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THE EVOLUTION OF COLLABORATIVE PRACTICE IN AUSTRALIA

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About the authors

Sue Abrams

Sue Abrams is currently Chief Counsel with and, until 31 December 2022, was a founding Solicitor Director of ATW Family Law. Sue has practised extensively in Family Law throughout her career of over 40 years. Since 1995 when Sue became an Accredited Specialist in Family Law, she has practised exclusively in the area of Family Law.

Sue's preferred approach to practice is to achieve negotiated outcomes for clients outside the Court system. In 2006 and 2007, she completed basic and advanced training in Collaborative Practice and has since practised extensively as a Collaborative Lawyer.

Sue is currently Vice-President of the Australian Association of Collaborative Professionals, a founding and current member and past-President of Collaborative Professionals NSW, a founding and current member and past-President of Central Sydney Collaborative Forum, a founding member of Relationships Australia (NSW) Collaborative Practice Group and a current member of the International Academy of Collaborative Professionals.

Beth Jarman

Beth is a Special Counsel in the Sydney Family Law practice of Mills Oakley, having joined the firm in January 2014. Beth has practised exclusively in Family Law for approximately 29 years.

Beth has been an Accredited Specialist in Family Law since 2001 and acted as Deputy Registrar of the Family and Federal Magistrates Court in 2004.

Beth has extensive experience across the range of all Family Law matters. Prior to commencing work with Mills Oakley Beth worked for the Legal Aid Commission of NSW from 1994-2013 where she advised and acted for many thousands of clients and acted as an ICL since 1996.

Beth is trained in Collaborative Practice.

…from lawyer-based negotiation to interdisciplinary, multi-layered dispute resolution

… where to next?

The Winds of Change

It was 1972 and the Whitlam Government had been swept into power bringing with it the winds of change. Love him or loathe him, it is incontrovertible that Gough Whitlam and his government brought extensive social reform to Australia, including in the area of Family Law.

Since 1959, the *Matrimonial Causes Act 1959* (Cth) had regulated divorce and associated matters throughout Australia. The Whitlam Government, however, was of the view that Courts had been found to be "unsuitable and ill-equipped to deal sympathetically and helpfully with the particular problems of family disputes."[1] Consequently, in 1974, the *Family Law Bill* was introduced, the late Hon Justice Murphy its architect.

The proposed new legislation was intended to:

- remove guilt and fault from divorce proceedings, providing that the sole ground for divorce would be the irretrievable breakdown of the marriage, established by 12 months separation; and
- establish a new Court, the first Court of its kind in the world "set up to handle divorce proceedings and to administer an extensive machinery for reconciliation"[2]

1 The Hon Kep Enderby, "the Family Law Act: Background to the Legislation 1975" University of New South Wales Law Journal 10,17 and as cited in the ALRCR page 57.

2 Former Prime Minister the late Gough Whitlam Press Conference, Canberra, 20th May 1975

The 1974 Senate Standing Committee on Constitutional and Legal Affairs envisaged that the new Family Court would:

- deal exclusively with family law matters;
- be a "helping court";
- be composed of judges appointed specifically for their suitability for dealing with family law matters; and
- employ ancillary staff including welfare officers, marriage counsellors and legal advisers.[3]

The creators of the Court correctly identified that the breakdown of relationships and arrangements for children, which are covered by the Family Law system have **legal, social and financial obligations and consequences**.[4] To address these obligations and consequences, integral to the reformed approach was an emphasis on conciliation, and subsequently mediation, as preferred alternatives for resolution of family disputes.

With the 2021 reforms of the Court, and the new Overarching Principles, a heightened emphasis has been placed on Family Dispute Resolution (FDR) and mediation. These reforms made some headway into supporting the "legal, social and financial" needs of separating families but not comprehensively.

