

# What is this thing called collaborative law?

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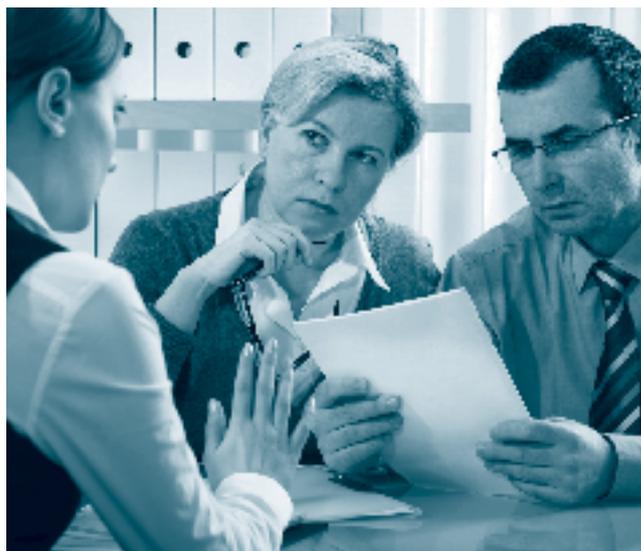
Over the last decade there has been considerable growth in both the different models of professional assisted dispute resolution available, and in the range of government, non-government and private sector agencies providing them. Awareness of the various options available to clients can assist practitioners working with separating couples to make more effective referrals. The following article describes a form of lawyer-assisted family dispute resolution (FDR), known as collaborative practice.

Prior to recent legislative amendments, the private negotiation of settlements in family law disputes was historically the domain of lawyers. Within the context of an adversarial legal system, such negotiations were typically conducted by letter, were positional and were informed by the ever-present threat of litigation. Collaborative family law practice creates a new role for lawyers that includes skills similar to those used in mediation, whereby lawyers work together (sometimes in conjunction with other collaboratively trained professionals) to facilitate child- and family-focused discussion between the parties, with the aim of reaching mutually acceptable negotiated settlements. It is a process involving confidential and transparent negotiations that take an interest-based, team approach, as opposed to one that is rights-based or adversarial.

The process involves separating couples and their lawyers entering into a written agreement that during the process the parties will not litigate or threaten litigation in relation to the dispute, and the lawyers will not advise clients to threaten litigation. If the collaborative process is not adhered to and/or the process does not resolve the dispute, the agreement is terminated; the lawyers for both cannot represent the separating couple in any subsequent, related litigation and the clients are referred to new lawyers. Clients and lawyers have a duty to make a full and frank disclosure of all matters relevant to the dispute. Lawyers, while representing their individual clients, have a duty to assist the family as a whole to achieve the best possible outcome. Jointly retained neutral experts can be called into the process to reduce conflict opportunities and support parties.

## What clients are suited to using collaborative processes?

Collaborative practice does not favour one type of client or exclude others. While it is theoretically open to all clients, clients with severe psychological or personality disorders,



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and cases involving a history of domestic violence, may be deemed inappropriate for using collaborative processes.

The collaboratively trained lawyer conducts their first interview with a client in a very different manner to a lawyer in a traditional lawyer-directed negotiation or litigation. The first interview is referred to as a “process” interview, in which all the methods of achieving settlement are discussed and evaluated with the client. A collaborative practitioner is trained to screen a client in or out of the process. If it becomes clear that the client, or their former partner, is unsuited to the collaborative process, then the lawyer is able to switch gears and change the content of the interview.

In the process interview, it is important for the lawyer not to indicate a preference for a specific method of dispute resolution. The client may indicate a clear preference or may in fact elect to decide which process may work best for them and their family at a later date. It is imperative that the client opt-in to a process that they perceive to be safe for them. It is also important for the practitioner to avoid giving unduly positional legal advice.

As part of the screening process, the kinds of issues explored can include:

- any concerns the client may have about being in the same room as their former partner, or negotiating with them;
- the level of trust between the parties—Is trust so diminished that the client wishes to utilise court processes for discovery and production of documents? What, if anything, can be done to address a lack of trust?;
- the client's ability to demonstrate empathy for their former partner;
- the client's ability to articulate what is important to them, and what they want to achieve; and
- any drug/alcohol dependency or other addictive behaviours of either party.

Difficulty in any of these areas may not necessarily preclude a client from opting-in to collaborative processes. As with mediation, a collaborative practitioner may be able to assist the client with concerns about participating in the process. In some cases, the involvement of a mental health care professional is essential for helping to explore such issues, and putting in place sufficient support systems to assist that particular client.

If lack of trust is an issue and this cannot be overcome, then the collaborative process may be unsuitable, particularly if the client no longer perceives the collaborative process as being “safe” for them.

### How does collaborative practice differ from other forms of FDR?

Collaborative practice is positioned differently in relation to litigation than FDR and other lawyer-directed negotiation processes.<sup>1</sup> The collaborative agreement entered into by the parties means that those involved do not operate in the shadow of the court. Most clients attending FDR retain access to court processes should they elect to proceed down that path. Litigation, while not on the table, is still on the menu.

In a collaborative practice setting, litigation has been removed from the equation. While the separating couple can elect to abandon the collaborative process and proceed to litigate at any time, the lawyers who represent them in the process cannot. The lawyers are voluntarily excluding themselves from ever representing the clients in court and this voluntary exclusion becomes binding on them should the process come to an end. As such, the clients would need to be sufficiently motivated to litigate to invest the time and money required to instruct a new lawyer.

