COLLABORATIVE PRACTICE IN AUSTRALIAN CIVIL DISPUTES

A Thesis Submitted by

Timothy Nugent

For the award of

Doctor of Philosophy

2020

Abstract

This thesis examines the potential for the collaborative process as a tool for dispute management in Australian civil matters. It applies exploratory research methods to first understand collaborative practice in its present use, which is predominantly as a tool for family law matters, and then explores how the process can assist parties in other types of dispute. The areas most suited to collaborative practice are identified, and the barriers to its expansion into these fields are considered. The thesis concludes with recommendations to support the expansion of the collaborative process and an illustrative example of how the process might be applied in a commercial setting.

Certification of Thesis

This thesis is entirely the work of Timothy Nugent except where otherwise acknowledged. The work is original and has not previously been submitted for any other award, except where acknowledged.

Principal Supervisor: Professor Pauline Collins
Associate Supervisor: Professor Anthony Gray
Student and supervisors' signatures of endorsement are held at the University.

Acknowledgements

This research would not have been possible without the support and contributions of a great many people. Thank you to my supervisors, Professor Pauline Collins and Professor Anthony Gray and to my proof-reader, Dr Henk Huijser. Thank you to Nikki-Lee, Ross, and Kathleen Nugent, who supported me throughout this journey. Thank you to the anonymous examiners, and finally to the hard-working lawyers and other professionals who contributed their time to filling surveys and/or participating in interviews.

The research was supported by the Australian Government, through the provision of a Research Training Program Stipend and through the Research Training Scheme. Further funding, and administrative and academic support was provided by the University of Southern Queensland.

Acronyms and Abbreviations

Organizations

AACP: Australian Association of Collaborative Professionals

ABA: American Bar Association (United States)

ADRAC: Australian Dispute Resolution Advisory Council

ALRC: Australian Law Reform Commission

VLRC: Victorian Law Reform Commission

CPC: Collaborative Practice Canberra

CPNSW: Collaborative Professionals (NSW) Inc

CSA: Collaborative SA (South Australia)

CPWA: Collaborative Professionals WA (Western Australia)

IACP: International Academy of Collaborative Professionals

IAMA: Institute of Arbitrators and Mediators Australia

NADRAC: National Alternative Dispute Resolution Advisory Council (Australia)

NCCL: National Centre for Collaborative Law (Australia)

QACP: Queensland Association of Collaborative Practitioners

RASA: Relationships Australia South Australia

VACP: Victorian Association of Collaborative Professionals

Jurisdictions

ACT: Australian Capital Territory

NSW: New South Wales

NT: Northern Territory

QLD: Queensland

SA: South Australia

TAS: Tasmania

VIC: Victoria

WA: Western Australia

Table of Contents

List of Figures

List of Tables

Chapter 1. Introduction

Collaborative practice is both a novel dispute management process and an evolution of the role of the legal practitioner.[1] The process has received considerable scholarly interest. Fairman describes collaborative practice it as 'the hottest area in dispute resolution,'[2] Macfarlane considers it to be 'one of the most significant developments in the provision of family legal services in the last twenty-five years,'[3] and Gutman notes the adoption of collaborative problem-solving techniques by lawyers as one of the 'most important changes'[4] to the legal profession in recent times. Yet, despite this interest, the process has struggled to achieve a foothold outside its present primary use in family law. This thesis draws on the extant literature and on professional perspectives to explore why this is so, and to explore the opportunities for collaborative practice in other civil matters.

In the collaborative process, the parties agree to treat their dispute as a shared problem. They work together to gather the relevant facts and expertise and then to generate options that address their circumstances. What the parties decide may, but need not, resemble a potential judicial determination— the process is guided by the parties' goals, needs and interests rather than by an externally imposed system of rights and obligations.[5] The parties are supported by lawyers who are specially trained to support a cooperative dynamic that focuses on interest-based negotiations.[6] Instead of communicating about the strengths and weaknesses of the parties' legal positions, collaborative lawyers represent their respective clients by guiding them through a series of face-to-face negotiations with both parties and lawyers present.[7] In

---

1 There are several books written by practitioners and/or theorists that describe the collaborative process and provide detailed guidance for collaborative practitioners: see, e.g., Pauline H Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (American Bar Association, 3rd ed, 2017); Forest Mosten, *Collaborative Divorce Handbook: Helping Families Without Going to Court* (Jossey-Bass, 2009); Nancy Cameron et al, *Collaborative Practice: Deepening the Dialogue* (Continuing Legal Education Society of British Columbia, 2014); Sheila Gutterman, *Collaborative Law: a New Model for Dispute Resolution* (Bradford, 2004).

2 Jill Schachner Chanen, 'Collaborative Counsellors' (June 23, 2006) *American Bar Association Journal* 52, 54: quoting Christopher Fairman (unpublished).

3 Ibid: quoting Julie Macfarlane (unpublished); see also Julie MacFarlane, 'The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases' (Department of Justice, Canada 2005) vii.

4 Judy Gutman, 'Legal Ethics in ADR Practice: Has Coercion Become the Norm?' (2010) 21 *Australasian Dispute Resolution Journal* 218, 224.

5 See, e.g., Law Council of Australia, 'Australian Collaborative Practice Guidelines for Lawyers' (2011) 4 [4].

6 See, e.g., Roger Fisher, William L Ury, and Bruce Patton, *Getting to Yes: Negotiating an Agreement Without Giving In* (Houghton Mifflin, 3rd ed, 1991) 23-30.

7 Macfarlane (n 3) 29-39.

these ‘four-way’ meetings, the parties work together to gather all the relevant information and then generate options that provide for the interests of all involved.

To maintain a positive negotiating environment, the parties and their lawyers agree to a unique ‘laying down of arms’.[8] They commit, in a binding contract called the participation agreement, that they will not commence unilateral proceedings in court, and that they will refrain from positional tactics, such as making unrealistic opening settlement offers or issuing threats throughout the collaborative process.[9] If one of the parties is unwilling or unable to work within the rules, then the process is terminated, and both collaborative lawyers step down.[10] The disqualification of collaborative lawyers does not otherwise affect the parties’ right to seek a remedy in court. Parties may commence proceedings as usual with new (adversarial) counsel or as self-represented litigants. They will, however, bear the cost of hiring new lawyers and briefing them on the matter.[11]

Collaborative practice is facilitated by the participation agreement, a contract which sets out the commitments made by parties in relation to their participation in the process.[12] The participation agreement sets out essential characteristics of the collaborative process such as commitments to act in good faith, to voluntarily identify and disclose all relevant materials, and to abstain from unilateral proceedings or threats of litigation.[13] While some participation agreements are set out in a manner that is hortative or aspirational, most are binding contracts.[14]

The use of the participation agreement is widely credited with protecting the integrity of the collaborative process. Fairman describes disqualification as the 'real force behind

---

8 Nancy Cameron, 'Collaborative Practice in the Canadian Landscape' (2011) 49(2) *Family Court Review* 221, 221.

9 Wanda Anne Wiegers, Michaela Keet, ‘Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities’ (2008) 46 *Osgoode Hall Law* Journal 733, 763; see also Bobette Wolski, ‘Collaborative Law: An (Un)ethical Process for Lawyers’ 20 (2017) *Legal Ethics* 224, 226-9.

10 See, e.g., David A Hoffman, 'Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR' (2008) 1(4) *Journal of Dispute Resolution* 11, 15; Patrick Foran, ‘Adoption of the Uniform Collaborative Law Act in Oregon: The Right Time and for the Right Reasons’ (2009) 13(3) *Lewis & Clark Law Review* 787, 801.

11 See, e.g., Cameron (n 1) 13.

12 Macfarlane (n 3) 4; Wiegers and Keet (n 9) 763-4.

13 See, e.g., William H Schwab ‘Collaborative Lawyering: A Closer Look at an Emerging Practice’ (2004) 4(3) *Pepperdine Dispute Resolution Law Journal* 354, 358.

