contain the client's emotions. It is important to note that the coaches would not function as psychologists or therapists. Scott argues that family law requires an interdisciplinary approach and an independent coach can help facilitate emotional and communication skills that are outside the lawyer's expertise.[43] However, the idea of an independent coach has more drawbacks than advantages. Hiring an independent coach further increases the client's costs. Furthermore, a properly trained collaborative lawyer should be able to assist clients in coping with their emotions and guiding their communication in the context of interest-based negotiations. The widespread introduction of independent coaches would be an indictment on the ability of collaborative lawyers to perform the basic tasks of the collaborative process. Therefore, independent coaches should not be introduced in the collaborative process and they should not be included in collaborative guidelines. Instead, better training and education should be offered to collaborative lawyers.

CONCLUSION

Collaborative law has come a long way from a local practice in Minnesota to becoming an increasingly popular form of ADR in many different countries. Indeed, it has expanded the ADR toolbox that lawyers can use to solve family law disputes without litigation. There are various merits to collaborative law, namely the non-adversarial, non-litigious, interest-based negotiations, and providing a mechanism for family dispute resolution within the collaborative process. However, there are significant disadvantages to the theory and practice of collaborative law. In particular, it has not necessarily fulfilled its main aim of being less costly, less stressful and less time consuming in most cases. The collaborative process can still be adversarial and complex, especially if the process fails. Moreover, it is limited in accessibility and demographic appeal within Australia. Nevertheless, for some people, collaborative law is seen as the innovative and efficient way of resolving disputes that clients and lawyers have been longing for. This is especially the case where parties are co-operative and basically wield the same balance of power. However, this situation is the exception rather than the rule, and thus collaborative law is best for the few.

[40] Di Marco, n 11 at 31.

[41] Family Law Council, n 3, pp 31, 57.

[42] Scott, n 10 at 231.

[43] Scott, n 10 at 223-225.