How Collaborative Practice began

Meanwhile during the late 1980s on the opposite side of the world, a Minneapolis lawyer, Stuart ("Stu") Webb, who had practiced traditional family law for more than twenty years, had become disillusioned with litigation, believing that there must be a better way. He explored mediation and alternate dispute resolution but was determined to craft a way to bring the particular talent of lawyers as problem-solvers into a "settlement only" process for family law representation. In his 14 February 1990 letter to Justice A M "Sandy" Keith of The Minnesota Supreme Court, when describing a particularly successful productive settlement conference Stu opined:

> Why not create this settlement climate deliberately? I propose doing this by creating a context for settling family law matters by, where possible, removing the trial aspects from consideration initially. I would do this by creating a coterie of lawyers who would agree to take cases, on a case-by-case basis, for settlement only.[5]

At about the same time, an interdisciplinary approach to divorce resolution began to develop through Californian family psychologists Peggy Thompson and Rodney Nurse, along with a group of lawyers and financial professionals. Simultaneously, Nancy Ross, a clinical social worker, began to work with a group of Santa Clara County lawyers to create a partnership between mental health professionals and collaborative attorneys. The two groups were introduced to Collaborative Law through Pauline Tesler, a San Franciscan lawyer, and thus began the creation of the Interdisciplinary Collaborative Practice concept.

Pauline Tesler in her text "Collaborative Law" provides an overview of Collaborative Practice:

> In the collaborative law process, the parties agree that no one will threaten or engage in litigation to coerce compromises. The parties retain a right of access to the Courts, but if either party does resort to the Courts for dispute resolution, both lawyers are automatically disqualified from further representation of either of the parties against the other. All experts are retained jointly with the collaborative law model and are similarly disqualified if the process breaks down. During the process, although the lawyers remain advocates for their respective clients within all bounds of professional responsibility, they share a formal and binding commitment to keep the process honest, respectful and productive on both sides.

> More than mediation, in Collaborative Practice parties are assisted by a team of professionals from each of the **legal, social science and**

3 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Law and Administration of Divorce and Related Matters and the clauses of the Family Law Bill 1974* (Parliamentary Paper, No. 133, October 1974) [44] as cited in 2019 Australian Law Reform Commission (ALRC) Report Family Law for the Future – An Enquiry into the Family Law System, (ALRCR), page 57.

4 Australian Association of Collaborative Professionals (2018). Submission on the Inquiry into the Family Law System. Australian Law Reform Commission. Retrieved from https://www.alrc.gov.au/wp-content/uploads/2019/08/family-law_326._australian_association_of_collaborative_professionals.pdf, page 3.

5 Stuart Webb letter to Justice Keith 4 February 1990, Minnesota Supreme Court. Australian Association of Collaborative Professionals (March 31 2022.) The Origins of Collaborative Practice Retrieved March 7 2023 from https://www.collaborativeaustralia.com.au/the-origins-of-collaborative-practice/.

financial disciplines (emphasis added), chosen according to the needs of the parties and the ambit of their dispute.

The hallmarks of the process are:

- Full, voluntary, early discovery of disclosures;
- Acceptance by the parties of the highest fiduciary duties toward one another;
- Voluntary acceptance, a priori, of settlement as the goal and respectful, fully participatory process as the means;
- Transparency of process;
- Joint retention of mutual experts;
- Commitment to meeting legitimate goals of both parties if at all possible;
- Avoidance of even the threat of litigation;
- Disqualification of all lawyers and experts from participation in any legal proceedings between the parties outside the collaborative law process;
- Four-way settlement meetings as the principal means by which negotiations and communications take place.[6]

Collaborative Practice Catches on.

In 1999 the American Institute of Collaborative Professionals ("AICP") was established as "an umbrella networking organisation to serve Collaborative Practice in its many forms".[7] As Collaborative Practice began to develop throughout Canada, it was agreed that AICP needed a "broader and more inclusive name and mission".[8] Thus, the International Academy of Collaborative Professionals (IACP) was born in 2000, officially changing its name in 2001. Today, it is the leading international body for collaborative professionals and has over 5,000 members across the USA and 24 additional countries around the globe, including Europe, England, Wales, Northern Ireland, Scotland, Ireland, Netherlands, Germany, France, Austria, Czech Republic and Switzerland, Israel, Kenya and Uganda and in the South East Asian area in Hong Kong, Singapore, New Zealand and Australia.[9]

The Australian experience

In 2003, collaborative practice was introduced to the Australian legal profession by His Honour Justice Robert Benjamin.

In 2005, Stu Webb conducted collaborative training in Canberra and New South Wales. In 2006, three Queensland lawyers travelled to Seattle, Washington to train with Pauline Tesler, and on their return founded Queensland Collaborative Law (now QACP) (Queensland Association of Collaborative Practitioners).