14 See, e.g., Queensland Association of Collaborative Practitioners ‘Collaborative Contract’ (unpublished, held on file by author).

collaborative law'.[15] Similarly, Gutterman writes that it gives the collaborative process 'its spine'.[16]

For many lawyers who work with the collaborative process, it represents more than just a new process for managing disputes. Collaborative lawyers describe the collaborative process as changing the way they understand their professional role, their duty to the client, and their interactions with other lawyers.[17] Collaborative lawyers maintain a partisan loyalty to their client, and provide them with relevant legal advice and 'positive advocacy'.[18] However, they do not conceptualise the other party to the matter as their opponent.[19] Collaborative practice models explicitly reject the assumption that disputes are a zero-sum game— where a benefit to one party is achievable only through a comparable detriment to the other. The collaborative process has been characterised as building 'power with' instead of 'power over' the other side.[20] Follet explains that 'power over' is exercised by making threats of coercive force to convince the other negotiator to make concessions.[21] In contrast, 'power with' involves negotiators working together to identify opportunities for mutual gains.[22] Thus, in the collaborative process, value is not merely distributed but may be created within the negotiating process itself. [23]

Legal representation is compulsory in collaborative practice.[24] The process will always include at least the parties themselves and their collaboratively trained lawyers. Some models of practice, termed 'interdisciplinary' or 'multidisciplinary' models, expand upon this framework to include members of other professions.[25] The professionals who are most

---

15 Christopher Fairman, 'A Proposed Model Rule for Collaborative Law' (2005-6) 21 *Ohio State Journal on Dispute Resolution* 73, 80.

16 Gutterman (n 1) 49.

17 Pauline Tesler 'Collaborative Law: A New Paradigm for Divorce Lawyers' (1999) 5(4) *Psychology, Public Policy and Law* 967, 990.

18 Helen Rhoades, Hilary Astor, Ann Sanson, and Meredith O'Connor 'Enhancing Inter-Professional Relationships in a Changing Family Law System' (University of Melbourne, 2008) iv.

19 See, e.g., Macfarlane (n 3) 47.

20 Marilyn A Scott 'Collaborative Law: Dispute Resolution Competencies for the "New Advocacy" (2008) 11 *Queensland University of Technology Law Journal* 213, 237.

21 Mary Parker Follet in Henry C Metcalf (ed), L Urwick (ed) *Dynamic Administration: The Collected Papers of Mary Parker Follett* (Harper & Brothers Publishing, 1942) in Kenneth Thompson (ed) *The Early Sociology of Management and Organisations* (Routledge, 2014) 78; Domènec Melé and Joseph Rosanas, 'Power, Freedom and Authority in Management: Mary Parker Follett's "Power-With"' (2003) 3(2) *Philosophy of Management* 35.

22 Ibid.

23 See, e.g., Fisher, Ury and Patton (n 6); Doug Stewart, 'Expand the Pie Before you Divvy it Up' (1997) *Smithsonian Magazine* 78, 80: reports an interview with William Ury.

24 See, e.g., International Academy of Collaborative Professionals 'Standards and Ethics' (2018) 4 [4].

25 'Cross-disciplinary', and 'transdisciplinary' are also extant in the literature; some sources use

frequently represented in family interdisciplinary collaborative practice include psychologists, financial planners, and 'collaborative coaches'— a facilitative role particular to the collaborative process.[26] These professionals provide support and advice within their field of expertise.

To date, the overwhelming majority of matters that have been addressed using collaborative practice have related to family law.[27] However, the collaborative process is, in principle, capable of helping parties to manage their disputes in many more areas of law.[28] The creator of collaborative practice, Stu Webb, saw his invention as a general 'engine for dispute resolution',[29] not just a specialised tool for family law matters. Anecdotal evidence points to a mostly unrealised potential for collaborative practice to be used outside of a family law context.[30] This thesis employs an exploratory research method in its aim to investigate the reasons behind uptake of collaborative practice having been slower outside of family matters. In this it identifies other areas of law where there is potential for using the collaborative process effectively, and it provides suggestions for how this potential may be realised. It aims to encourage lawyers and other dispute management professionals by providing a starting point for innovation; and it will offer sound suggestions to policymakers and stakeholders who have an interest in the future of collaborative practice, as well as non-adversarial forms of dispute management more broadly. The thesis addresses the extension of collaborative practice in Australian jurisdictions. However, these issues are reflective of international challenges.[31] Thus, the findings are relevant to other common law jurisdictions.

'collaborative practice' to refer exclusively to interdisciplinary models, and 'collaborative law' for lawyer only models, see '1.7 Terminology'.

26 Interdisciplinary collaborative process roles are more fully discussed in chapter four, 4.2.

27 See, e.g., Linda Wray, 'International Academy of Collaborative Professionals Practice Survey' (2010) 1 <http://collaborativepractice.com>; Marion Korn, 'Fitting the Fuss to the "Form": the Ethical Controversy over Collaborative Law Contracts' 8(1) *Queensland University of Technology Law and Justice Journal* 279, 281.

28 Stu Webb, 'Collaborative Law: A Practitioner's Perspective on Its History and Current Practice' (2008) 21 *Journal of the American Academy of Matrimonial Lawyers* 155, 156; Anne Ardagh, 'Repositioning the Legal Profession in ADR Service: 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, 241.

29 Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49 (2) *Family Court Review* 213, 217; See chapter 3, 3.1 for a discussion of Webb's contributions to the process

30 See, e.g., Sherrie R Abney, *Civil Collaborative Law: The Road Less Travelled* (Trafford, 1st ed, 2011); Kathleen Clark, 'Use of Collaborative Law in Medical Error Situations' (2007) 19 *Health Lawyer* 19; Emily Kwok and Dianna T Kenny, 'Misattributed Paternity Disputes: The Application of Collaborative Practice as an Alternative to Court' (2015) 26(3) *Australasian Dispute Resolution Journal* 127.

31 See, e.g., David Hoffman, 'Collaborative Law in the World of Business' (2003) 6(3) *The Collaborative Review* 1.

1.1 Unique Nature of Collaborative Practice

Collaborative practice integrates aspects of different dispute management methods. For this reason, it has sometimes been described as a hybrid method. For example, Wolski argues that collaborative practice is intended to combine the 'collaborative aspects of mediation,'[32] and the 'simplicity of negotiation'[33] between parties and their representatives without a neutral third-party.[34]

Such a perspective risks minimising the unique contributions of the process. It is true that collaborative practice 'owes a debt'[35] to longer-established dispute management processes. Mediation, in particular, was instrumental in developing the interest-based theoretical framework that supports collaboration, and mediation training often forms part of the path that lawyers tread on the way to collaborative practice.[36] However, dispute management processes have always learnt from what has come before. Iterating on the foundation of the first generation of dispute management processes is not a reason to dismiss the 'new kid on the alternative dispute resolution block.'[37] Foran argues that the reworking of successful aspects of other methods should be considered an advantage of collaborative processes because parties receive 'the best of both worlds'.[38] That is, they receive the protections and legal knowledge provided by legal representation[39] and the benefits of party-control and interest-based dispute management associated with facilitative mediation.[40]

In addition to reworking aspects of other processes, the collaborative process incorporates at least three innovations in its approach to dispute management. First, the collaborative process sustains an interest-based negotiating dynamic without the need for any neutral facilitator. Instead, the positive negotiating dynamic of the collaborative process is maintained by its 'structural and procedural features'[41] and by the goodwill of both the parties

---

32 Bobette Wolski, 'Collaborative Law: an (Un)ethical Process for Lawyers' 20 (2017) *Legal Ethics* 224, 225.

33 Ibid.

34 Ibid.

35 Foran (n 10) 802.

36 Caroline Counsel, 'What is this Thing Called Collaborative Law' (2010) 85 *Family Matters* 77, 77.

37 Lopich Lawyers, 'A Move to Collaborative Dispute Resolution'(18 January 2019) <http://lopichlawyers.com.au/legal-problem-solving>.