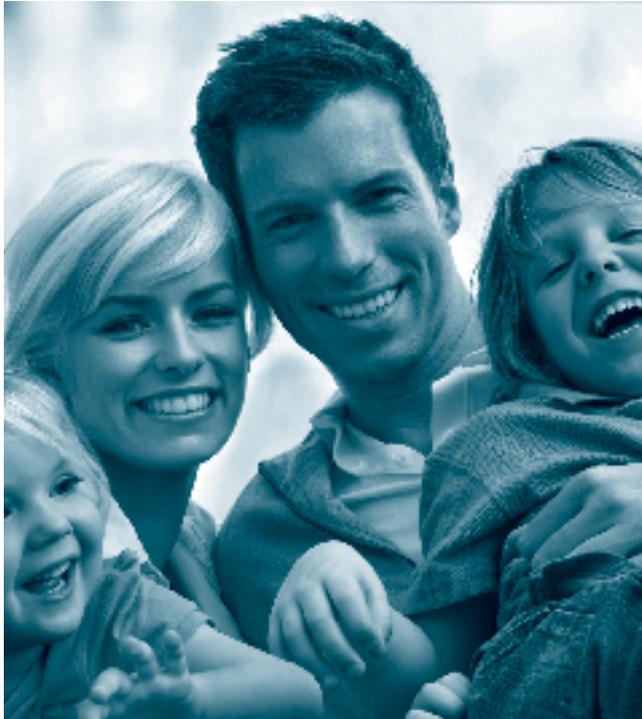
Once court has been ruled out, the focus for all concerned is no longer about winning and losing. Rather, the energies shift towards getting to a mutually acceptable agreement for the family as a whole. Interest-based negotiation techniques allow parents greater scope to focus on their children's needs. By working with other collaboratively trained professionals—such as child psychologists, counsellors and therapists—clients can begin to develop a different relationship with each other, learn the business of parenting apart in a way that promotes the wellbeing of their children, and thereby preserve the concept of family.

A lawyer cannot collaborate by themselves, but is trained to assist a client interested in collaborative practice about how best to raise this with their former partner. If one client chooses a lawyer who is not trained in the process, the lawyers can work out how best to proceed and it is still open to them to conduct a cooperative negotiation. Given the very specific skill set required to do the work, it is not possible for an untrained lawyer to enter into a collaborative negotiation.

### Some pros and cons of using collaborative processes

#### Pros

- Clients are present at all times during negotiations and are empowered to participate in their own negotiation. This can result in greater client ownership of the outcomes.
- Clients are in control of the process. Agenda items, frequency of meetings and the professionals involved are decided by the clients, not the lawyers.
- Clients must pre-approve expenditure for all steps of the process, and agree on how the professionals are to be paid.
- The collaborative contract provides clients with a clear understanding of the process.
- Unlike traditional lawyer negotiations, non-legal issues are not deemed irrelevant to the discussions.
- Clients can develop better communication and parenting skills.
- Clients with particular needs and vulnerabilities may cope better with negotiations when the threat of litigation is removed.
- Lawyers are learning a greater range of skills that can be incorporated into their practice.
- It is a less stressful way for lawyers to work in a profession that is noted for its mental health concerns.



- There are no tactics in this process. It has a win-win outcome and not win-lose at the expense of one of the parties.
- The same process of identifying and valuing assets and liabilities is used as with any other form of negotiation or litigation. The clients can then choose whether or not they want to conduct a detailed analysis of contributions. As the process is future-focused, “needs” are considered by both parties in the context of the best outcome for the family as a whole.

### Cons

- It is not advisable for clients with extreme personality disorders, mental health problems, ongoing addictive behaviours or severe domestic violence issues.
- Unlike litigation, clients have no access to Rules of Court to ensure access to information and documents (known as “discovery”), or compliance with processes.
- The client is required to engage new lawyers if the collaborative process does not result in settlement.
- If the negotiation process breaks down, collaborative practitioners are not presently authorised to issue a certificate under section 60I(8) of the *Family Law Act 1975*, stating that the parties have attempted to settle their dispute—a prerequisite to initiating court action.
- There is no authoritative decision-maker in the room.

- Lawyers are required to undergo training and change their thinking from a rights-based to an interest-based model.
- Given the relative newness of this process, it can be difficult to convince the other party to participate.

## Training

Lawyers must undergo introductory collaborative training before they can hold themselves out to be a collaborative practitioner. To join Collaborative Professionals Victoria (CPV), practitioners must first undergo the initial training and complete the advanced training within two years. The Law Institute of Victoria was the first law society in Australia to have a dedicated Collaborative Practice Section as part of its membership support and development. While there are ample opportunities for advanced collaborative training in Australia and overseas, there is yet to be a system for the accreditation of collaborative professionals in Australia. This is due in part to the relatively new addition of the collaborative process as a means of dispute resolution.

The International Academy of Collaborative Professionals (IACP) collates and disseminates statistical information gathered from all collaborative communities around the world as to outcomes and emerging trends. The IACP is not the exclusive domain of lawyers, reflecting the multidisciplinary nature of the work. The academy is responsible for the education of its members and holds an annual networking/education forum, incorporating current social science research.

## Conclusion

While the use of collaborative law processes in other jurisdictions is not restricted to family law disputes, it is a practice model peculiarly suited to resolving disputes between separated couples. Collaborative practitioners are motivated to preserve peace, enhance good communication and assist parents become child- and future-focused in their thinking and dealings with each other. In this way, collaborative practitioners work in parallel with the work being done by child psychologists and other FDR practitioners.

### Endnotes

- 1 Such as that provided by state legal offices pursuant to a grant of aid. See companion article for a comparison of these different processes.

**Caroline Counsel** is an Accredited Family Law Specialist and Co-Facilitator of Collaborative Professionals Victoria Practice Group.