In December 2006, the Family Law Council released a report to the Attorney-General in relation to Collaborative Practice in family law. The report consists of some 104 pages and can be found at 2007 Family Law Council Report to the Attorney-General. [10]

In 2007, international trainers were first brought to Australia to provide training to a "core group of lawyers, social scientists and financial professionals. Australian professionals then formed training and practice groups.[11] Across Australia there are now numerous groups of trainers providing training to lawyers, social scientists and financial professionals in the principles of collaborative practice.

> As more practitioners began to embrace the concept of Collaborative Practice throughout Australia, the need for networking or practice groups developed. These locally based, grass roots groups expanded in numbers, leading to the establishment of various State and Territory organisations.

6 Tesler, P (2001) Collaborative Law (1st ed.) American Bar Association, cited in AACP Submission to the ALRC Enquiry into the Family Law System op.cit., page 8.
7 International Academy of Collaborative Professionals (n.d.) IACP History Retrieved March 7 2023 from https://www.collaborativepractice.com/about-iacp.
8 Ibid.
9 Ibid.
10 Collaborative Practice in Family Law - A report to the Attorney-General prepared by the Family Law Council December 2006. Retrieved from https://www.ag.gov.au/families-and-marriage/publications/collaborative-practice-family-law.
11 Australian Association of Collaborative Professionals Submission to the ALRC Enquiry into Family Law System,op.cit., page 10

These currently comprise:

- Collaborative Professionals NSW INC;
- Queensland Association of Collaborative Professionals;
- Victorian Association of Collaborative Professionals;
- Collaborative Professionals WA;
- Collaborative SA;
- Collaborative Practice Canberra;

(There are currently no state based organisations in the Northern Territory or Tasmania)

In 2016 IACP held its Annual Forum on the Gold Coast in Queensland. Arising out of that forum and the gathering of many collaborative professionals from across the country, momentum built for the establishment of a national Australian organisation for collaborative professionals.

Eventually, on 10 March 2017, the Australian Association of Collaborative Professionals (AACP) was incorporated with its mission being to promote the use and development of Interdisciplinary Collaborative Practice across Australia, as a mainstream Alternative Family Dispute Resolution process.

> Throughout Australia there are now between approximately 500 and 600 lawyers, social scientists and financial professionals trained in Collaborative Practice and who are members of either or both state-based organisations and practice groups.[12]

AACP now boasts over 200 members and extends to practice in the areas of both Family Law and Wills and Estates.

- In 2021, despite the pandemic, AACP hosted the highly successful presentation of The Road to Resolution Virtual Conference, rolled out over 8 months and culminating in an all-day workshop presented by Pauline Tesler herself.
- 2021 also saw Wills and Estates Collaborative Training, and the establishment of the enthusiastic and expanding National Wills and Estates Practice Group.
- 2022 saw the National Family Law Practice Group being established, attracting participants from across the country.

Where to next?

Collaborative Practice in Australia has indeed evolved from its beginnings in 2003 as a process where two lawyers and their clients engaged in a series of interest-based negotiations to resolve family law disputes to the current Interdisciplinary and multi-layered approach it is today, involving lawyers, social scientists, financial neutrals and other collaboratively trained experts. It has grown beyond Family Law and now embraces Wills and Estates. It continues to evolve and is capable of utilising input from other dispute resolution models as required, including mediation and perhaps even arbitration.

Collaborative Practice is a comprehensive dispute resolution process, tailored to address the interests, needs and concerns of the individual participants in the process. It is suitable to many areas of legal practice, not just Family Law and Wills and Estates – employment law, neighbourhood disputes and various civil matters immediately come to mind. Collaborative Practice is a flexible, holistic and solution focused process. Its continued evolution is inevitable, limited only by the vision of its Practitioners.

We would be delighted to have as many of our colleagues as possible join us on this evolutionary journey.

Enquiries concerning training or membership can be initially made through the AACP website https://www.collaborativeaustralia.com.au or at info@collaborativeaustralia.com.au. State Websites can also be accessed via the AACP website via a link. The AACP welcomes all enquiries. 2023 is a year packed with activities!

12 Ibid.

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