38 Foran (n 10) 803.

39 See, e.g., Macfarlane (n 3) 6.

40 Cameron (n 1) 14.

41 Laurence Boulle and Rachel Field, *Australian Dispute Resolution Law and Practice* (LexisNexis Butterworths, 1st ed, 2017) 245 [6.113]; structural and procedural features of collaborative practice such as disqualification and the use of 'four way' meetings are discussed further in section 3.2.

and their respective lawyers.[42] Second, collaborative practice creates a new form of legal representation. Collaborative lawyers work as settlement-specialists— meaning that their efforts are solely dedicated to supporting negotiations between the parties. Third, collaborative practitioners have developed their own distinct culture of legal practice. Collaborative lawyers actively form and maintain collaborative practice groups where members share, learn from and provide feedback on their experiences.[43] Thus, while the collaborative process incorporates aspects that have proven effective in lawyer-assisted negotiations and in mediation, it should be regarded as a new process rather than a hybrid of first-generation processes.

1.2 Process Philosophy and Values

Daicoff suggests that the collaborative process is a vector of the comprehensive law movement— a reform movement led by lawyers,[44] judges[45] and psychologists[46] who work to humanise legal and judicial practice.[47] Their efforts are described as following a rights-plus approach.[48] The term 'rights plus' here conveys that the process considers not only parties' legal entitlements, but also, where possible, 'their needs, desires, goals, mental status, wellbeing, relationships, and future functioning.'[49] Collaborative practitioners aim to engage with the matter as their clients perceive it, taking a much wider perspective than the narrow discourse of enforceable rights that is the focus of traditional legal representation. Because parties are the natural experts in their own interests and needs, this broadening of perspective places the parties, rather than the lawyers, in control of their matter.[50] In a significant early study of collaborative lawyers in the United States and Canada, Macfarlane notes:

> …collaborative lawyers consistently stressed that the power dynamic within the lawyer-client

---

42 Ibid.

43 Collaborative practice groups are further discussed in chapter 3, 3.4(a).

44 See, e.g., Marjorie Silver (ed), *The Affective Assistance of Counsel: Practicing Law as a Healing Profession* (Carolina Academic Press, 2007).

45 See, e.g., Bruce Winick and David Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003).

46 See, e.g., Andrew Benjamin, Bruce Sales and Elaine Darling 'Comprehensive Lawyer Assistance Programs: Justification and Model'(1992) 16 *Law and Psychology Review* 113.

47 Susan Swaim Daicoff, 'The Future of the Legal Profession' (2011) 37(1) *Monash University Law Review* 7, 17-21; see also Boulle and Field (n 41) 246 'A manifestation of larger changes in law and legal structure which promote values such as humanism, emotional expression, and the maintenance of relationships.'.

48 Daicoff (n 47) 19: crediting Tesler's work in a general sense.

49 Ibid 5; see also Susan Daicoff, 'Law as a Healing Profession: The Comprehensive Law Movement' (2005) 6(1) *Pepperdine Dispute Resolution Journal* 1.

50 Foran (n 10) 803.

> relationship has shifted. Many referred to… a tendency in a litigation model to take ownership of the problem on behalf of the client…in collaborative family law, clients are expected to take on more responsibility for solving their own problems.[51]

Researchers who have studied the collaborative practice community have frequently noted great enthusiasm that its adherents have for the process.[52] For example, Tesler notes that collaborative lawyers experience a new sense of 'pride and excitement'[53] in their work and appreciate the opportunity to exercise greater creativity and problem-solving.[54]

Such observations are particularly salient in light of findings that members of the legal profession experience mental illness, alcoholism and illicit substance abuse at levels significantly higher than the general population.[55] In 2006, Beaton Consulting and Beyond Blue found that legal professionals are especially vulnerable to depression.[56] Legal professionals were found to be more likely to report moderate or severe depressive symptoms (15%) than professionals overall (9%) or the general population (6%). Furthermore, lawyers are the professional group most likely to use alcohol or other non-prescription drugs to 'reduce or manage feelings of sadness and depression'.[57] A 2009 report by the Brain and Mind Research Institute found similarly that solicitors (31%) and barristers (17%) were more likely to report high or very high psychological distress than the general population (13%).[58]

---

51 Macfarlane (n 3) 45.

52 See, e.g., John Lande 'An Empirical Analysis of Collaborative Practice (2011) 49 *Family Court Review* 257, 262; Connie Healy, *Collaborative Practice: An International Perspective* (Taylor and Francis, 2017) 47.

53 Tesler (n 17) 991.

54 Ibid.

55 See, e.g., Leonie Paulson, 'Lawyers and Depression' (2009) 31(2) *Bulletin (Law Society of South Australia)* 22; Adele Bergin and Nerina Jimmieson, 'Explaining Psychological Distress in the Legal Profession: The Role of Overcommitment' (2013) 20 *International Journal of Stress Management* 134; Gordon Parker 'Depression Among Lawyers' (2012) 110 *Precedent (Australian Lawyers Alliance)* 17; Connie Beck, Bruce Sales, and Andrew Benjamin, 'Lawyer Distress: Alcohol Related Concerns among a Sample of Practicing Lawyers' (1995) 13 *International Journal of Law and Psychiatry* 233; Christine Parker, 'The "Moral Panic" over Psychological Wellbeing in the Legal Profession: A Personal or Political Ethical Response?' (2014) 37(3) *University of New South Wales Law Journal* 1103; Several authors identify the related challenges facing law students: e.g., Linda Crowley-Cyr, 'Promoting Mental Wellbeing in Law Students: Breaking-Down Stigma & Building Bridges in the Online Legal Environment' (2014) 14 *Queensland University of Technology Law Review* 129; Wendy Larcombe and Katherine Fethers, 'Schooling the Blues? An Investigation of Factors Associated with Psychological Distress Among Law Students' (2013) 36 *University of New South Wales Law Journal* 390.

56 Beaton Consulting, Beyond Blue, 'Annual Professions Survey: Research Summary' (2007) 2: researchers received surveys from 7, 551 professionals comprising accounting, consulting, engineering, law, patent attorney, actuarial, IT services, architectural, insurance underwriting and insurance brokering backgrounds.

57 Ibid 3.

58 Norm Kelk et al 'Courting the Blues: Attitudes towards Depression in Australian Law Students and Lawyers' (Brain and Research Institute, 2009): Based on a survey of 741 law students, 924 solicitors,

Law students (35%) were found to be even more vulnerable. While the pressures of studies may be a significant stressor for law students, there is likely more to the picture, as indicated by comparison with medical students (18%).[59] It has been suggested that the weight of 'moral and practical responsibility'[60] carried by lawyers in the adversarial model is at least part of the reason for chronic stress in the profession.[61] A participant in Macfarlane's research notes:

> The stress and anxiety of being a litigator [means that I am in] … a place of being detached, really disconnected from my clients, disconnected from the other lawyer, and not feeling connected with the process either.[62]

Proponents claim that collaborative practice reforms the lawyer-client relationship in a way that reduces the moral burden felt by practitioners.[63] In the collaborative process, it is the clients who take personal responsibility for the management of their dispute. Lawyers refocus their role on support, collaborative advice, and guidance. They ensure that their client has the information they need to participate, such as by obtaining expert opinions on issues like parenting or finances; and they engage in positive advocacy to ensure that their client's interests are considered along with those of the other party and any other people involved, such as children.[64] Thus, the role of the lawyer is transitioned from a combative champion to a peacemaker, guardian and guide. Tesler notes: 'collaborative lawyers find themselves becoming members of a healing profession— and in doing so, heal themselves.'[65]

---

and 756 Barristers; distress was evaluated with the widely used Kessler Psychological Distress Scale (K10); general population comparison data per Australian Bureau of Statistics, 'National Health Survey 2004-05: Summary of Results' (Australian Government, 2006).

59 Ibid; Medical Student comparison data per Ian B Hickie et al, 'The Assessment of Depression Awareness and Help-Seeking Behaviour: Experiences with the International Depression Literacy Survey' (2007) 7(1) *BMC Psychiatry* 48.

60 Julie Macfarlane*, The New Lawyer: How Settlement is Transforming the Practice of Law* (University of British Colombia Press, 1st ed, 2008) 141: drawing upon unpublished data from the Collaborative Lawyering Research Project.

