

Dispute resolution choices

A comparison of family dispute resolution, family law conferencing services and collaborative law

Catherine Caruana

Separating couples who require assistance with disputes over property or arrangements for their children now have a range of different dispute resolution services to choose from. To contrast the work of family dispute resolution services with collaborative law and family law conferencing, we sought the views of family dispute resolution practitioners from Chadstone Family Relationship Centre, Legal Aid Queensland lawyers involved in family law conferencing, and collaborative law practitioner, Caroline Counsel, as to how collaborative law practice differs from what FRCs and legal aid can provide.

Clients wanting to commence litigation related to children in the family courts, subject to some exceptions, must first make a genuine effort to resolve the dispute by family dispute resolution (FDR). Accredited FDR practitioners, including those employed at Family Relationship Centres (FRCs), and those providing lawyer-assisted dispute resolution at legal aid offices, are authorised to issue certificates indicating whether FDR is appropriate in a given case, or whether a genuine effort has been made to resolve the matter. However, there are some fundamental differences between:

- traditional mediation, or FDR as provided by the network of FRCs, community organisations and private mediators;
- dispute resolution services provided by state legal aid commissions following a grant of aid; and
- collaborative law processes provided by private lawyers.

The role of lawyers

The most obvious difference is the role of lawyers. The more traditional dispute resolution processes involve a neutral third party (the FDR practitioner) who *facilitates discussion* between the parties but does not give legal advice. Where appropriate, FRC staff may encourage parties to seek legal advice before engaging in the process, and in between FDR appointments. Following a change in policy, FRCs can also allow lawyers to attend FDR sessions

with their clients in appropriate cases; however, this does not translate to an automatic right to legal representation.

Collaborative law practice and family law conferencing provided by a legal aid commission are characterised as lawyer-assisted dispute resolution: lawyers are always involved in the process, whether as advisers to the parties to the dispute, in a discussion facilitated by a neutral Conference Chair (legal aid conferencing), or working together as a team with their clients to help them reach a resolution (collaborative law). At Legal Aid Queensland, each party has an opportunity to meet with their lawyer in private throughout the process; however, it is the Conference Chair who directs the discussions. Unlike lawyers representing parties involved in FDR at FRCs or legal aid conferencing, collaborative lawyers actively participate in the negotiations between the disputing parties as “settlement counsel” and, in a role more akin to that of FDR practitioners and legal aid conference chairs, assist them to identify issues in dispute, consider various options and reach agreement. Separating couples involved in a collaborative process can also obtain legal advice, either privately or, where all agree, in the presence of the parties.



Clients wanting to commence litigation related to children in the family courts must first make a genuine effort to resolve the dispute by family dispute resolution.

Cost

Another difference is cost. Fees for mediation can vary, depending on the service provider. At FRCs, the first three hours of mediation are free, and then a sliding scale of fees applies, which is dependent on the income of the clients.¹ Exemption from fees for mediation exists at FRCs in a number of situations; for example, if the client is a holder of a health care or pensioner concession card or in cases of financial hardship.² Similarly, there is no cost for the lawyer-assisted conferencing provided by legal aid, but clients must first qualify for a grant of aid, satisfying the relevant means and merit tests set by the relevant state/territory legal aid body.

When using private lawyers for assistance in negotiating a settlement through collaborative processes, clients are billed at an hourly rate and meetings are limited to two hours. It generally takes four to six meetings to reach a resolution, and as such, the process has the potential to be considerably less expensive than litigating. The clients, not the lawyers, control the costs in the collaborative process, as they decide how many meetings they want and what will be discussed at those meetings. However, for families with many issues to resolve it can become as expensive as litigation.

What issues can be discussed?

Another point to consider is the types of issues that may be covered in each process. Mediators are generally able to help parties negotiate any matters arising from the separation, including arrangements for the care of children, property settlement and financial support. FRCs, however, provide FDR primarily to help resolve issues relating to the care of the children, but will also mediate property matters in combination with children's issues.

Family law conferencing at Legal Aid Queensland is available for parenting issues, spousal maintenance and property settlement where the dispute relates to the matrimonial home, or to deferred benefit funds, such as superannuation. However, the Property Arbitration Program (Qld) can deal with all property matters. To use this service, at least one party must qualify for a grant of aid. The party who is not eligible for aid will be charged a fee for the service.

Collaborative law practices can be used to resolve any issues in dispute.