61 Ibid.

62 Ibid.

63 See, e.g., Julie Macfarlane, 'Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project' (2004) 1(13) *Journal of Dispute Resolution* 180, 191.

64 Ibid.

65 Tesler (n 17) 991; see also Stuart Webb, 'An Idea Whose Time has Come: Collaborative Law: An Alternative for Attorneys Suffering 'Family Law Burnout' (2000) 13(5) *Matrimonial Strategist* 7.

1.3 International Reach

The Collaborative process has achieved popularity with an international community of lawyers. Beginning with its creation as 'collaborative law' by Stu Webb,[66] the process has displayed a remarkable capacity for translation between jurisdictions. Cameron states that 'because collaborative law is a process and a way of practice, its spread is not hindered by differences in legal procedure between jurisdictions.'[67] There are now significant contingents of collaborative family practitioners in Canada,[68] the United Kingdom,[69] Ireland,[70] Australia[71] and Hong Kong.[72] The collaborative process has even bridged the divide between common-law and civil legal traditions with increasing use in civil law jurisdictions such as Italy and the Netherlands.[73] In 2018, a group of International Academy of Collaborative Professional (IACP) trainers conducted the first collaborative training in Japan.[74] Clearly, the collaborative process has proven highly adaptable in terms of jurisdiction.

Notwithstanding these positive developments, the collaborative process has struggled to achieve a comparable expansion in terms of the subject matter of disputes. While it is intended as a process suited to a broad range of disputes,[75] most collaborative cases continue to be family matters, and especially separations. Between 2006 and 2010, the IACP collected data from its members about their collaborative matters. Of the 933 matters reported, 97 percent were divorces. The remaining 3 percent comprised mainly other types of family

---

66 Webb and Ousky (n 29) 213; The early history of collaborative practice is further discussed in chapter 3.

67 Cameron (n 1) 13.

68 Collaborative Professionals of Canada <http://collaborativepracticecanada.gca>.

69 Resolution <http://resolution.org.uk>; Roger Bamber 'Happier Endings' (29 May 2006) *The Lawyer* 31.

70 Patricia Mallon, 'Collaborative Practice: An Overview' (2009) *Irish Judicial Studies Journal* 3; Irish association of Collaborative Professionals <http://acp.ie>; Healy (n 52).

71 Australian Association of Collaborative Professionals <http://collaborativeaustralia.com.au>.

72 'Hong Kong Collaborative Practice Group Ltd' <http://collaborativepractice.com/ collaborative-practice-groups/353>; Cliff Buddle, *South China Morning Post* (31 March 2016) 'Hong Kong Divorce Professionals Promote Radical Alternative to Court Action'; Nadja Alexander, 'Introducing Collaborative Practice as a Method of Dispute Resolution: What Should I Be Able to Expect from my Lawyer? Hired Gun or Problem Solver?' (22 March 2014) International Institute for Conflict Engagement & Resolution, Hong Kong.

73 Vereniging van Collaborative Professionals <http://vvcp.nl>; Associazione Italiana Professionisti Collaborativi <http://praticacollaborativa.it>; Mariachiara Michelagnoli, 'Italy: Breaking News! Collaborative Practice on Trial!' (2015) 15(2) *Collaborative Review* 20; Carla Marcucci 'Italy's Current Challenge: Transforming Baccarat Crystal into Everyday Glasses' (2019) *Collaborative Review* 10.

74 International Academy of Collaborative Professionals, 'First Collaborative Practice Training in Japan' <http://collaborativepractice.com/event/first-collaborative-practice-training-japan>: training was facilitated by Jacinta Gallant, Barbara Kelle, and Gaylene Stinglert in Nagoya, November 24-25, 2018.

75 See, e.g., Webb and Ousky (n 29) 219.

matters.[76] Only three non-family civil matters were reported: an employment matter, a sexual harassment/retaliation matter, and a probate matter.[77] Lande notes that 'virtually all collaborative law cases have been family law matters.'[78]

The apparent focus on family law persists despite longstanding interest in the expansion of the process. Webb and Ousky noted in 2011 that there were 'increasing efforts to expand collaborative practice into many other areas of civil law.'[79] In Australia, the New South Wales State collaborative process body, 'Collaborative Professionals (NSW)', describes collaborative practice as 'ideally suited to civil and commercial disputes, especially where there is a need for continuing relationships between the parties.'[80] A prominent Australian collaborative family lawyer has claimed that the collaborative process 'should be applicable to all areas of law.'[81]

1.4 The Problem the Thesis will Investigate

This thesis investigates the unresolved question of why so few commercial and other civil non-family matters are resolved using the collaborative process.[82] The literature supports the need for such research. For example, Lopich asks:

> Although collaborative law has been held up as a means of resolving almost any form of dispute it has struggled to gain traction in Australia (and most other places) as more than a dispute management process for family law matters… why is it so?'[83]

In the United States context, Hoffman poses a similar question: 'Why has collaborative law been slow to develop as a method for resolving tort cases, contract disputes, employment terminations, and partnership break-ups?'[84] Lande suggests a whole list of lines for enquiry concerning the extension of collaborative processes:

---

76 Wray (n 27): Subsequent IACP research into collaborative practice has focused on family matters, so more recent figures are not available: e.g., Linda Wray, Barbara Kelly, 'IACP Client Experience Survey' (2017) 6(1) *Collaborative Review* 10.

77 Ibid.

78 John Lande, 'The Promise and Perils of Collaborative Law' (2005) 12 *Dispute Resolution Magazine* 29, 29.

79 Webb and Ousky (n 29) 219.

80 Collaborative Professionals NSW 'Commercial' <collaborativeprofessionalsnsw.org.au/commercial>.

81 Jerome Doraisamy, 'Collaborative Practice 'Should be Applicable to all Areas of Law' (20 June 2019) *Lawyer's Weekly*: based on an interview with Shelby Timmins.

82 Hoffman (n 31).

83 Robert Lopich, 'Civil (non-family) Collaborative Practice – The Way of the Future?' (Conference Presentation, 12 September 2016, National Mediation Conference (Australia))

84 Hoffman (n 31) 1.

> Why have parties used collaborative practice so rarely in non-family cases? The disqualification agreement, which puts the continuation of the clients' relationships with their lawyers at risk, is an essential element of the collaborative practice process. Is it a major barrier to parties' willingness to use collaborative practice in non-family cases? Do parties in non-family cases place greater value on their relationships with their lawyers than parties in family cases? What are the perceptions of parties and lawyers in non-family cases about collaborative practice? It would be helpful to conduct studies of disputants who do not use collaborative practice to learn why they do not use it, what process features are particularly important to them, and what features they do not want.[85]

Despite such worthy questions, there have been few investigations into the potential of collaborative process outside of family law.[86] Of those, none has included empirical research into the perspectives of Australian solicitors or other dispute management professionals. This thesis takes up this challenge and interrogates the research area of collaborative processes outside of family law. Three questions are posed, as follows, to guide an exploratory research process:

1. What barriers limit the expansion of collaborative practice into civil non-family disputes in Australia?
2. What could result from use of collaborative practice for civil non-family disputes in Australia?
3. What would facilitate the greater use of collaborative practice for civil non-family disputes in Australia?

1.5 Methodology

The research was conducted through an exploratory research process that included a review of the literature, desk research and empirical data gathering.[87] The literature review comprises academic sources, reports, and doctrinal sources. Since there is limited research into civil

---

85 Lande (n 52) 278.

86 See, e.g., Hoffman (n 31) 8; Lopich (n 83); Clark (n 30); Rory McMorrow, 'Collaborative Practice: A Resolution Model for Irish Employment Disputes?' (Master of Business Studies Thesis, Letterkenny Institute of Technology, 2012).

87 In this research, 'empirical' should be understood to include both quantitative and qualitative research, a sense advocated by Lee Epstein and Gary King 'Exchange: Empirical Research and the Goals of Legal Scholarship: #1 The rules of inference' (2002) *69 University of Chicago Law Review* 1, 1: 'What makes research empirical is that it is based on observations of the world, in other words, data, which is just a term for facts about the world. These facts may be historical or contemporary, or based on legislation or case law, the results of interview, or surveys, or the outcomes of secondary archival research or primary data collection… as long as research involves data that is observed or desired it is empirical.'

(non-family) applications of the collaborative process in Australia, the literature review also draws upon experiences of theorists and collaborative practitioners in other common law jurisdictions such as the United States, Canada, Ireland, and the United Kingdom. Desk research is used to supplement the formal literature review with an analysis of professional materials such as brochures, public directories of practitioners, collaborative practitioner member websites, and educational materials. This approach helps to build an initial picture of the use of collaborative practice in Australian jurisdictions and to begin to understand the process through the perceptions of its practitioners. The empirical data collection methods comprise survey and interview research conducted with lawyers (both traditional and collaborative) and with 'collaborative neutrals' such as communication coaches, financial planners and mediators.

This research is not an attempt to test the specific claims or hypotheses proposed by theorists in the literature. Instead, it is positioned to explore an independently constructed account of the theoretical grounds for the limited uptake of the collaborative process in non-family areas of law. Consistent with an inductive research orientation, the literature review is undertaken tentatively so as not to build a strong preconception that might create a bias for the final analysis of data.[88]

This research contributes to strengthening the international empirical knowledge base on the collaborative process. For example, between 2001 and 2004, Macfarlane conducted a study of collaborative family practice in the United States and Canada.[89] Macfarlane's 'pioneering'[90] research involved gathering data through interviews with collaborative lawyers, clients, and interdisciplinary collaborative professionals, and conducting case studies. Macfarlane found that the collaborative process reduces 'posturing and gamesmanship'[91] in negotiations, and facilitates outcomes that are acceptable both from a legal standpoint and to the parties themselves.[92]

In 2003, Schwab conducted a survey, mailing a package to 367 collaborative lawyers from eight 'older more established'[93] collaborative law groups across the United States.[94] The

---

88 Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (Sage, 2006) 165: discusses the 'disputed' role of the literature review in a grounded theory study.

89 Macfarlane (n 3).

90 Lande (n 52) 5.

91 Macfarlane (n 4) 80.

92 Ibid.

93 Schwab (n 13) 367-8.

94 Ibid.

package included a cover letter, a survey to be completed by the lawyer, and a separate survey and cover letter with instructions asking that this be sent to the lawyer's most recent collaborative client.[95] Schwab's research population was limited to collaborative family lawyers, even though some of the groups surveyed included sections dedicated to other areas of practice.[96]

In 2016, Collins and Scott conducted a comparative study of two Australian collaborative practice groups to 'examine the delivery of collaborative practice services in family law.'[97] Focus groups were conducted across an inner-city and a regional city collaborative practice group. Members were provided with questions in advance to allow groups to discuss their content beforehand.[98] Collins and Scott found support for the essential nature of the collaborative practice group and highlighted the diverse functions that collaborative practice groups supply, centred around the concept of a learning community.[99]

These and other empirical studies[100] demonstrate that valuable insights can be constructed through research with collaborative professionals (and in some cases, their clients). This thesis makes a unique contribution to this body of knowledge by focusing data collection on the opportunity for collaborative processes for applications beyond the limited area of family law in Australia, and by incorporating views of both collaborative and traditional adversarial lawyers. Because the research is exploratory, it has cast a 'broad net' for initial data collection. The research population includes both collaborative and traditional lawyers, and interdisciplinary (non-lawyer) collaborative professionals. Two empirical data collection methods were used: an in-depth semi-structured interview and an anonymous

---

95 Ibid

96 Ibid.

97 Pauline Collins, Marilyn Scott, 'The Essential Nature of a Collaborative Practice Group for Successful Collaborative Lawyers' (2017) 28 *Australasian Dispute Resolution Journal* 12, 13: See Chapter 3, 3.4(a) for further discussion.

98 Ibid.

99 Ibid.

100 See, e.g., Anne Ardagh, 'Evaluating Collaborative Law in Australian: A Case Study of Family Lawyers in the ACT' (2010) 21 *Australasian Dispute Resolution Journal* 204, Gay Cox & Syd Sharples, 'Wouldn't You Want to Know?' (2008) 8 *Collaborative Review* 10; Wray (n 27);16); Michaela Keet, Wanda Wiegers, & Melanie Morrison, 'Client Engagement Inside Collaborative Law' (2008) 24 *Canadian Journal of Family Law* 145; Wanda Wiegers & Michaela Keet, 'Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities' (2008) 46(4) *Osgoode Hall Law Journal* 733-72; Mark Sefton, 'Collaborative Law in England and Wales: Early Findings: A Research Report For Resolution' (2009); Richard W Shields, 'On Becoming a Collaborative Professional: From Paradigm Shifting to Transformative Learning Through Critical Reflection and Dialogue' (2008) *Journal of Dispute Resolution* 427; Wray (n 27); John-Paul E Boyd 'What Would I Choose? Canadian Lawyer's Views on Dispute Resolution Practice' (2018) 17(2) *Collaborative Review* 6; Connie Healy, *Collaborative Practice: An International Perspective* (Taylor and Francis, 2017).

online survey. Once data saturation was determined to have been reached, thematic analysis was performed using NVivo qualitative data analysis software.[101] The intent is to produce an inductively generated perspective, which emerges from, and therefore is supported by, the data, including the literature and desktop review.

1.6 Thesis Contributions

The thesis contributes insights into the potential of the collaborative processes in areas of law outside of its current nexus of family law. It is the first empirical research to focus on the opportunities for the collaborative process in non-family areas in Australia. In 2017, Scott and Collins noted 'a relative paucity of empirical qualitative research studies, especially in Australia, on the emergence and evolution of [collaborative] practice.'[102] This research is, therefore, an opportunity to build upon and update the picture of collaborative practice as it is experienced in Australia. It fills a gap in knowledge by providing an empirical basis for planning and decision making in relation to the uptake of the collaborative process across the Australian legal landscape.

The research also contributes to the broader goal of increasing the knowledge base for dispute management policy development. In 2014, the Australian Productivity Commission reflected on concerns that the civil justice system was 'too slow, too expensive, and too adversarial'.[103] The report recognised the role of dispute management methods in improving access to justice. In particular, the Productivity Commission recommended that:

> Where dispute resolution processes have been demonstrated to be efficient and effective (such as low value litigation), courts and tribunals should endeavour to employ such processes as the default dispute resolution mechanism, in the first instance, with provision to exempt cases where it is clearly inappropriate.[104]

A 2019 Law Reform Commission inquiry into the family law system further supported the importance of non-litigation dispute management. The Commission recommended that the

---

101 NVivo OSX version 12, for an in depth guide, see Krist Jackson, Patricia Bazely, *Qualitative Data Analysis with NVivo* (Sage, 2019), for a discussion of the opportunities presented by this type of software in legal scholarship see, Hanna Schebesra 'Content Analysis Software in Legal Research: A Proof of Concept Using ATLAS.ti' (2018) 23 *Tilburg Law Review* 23.

102 Marilyn Scott and Pauline Collins, 'The Challenges for Collaborative Lawyers in Providing CP Processes' (2017) 31 *Australian Journal of Family Law* 27; see also Tania Sourdin, *Alternative Dispute Resolution* (Lawbook Co, 5th ed, 2016) 146.

103 Australian Government Productivity Commission, 'Access to Justice Arrangements' (2014) <http://pc.gov.au> 2.

104 Ibid: 'recommendation 8.1'.

Family Law Act 1975 (Cth) be amended to 'require that parties take genuine steps to attempt to resolve their property and financial matters prior to filing an application for court orders'.[105] The recommendation complements existing measures in the act that focus on parenting orders.[106] However, rather than requiring parties to use Family Dispute Resolution, the Law Reform Commission Recommendation would leave the choice of process to the parties, requiring only that parties lodge a genuine steps statement in a similar manner to the *Civil Dispute Resolution Act 2011*.[107] Parties could therefore use collaborative practice as a means to satisfy such a requirement.