Dispute resolution choices in a nutshell³

FDR (or mediation) provided at FRCs

- FDR at an FRC is conducted by a trained practitioner, who may have a legal or social science background



There are some fundamental differences between traditional mediation, dispute resolution services and collaborative law processes.

and who operates as an impartial, neutral third party, but does not provide legal advice. Practitioners also need to meet specific accreditation requirements in order to issue 60I certificates, if the matter needs to progress through the courts.

- Lawyers can be present during FDR sessions where required.
- FDR is child-focused, aiming always to promote the best interests of the children.
- FDR has the potential to involve the children in the process, via child-inclusive processes.
- It involves careful assessment for suitability, screening for issues such as domestic violence and child abuse, and preparation of clients. FDR practitioners may refuse mediation where they believe there is a concern about the safety of the clients or the mediators, or where there is a power imbalance that cannot be adequately addressed within the process.
- It is a requirement that the client be able to negotiate on his or her own behalf. However, there are mechanisms to support clients in their negotiations, including having a support person or a lawyer present, or conducting the mediation on a shuttle basis where the parties are located in separate rooms and the mediators move between the rooms.
- In some cases, the parties are required to sign an agreement with the FRC prior to commencing the

mediation which, among other things, ensures the client cannot sue the FRC unless they act fraudulently or negligently.

- FDR may include access to the services of FRC staff known as Family Advisors, who help separating couples prepare for the mediation by providing coaching support and referral to other services, which may be required from time to time.
- Chadstone FRC can offer a unique service combining co-mediation and therapy (“Co-met”), a process where both mediator and counsellor are present, and the joint session between the parties moves between strategies of the two modes, as the need arises. It is particularly useful where mediation has “stalled” due to an emotional obstacle (that may have its origins in the parties’ prior relationship or even from either of the parties’ family of origin), and cannot move until that obstacle receives some therapeutic attention.

Legal aid family law conferencing (Qld)⁴

- Conferences are conducted by a Conference Chair who is an accredited FDR practitioner. The chair’s role is to facilitate the discussion. S/he does not provide legal advice to the parties, nor make decisions for anyone. However, the chair reports to Legal Aid Queensland about the outcome of the conference and makes recommendations that may involve further aid for more conferencing, or the drafting of consent orders. Sessions are 4 hours in duration.
- There is a great degree of flexibility as to what form the conference takes. While there is a preference for face-to-face meetings, conferences are commonly conducted over the phone, whether between the parties with their lawyers present, just between their lawyers, or by shuttle, particularly where there is a high degree of violence. Where both parties attend, the conference can be conducted by shuttle—perhaps bringing the parties together at some stage—or can involve only the lawyers negotiating on their clients’ behalf.
- Conferences are modelled on a child-focused, but not child-inclusive model. Children do not attend conferences.⁵
- An intake process, involving the completion of assessment sheets, is conducted with both the client and their lawyer to screen for violence and other issues that may affect the parties’ ability to negotiate.
- Other professionals, such as an independent children’s lawyers, may participate in the conference. There is also a follow-up support service available at Legal Aid Queensland, where clients may be referred to a social worker for assistance in implementing

the agreement (Conference Resolution Support Intervention).

- While clients are encouraged to speak for themselves if they so wish, there is always the option of lawyers negotiating on their clients’ behalf.
- There are no costs involved for parties granted legal aid; however, parties using the process to settle property matters may be asked to make a contribution. The grant of aid will often include the filing of consent orders in the family courts.

Collaborative law⁶

- There is no facilitator or convenor in the collaborative process—rather it is a team approach, where lawyers trained in the collaborative process coach their clients through the process, assisting them to have a better conversation with their former partner to achieve settlement.
- If the process does not resolve the issues in dispute, collaborative lawyers cannot provide the certificates required (under s60I of the *Family Law Act*) for clients to institute legal proceedings; however, should they require such a certificate, clients would be referred to FDR practitioners who can.⁷
- Lawyers avoid giving legal advice at the commencement of the collaborative process in order to dissuade clients from being positional. Rather, lawyers give legal advice during the process as required, either in the meeting or privately.
- The lawyers and the parties to the dispute enter into a written agreement at the beginning of the process setting out the ground rules for the collaborative process and stipulating that if either party commences court proceedings, neither of the collaborative lawyers will be able to represent their clients in subsequent litigation.
- The collaborative process is a child-focused process insofar as the team may agree to engage a collaboratively trained child psychologist or counsellor to assist the family. It may become a child-inclusive process at the behest of that professional. Other professionals, such as financial planners, assist the team as required on a case-by-case basis.
- In cases involving a history of domestic violence, collaborative lawyers carefully consider suitability of the process, and other professionals such as counsellors may be asked to attend the meetings or be consulted separately.
- Negotiations are conducted on a confidential and without-prejudice basis.