Noting these signs of ongoing interest in the reform of civil justice, the research is timely. The novel approach of the collaborative process presents an opportunity for the Australian justice system. The thesis explores how the experiences of collaborative professionals can be leveraged to improve the efficiency, accessibility, and effectiveness of dispute management for a broad range of civil disputes. By triangulating multiple sources of knowledge, the thesis aims to explore the unique aspects of the collaborative process and report how this singularly non-adversarial process can be used to benefit lawyers and their clients in circumstances beyond its most common applications in family law.[108]

1.7 Terminology

As this method of dispute management is comparatively new, the terminology surrounding its discussion is not entirely settled. Some theorists use the term 'collaborative practice' to describe interdisciplinary models, and 'collaborative law' to describe models that include only lawyers.[109] Others use one or the other of these terms universally or each interchangeably.[110] In some United States literature, 'Collaborative Divorce' may be used to refer to a particular

---

105 Australian Law Reform Commission, 'Family Law for the Future—An Inquiry into the Family Law System' (ALRC Report 135, March 2019) 258 'recommendation 21'.

106 *Family Law Act 1975* (Cth) s 60I.

107 *Civil Dispute Resolution Act 2011* (Cth) ss 6-12.

108 Triangulation is a research strategy where different methods or sources of information are used to cross-confirm one another and construct a rich understanding of the area of inquiry. See, e.g., Michael Patton, 'Enhancing the Quality and Credibility of Qualitative Analysis' *34 Health Sciences Research* (1999) 1189, 1192-3, Nancy Carter, Denise Bryant-Lukosius, Alba DiCenso, Jennifer Blythe, Alan J Neville 'The Use of Triangulation in Qualitative Research' (2014) 41(5) *Oncology Nursing Forum* 545, 545.

109 See, e.g., Anne Ardagh 'Evaluating Collaborative Law in Australia: A Case Study of Family Lawyers in the ACT' (2010) 21 *Australasian Dispute Resolution Journal* 204; Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis Butterworths, 6th ed, 2019) 175: using the term 'collaborative legal practice'.

110 See, e.g., Boulle and Field (n 41) 54, 245 [6.111]; Sourdin (n 102) 122: 'collaborative practice' is sometimes preferred because it acknowledges the role of non-lawyers in interdisciplinary process models.

model, which for a time held a United States service mark for that label.[111] However, the term 'collaborative divorce' is also now in generic use to refer to the use of the collaborative process to separate from marriage, de facto relationships, or other civil unions.

The terms 'collaborative practice' and 'collaborative process' are preferred in this thesis to describe any dispute management process that includes the concept of disqualification as outlined above (including both interdisciplinary and lawyer-only models). The literature is quoted verbatim, with clarification where the quoted author intends to refer to 'collaborative law' or 'practice' in an exclusive sense.

The adjectives 'collaborative' or 'traditional' are sometimes used in this thesis to describe lawyers or other professionals. In this sense, 'collaborative' should be understood as a shorthand to indicate that a person has trained in, or professionally participated in, the collaborative process. The term 'traditional' refers to all other lawyers and professionals. This terminology must not be taken to suggest a clean structural division of the profession; many collaborative lawyers, including all interviewed, continue to represent some clients in traditional practice. In jurisdictions where collaborative practice is more developed, lawyers may work exclusively with the collaborative process, but these are rare in Australian practice. It is also important to note that the term traditional should not be taken as a statement about the approach of individual lawyers. Traditional lawyers make use of a variety of approaches to negotiation; some highly adversarial, others 'collaborative' with the other side in the ordinary sense of the word.[112]

The acronym 'ADR' is the most used term for processes other than litigation that may be used to resolve legal disputes.[113] While initially derived from 'alternative dispute resolution', this phrasing has since been identified as problematic. The term 'alternative' may imply that litigation is the primary means through which disputes are resolved.[114] One

---

111 See, e.g., Gutterman (n 1) 90; Schwab (n 13) 367; '*US Service Mark Registration No* 76521641, Filed on Jun 11, 2003, Registered 26 July, 2004, (Abandoned March 15, 2005): the mark was abandoned following an office action that included evidence that the mark was 'highly descriptive and/or generic'.

112 See, e.g., Andrea Kupfer Schneider, 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' (2002) 7 *Harvard Negotiation Law Review* 148, 162.

113 See, e.g., National Australian Dispute Resolution Advisory Council 'Dispute Resolution Terms' (Australian Government, 2003) 4.

114 Litigation is certainly not the 'primary' method if this is evaluated by reference to matters resolved: see, e.g., Wayne Martin CJ, 'Managing Change in the Justice System' (Speech, 14 September 2012, 18th Association Internationale des Jeunes Avocats Oration); Kenneth Hayne J 'The Vanishing Trial' (Speech, 23 January 2008, Supreme and Federal Courts Judges Conference); Stephen Landsman, 'So What? Possible Implications of the Vanishing Trial Phenomenon' (2004) 1(3) *Journal of Empirical Legal Studies* 973; however, there is a tendency to evaluate outcomes or processes against litigation as a normative standard: see, e.g., Boulle and Field (n 41) 39.

common remedy is to reassign the acronym to 'appropriate', 'assisted', or occasionally 'affordable' dispute resolution.[115] Boulle and Field claim that the term 'ADR' is of diminished utility and argue for it to be replaced by the treatment of 'dispute resolution' as a comprehensive field that includes litigation and non-litigation processes.[116] There are two reasons for this. First, there is now greater process diversity within the Courts, including the institutionalisation of non-litigation dispute resolution methods, which precludes the precision of a 'bright line' distinction.[117] Second, the linking of very different processes under the broad concept of ADR may obscure the 'many and important distinctions between different ADR processes…'[118] The author agrees with this approach, and so treats the management of disputes as a comprehensive field which includes litigation. However, the term 'dispute management' is used in the thesis instead of 'dispute resolution'. This change in terminology reflects an understanding of the nature of disputes that is more in line with the collaborative paradigm.[119] In traditional legal practice, disputes are often treated as having discrete beginnings and endings, starting with a cause of action, and ending with a judicial determination or out of court settlement. The term dispute management acknowledges that many disputes will remain active in some sense, even after a formal outcome. Further, it recognises that while resolution is often the intent of dispute management processes, this is not always possible, and some disputes can only be managed but not resolved.[120] The term 'non-litigation dispute management' is used in contexts where it is helpful to refer in particular to processes other than litigation. 'ADR' occasionally appears as 'an historic term of art'[121] to describe the movement which refined, adapted, and popularised approaches to manage disputes without litigation.

---

115 Other terms forwarded in the literature include 'innovative dispute resolution': Richard McLaren and John Sanderson, *Innovative Dispute Resolution: The Alternative* (Carswell Thompson Professional, 1994) and 'less drastic dispute resolution': William Fox, *International Commercial Agreements* (Kluwer Law International, 3rd ed, 1988).

116 Boulle and Field (n 41) 39-40.

117 See, e.g., Tania Sourdin, 'Five Reasons Why Judges Should Conduct Settlement Conferences' (2011) 37(1) *Monash Law Review* 145.

118 Boule and Field (n 41) 39-40; see also Robert Baruch Bush, 'Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments' (1989) 66 *Denver University Law Review* 335.

119 The collaborative paradigm is discussed further in chapter 6, 6.6.

120 Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis Butterworths, 6th ed, 2019) 2.

121 Rachael Field 'What was Alternative Dispute Resolution (ADR)? What is Dispute Resolution' (1 December 2016) *Australian Dispute Resolution Network* <http://adrresearch.net>.

1.8 Thesis Structure

Eight chapters are presented in the thesis. The initial chapters are based on an interpretive analysis of the literature. These chapters provide relevant background on the collaborative process and examine how it differs from other dispute management processes. In addition to academic publications, attention is afforded to materials for a professional or lay audience, including collaborative practice group websites, brochures and advertisements. These materials present an efficient means to build an understanding of how collaborative practice functions in an Australian context. The thesis then further explores the experience of collaborative practitioners through empirical methods, turning to survey and interview research to answer the exploratory questions. An outline for the remaining chapters is now presented.

Chapter two describes in detail the methodology followed in the research. The chapter begins with a discussion of exploratory research. It then discusses how influence has been drawn from reflective practice in developing an inductive approach suitable for an inquiry into an area where there has been little previous empirical research. The methods used to collect primary and secondary data are subsequently discussed. These include a desktop review of promotional and informational materials produced by collaborative practitioners, a review of the academic literature, and a survey and in-depth interviews conducted with lawyers (both traditional and collaborative) and with other professionals who have an interest in collaborative practice. Ethical issues concerning data collection are discussed.

Chapter three explores the emergence and core requirements of the collaborative process. It begins with an overview of the North American origins of collaborative practice including its creation by Stu Webb, and its early use by family lawyers in the United States and Canada. The chapter then explores the standard features that define these processes and the core principles described in professional and academic literature. These are explained as a commitment by each party to negotiate in good faith, free open disclosure of all relevant material, and disqualification of legal representatives if the matter is to proceed to litigation.

Chapter four discusses the further innovation of interdisciplinary models that make use of neutral collaborative professionals, such as coaches, mental health professionals and financial advisors. The chapter explores the diversity of models of interdisciplinary practice that have emerged and considers how the inclusion of non-lawyer roles influences the dynamics of the collaborative process.

Chapter five discusses the Australian adoption and development of the collaborative process. The chapter describes the expansion of the collaborative practice movement from the United States to other common-law jurisdictions, especially the circumstances of its import to Australia and growth in Australian jurisdictions. It then discusses how the collaborative process has been implemented in Australian jurisdictions, including the use of interdisciplinary models and collaborative practice groups, and its integration within the Australian legal institutions. The chapter concludes with a discussion of ethical issues concerning the collaborative process and their treatment in Australian legal-professional ethical discourse.

Chapter six explores how the role of the lawyer has evolved with the development of less adversarial dispute management methods, including first mediation, and then collaborative practice. The chapter begins by examining the role of the lawyer within the traditional bounds by considering how adversarial litigation has shaped what is expected of legal practitioners. It then explores the main criticisms levelled against the adversarial system within the general categories of cost, delay, and adversarial nature. The inquisitorial system is also addressed as an alternative approach, prevalent in European and international law, and influential in Australian tribunal systems. The chapter then considers how collaborative practice has recast the role of the lawyer as a peacemaker and healing profession. Finally, relational contracting is discussed, an alternative theory of contract that was identified as having a similarity of intent and purpose to collaborative practice, and therefore presents fertile ground for the exploration of collaborative practice in commercial applications.

Chapter seven presents the results of the interview and survey research. Survey results are presented question-by-question, generally following the format presented to survey participants. The survey gathered both qualitative and quantitative data. Interview results are reported by theme, based on a thematic analysis of interview transcripts using Nvivo qualitative data analysis software.

Chapter eight integrates the findings of the literature and empirical study to discuss how the collaborative process may be more effectively used in a broader range of civil disputes. The chapter identifies opportunities and themes found in the exploration. It documents challenges for expansion of the process, and tentatively suggests some possible solutions for further research. The chapter provides a summary of the thesis and presents conclusions and recommendations for the use of the study's findings.

1.9 Chapter Summary

This chapter has outlined the approach that is taken in this research, and the structure of the thesis. It has provided an overview of collaborative practice, and has identified a central mystery—why has this process remained largely confined to family law? It has further discussed how this research has been positioned to address the long-identified need for research in this area. The next chapter explains the exploratory methodology applied in this study and outlines how the methodology is intended to contribute to the growing base of knowledge on the extension of the collaborative process.

Chapter 2. Research Design

This chapter summarises the methodology used in the research. It begins by articulating the nature of exploratory research and the reasons for choosing this approach. It then describes the research domain and the development of the three open research questions that served to guide the inquiry. The methods used to collect primary and secondary data are outlined. These methods comprise a review of the academic literature, desk research (consisting of an analysis of professional websites, advertising materials, and explanatory brochures), semi-structured interviews with legal and non-legal professionals, and an online survey. The detail of the research design is then addressed, including the rationale behind sampling choices, relevant units of analysis, recruitment, and design of data-gathering instruments. The chapter concludes with a discussion of limitations of the research design, and how the methodology chosen in this study might be complemented by future research.

2.1 An Exploratory Research Approach

In its initial conception, this research was intended to follow a grounded theory approach[1] to understand the experience of lawyers using collaborative practice in commercial matters.[2] However, during the early investigation of the topic, it became clear that there were few such matters. Grounded theory requires a substantial base of empirical data to provide a sufficient sample for useful generalisation so would be a difficult in these circumstances. The focus of the research was then shifted towards the question of why so few non-family matters are being managed through the collaborative process in Australia, and whether there are opportunities for collaborative practice in new areas of law. For this new direction an exploratory approach was preferred in order to draw from the full breadth of sources of data that may inform on the area of inquiry.

According to Stebbins, exploratory research maintains a systematically open approach to create opportunities for discovery or construction of knowledge. He describes exploratory research as:

---

1 See generally, Barney G Glaser and Anselm Strauss, *The Discovery of Grounded Theory* (Aldine, 1967); Kathy Charmaz, *Constructing Grounded Theory* (Sage, 2nd ed, 2006).

2 For an example of a Grounded Theory Study on Collaborative Practice, see Randy J Heller, 'Exploring Competency and the Role of the Mental Health Professional in Interdisciplinary Collaborative Family Law: What Do "They" Do?' (PhD Thesis, Nova Southeastern University, 2011) 74; see also Randy J Heller, 'Using Research to Explore Competency and the Role of the Mental Health Professional in CP. What Do "They" Do? (2012) 12(1) *Collaborative Review* 25.

> a broad-ranging, purposive, systematic prearranged undertaking designed to maximise the discovery of generalisations leading to the description of social or psychological life…. a distinctive way of conducting science— a scientific process— a special methodological approach… and a pervasive personal orientation of the explorer... [3]

Thus, exploratory research involves 'going wide'— accessing a variety of information to provide a broad overview of a research domain. The method is therefore considered an appropriate choice where the subject of the research has:

> received little or no systematic empirical scrutiny, has been largely examined using prediction and control rather than flexibility and open-mindedness, or… has changed so much… that it begs to be explored anew.[4]

In moving from a grounded theory to a more general exploratory approach, the research retained an inductive pattern of reasoning. In inductive research, the researcher begins by examining data then develops tentative generalisations about the research area by making comparisons and identifying patterns.[5] Induction contrasts with traditional deductive research, whereby the researcher starts with one or more hypotheses and then collects data to support a statement about whether the hypotheses are likely to be true.[6] The difference between inductive and deductive approaches is shown below.

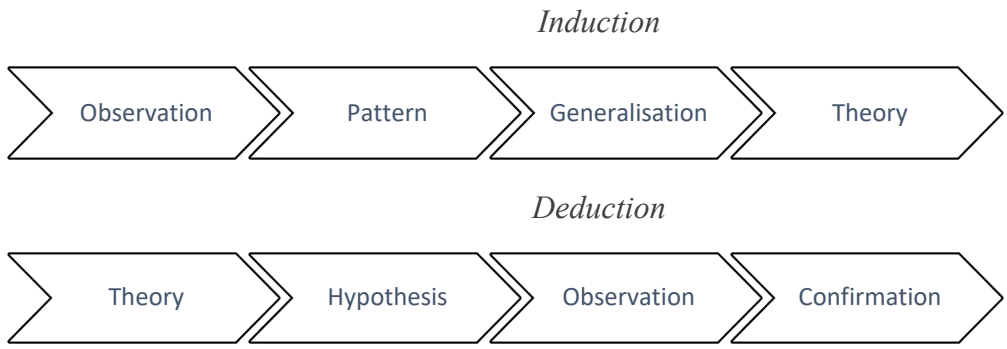


Figure 1: Inductive and Deductive Research

---

3 Robert Stebbins, *Exploratory Research in the Social Sciences* (Sage, 1st ed, 2011) 7; Chui Wing Hong 'Qualitative Legal Research' in Michael McConville, Chui Wing Hong (eds)*, Research Methods for Law* (Edinburgh University Press, 2nd ed, 2017) 48.