Dispute resolution choices at a glance

| | FDR at FRCs | Family law conferencing (at Legal Aid Queensland) | Collaborative law |
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| Issues addressed by the service | All matters arising from the separation, but primarily parenting issues and property settlement in conjunction with parenting issues | Parenting issues, spousal maintenance and property settlement relating to the matrimonial home and superannuation | Any issue in dispute |
| Role of lawyer | Advisor to client prior to and in between FDR sessions. Lawyers may be present during negotiations where required | Attend conference with, (or instead of) their clients as advisors or representatives | Lawyers for each party attend collaborative meetings, working as a team with the clients |
| Child-focused | Yes | Yes | Yes |
| Scope for children to participate in the process (child-inclusive) | Yes, where assessed as appropriate | No, however some legal aid commissions are considering implementing child-inclusive practice | Children may be involved in the process where recommended by a child psychologist or counsellor assisting the parties |
| Cost | First 3 hours free. Sliding scale of fees apply thereafter | Free, but must qualify for a grant of aid. Parties may be required to make a financial contribution in matters involving property settlement | Each party is responsible for their lawyers' hourly fees, and share any additional costs as agreed |
| Where no agreement is reached | Accredited FDR practitioners can issue the certificate required for the parties to initiate court action (s60I) | The Conference Chair can issue the certificate required for the parties to initiate court action | Collaborative lawyers cannot issue the required certificate. Their clients will need to obtain one from a registered FDR practitioner, and find a new lawyer if the matter is taken to court |
| Where agreement is reached | If the parties require the agreement to be made legally binding, there may be additional legal costs | Often, the drafting of consent orders is included in the grant of aid | The parties agree which of the lawyers is to draft the agreement and how the cost is to be shared |
| Other | Other FDR models, such as "Co-met" may be used | Follow-up service for assistance in implementing the agreement provided | Lawyers cannot act for the clients in any subsequent court proceedings if they are unable to reach agreement |

- While a collaborative lawyer has a duty to promote the best interests of their client, they each have an overarching obligation to ensure that whatever option is agreed upon meets the needs of the family as a whole and is an option within the range of possible outcomes that could have been decided by the court.
- Each party involved in collaborative practice will be responsible for their lawyer's hourly fee, unless other arrangements are made. They can decide, for example, whether the process is to be paid by the party earning the greater income or is to be drawn from their assets.
- Once settled, the parties then decide which lawyer is to draft either the Consent Orders or the Binding Financial Agreement (or the Parenting Plan and/or Child Support Agreement in children's matters). The parties choose how this is to be funded.

Endnotes

1 In May 2010, FRC managers were advised by the Federal Attorney-General of proposed changes to these fee arrangements. It is proposed that from 1 July 2011, only the first hour of dispute resolution services will be provided

- at no cost, with a standard means test applied to the second and third hour, and individual agencies to determine fees for additional hours after that.
- 2 For more information on the fees policy at FRCs, see the Family Relationship Services Guidelines <<http://tinyurl.com/yjfi9yj>>.
 - 3 The processes described are specific to the agencies featured and approaches may vary in different services and legal aid commissions.
 - 4 For information about legal aid conferencing in a particular state, contact the relevant legal aid body.
 - 5 However, Roundtable Dispute Management, the conferencing service attached to Victoria Legal Aid, has introduced a pilot child-inclusive service, and a similar pilot is proposed for Western Australia.
 - 6 It is important to note that collaborative law has been applied in various Australian and overseas jurisdictions with varying levels of success. In the ACT, for example, it was trialled but considered by ACT practitioners to be unsustainable for a range of reasons (personal communication, Julie Dobinson, 12 November 2009).
 - 7 The Family Law Council, in its 2007 report, recommended that the *Family Law Act 1975* should be amended to allow for participation in a collaborative process, to be taken into account by FDR practitioners when deciding whether to grant a certificate excluding clients from the requirement to attend FDR, prior to initiating litigation (Family Law Council, 2007).

Reference

Family Law Council. (2007). *Collaborative practice in family law: A report to the Attorney-General prepared by the Family Law Council*. Canberra: Commonwealth of Australia.

Catherine Caruana is a Senior Research Officer with the Australian Family Relationships Clearinghouse. This article first appeared in *Family Relationships Quarterly* No. 15 (2010).