4 Ibid; see also Frans L Leeuw, Hans Schmeets, JJG Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* (Edward Elgar Publishing, 2016) 57.

5 See, e.g., Martin V Curd 'The Logic of Discovery: An Analysis of Three Approaches' (1980) 56 *Scientific Discovery, Logic, and Rationality* 201, 201-19; JER Staddon 'Scientific Method' in Bruce B Frey (ed) *The Sage Encyclopaedia of Educational Research, Measurement, and Evaluation* (2018) 1473, 1473-4.

6 Ibid.

There has only been limited previous analysis of the potential of collaborative practice for use in Australian civil (non-family) disputes, and none has taken an empirical approach to the topic. It would be incautious to rely too heavily on research from other jurisdictions[7] because differences in process and the culture of the legal profession have been identified as relevant dimensions for analysis.[8] Therefore, exploratory research is well adapted to this research area.

Exploratory research, like all methods, has benefits and limitations. Benefits of exploratory research include its capacity to ensure that relevant data is not overlooked,[9] and that the findings can be regarded as trustworthy because they are grounded in the data, rather than in efforts to prove or disprove a preconceived idea of the subject.[10] The main limitation is that an exploratory study is not intended to produce a definitive quantitative understanding of the research area. Instead, exploratory research provides a framework for future work in the area.[11] Douglas and Batagol describe the contribution of their exploratory research into a lawyer's roles in mediation as: 'identifying concepts and factors, exploring the concepts and factors, and considering inter-relationships that can be developed into theories and investigated further in subsequent studies.'[12]

The term 'concatenated exploration'[13] has been coined to describe how, over time, a series of studies can contribute to an inductively generated theory similar to how individual steel links contribute to a chain.[14] Thus, initial broader studies do not provide a conclusive answer, but over time, a series of exploratory studies can illuminate areas that are identified

---

7 See, e.g., David Hoffman, 'Collaborative Law in the World of Business' (2003) 12 Collaborative Review 1; Kathleen Clark, 'The Use of Collaborative Law in Medical Error Situations' (2007) 19(6) *The Health Lawyer* 19; Rory McMorrow, 'Collaborative Practice: A Resolution Model for Irish Employment Disputes?' (Master of Business Studies Thesis, Letterkenny Institute of Technology, 2012).

8 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, 250-1.

9 Uwe Flick, *An Introduction to Qualitative Research* (Sage, 5th ed, 2014) 177.

10 See, e.g., Udo Kelle, 'The Status of Theories and Models in Grounded Theory' in Antony Bryant and Kathy Charmaz, T*he Sage Handbook of Current Developments in Grounded Theory* (Sage, 2019) 8.

11 See, e.g., Kathy Douglas and Becky Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40 *Monash University Law Review* 758, 773; for reflection on the contribution of qualitative work see, e.g., See Robert Yin, *Case Study Research: Design and Methods* (Sage, 4th ed, 2009) 55; Michael Quinn Patton, 'Two Decades of Developments in Qualitative Inquiry: a Personal, Experiential Perspective' (2002) 1(3) *Qualitative Social Work* 261; Michael Quinn Patton, *Utilization-Focused Evaluation* (Sage, 2008).

12 Kelle (n 10).

13 Stebbins (n 3) 12.

14 Ibid.

as salient in early research. This exploratory study is hoped to provide an early link for an understanding of the expansion of the collaborative process outside of the family law context.

2.2 Research Questions

Research questions guide the researcher throughout a particular project by translating the societal issue that inspired the inquiry into a researchable framework of questions.[15] Agee states that the researcher may find it 'helpful to think of research questions as navigational tools that can help a researcher map possible directions but also to inquire about the unexpected.'[16]

Three goals informed the construction and refinement of the research questions. First, the research questions should substantially cover the research domain; in this case, the extension of collaborative practice into new areas of Australian law. In particular, the questions needed to lead to a better understanding of where the collaborative process could contribute to improved outcomes for disputants, how it might be implemented, and the potential challenges that collaborative pioneers might encounter.

Second, the research questions must be open to the data. Flick notes that the formulation should 'remain open to new and perhaps surprising results'.[17] Abel even suggests that one way to remain open is to wait 'until one is in the field and collecting data to fully develop research questions.'[18] However, such a radical approach may be impractical for researchers in academic institutions, where funding bodies, confirmation panels, and ethics committees will typically expect research questions in order to define the problem.[19] Instead, open phrasing was used for the research questions to avoid 'forcing' the data to fit into a preconceived notion of what the study 'should' prove.[20]

Third, the research questions should meet the criteria for strong social science research; that is, they should be feasible (achievable with the resources available), interesting (providing answers that engage the researcher, peers and readers), novel (leading to results that support, refute or contextualise existing knowledge), ethical (subject to appropriate approvals and ethical best practice) and relevant (generating insights to improve practice or

---

15 Leeuw, Schmeet and Schmeet (n 2) 41.

16 Jane Agee, 'Developing Qualitative Research Questions: A Reflective Process' (2009) *International Journal of Qualitative Studies in Education* 431, 432.

17 Flick (n 9) 148,

18 Agee (n 16).

19 Lyn Richards, *Handling Qualitative Data: A Practical Guide* (Sage, 2005) 14.

20 Kathy Charmaz, *Constructing Grounded Theory* (Sage, 2nd ed, 2006) 46.

support future research).[21] These criteria are commonly described by the acronym FINER.[22] Following this guidance, the three following research questions were developed and refined:

1. What barriers limit the expansion of collaborative practice into civil non-family disputes in Australia?
2. What could result from use of collaborative practice for civil non-family disputes in Australia?
3. What would facilitate the greater use of collaborative practice for civil non-family disputes in Australia?

2.3 **Reflexivity**

The researcher applied a reflexive approach throughout the research. Reflexive research practice is characterised by making deliberate conscious choices throughout the research process, and by maintaining a candid approach to describing the research. Reflexivity includes recognition of the position of the researcher as a whole person rather than a purely objective mechanical instrument.[23] Thus, reflexivity involves 'turning the researcher lens back onto oneself to recognise and take responsibility for one's own situatedness within the research…', and maintaining 'awareness of the ways in which the researcher as an individual with a particular social identity and background has an impact on the research process.'[24]

Reflexivity has been characterised as comprising both prospective and retrospective dimensions.[25] The prospective dimension involves self-examination and transparency in relation to the choices made in the research process and the reasons behind those choices.[26] The retrospective dimension acknowledges that research may be transform the researcher.[27] So reflexivity acknowledges that the research is influenced by, and acts as an influence, on the researcher. In applying reflexive practice, how I have learned about the law is relevant as a dimension to be considered in the analysis. I am a relatively recent graduate with respect to the fields of law, and the specialised field of intellectual property. My legal education was

---

21 Ibid.

22 Steven R Cummings, Warren S Browner and Stephen B Hulley 'Conceiving the Research Question' in Steven B Hulley, Steven R Cummings, Warren S Browner, Deborah Grady and Thomas B Newman (eds), *Designing Clinical Research* (Wolter Kluwers Health, 4th ed, 2013) 14-22.

23 Roni Berger, 'Now I See it Now I Don't Researcher's Position in Reflexivity in Qualitative Research (2013) 15(2) *Qualitative Research* 219, 220.

24 Colin Robson, *Real World Research* (Blackwell, 2nd ed, 2002) 22.

25 Marriam Attia & Jullian Edge, 'Be(com)ing a Reflexive Researcher: A Developmental Approach to Research Methodology' (2017) 4(1) *Open Review of Education Research* 33, 35-7.

26 Ibid.

27 Ibid.

framed predominately by a perspective that saw disputes in terms of rights and entitlements. My Juris Doctor degree did not include a mandatory dispute management course, but it was possible to choose this as an elective. I eagerly did so because even my limited engagement with the professional world had given me a rising awareness of the importance of the high costs of litigation to parties and the consequent importance of non-litigation dispute management. Studying dispute management in this course provided some initial grounding in less adversarial processes. However, this course was a lone voice amongst a choir of courses that were steeped in the understanding of disputes as essentially contests between opposing views.[28] The course did provide some introductory material on collaborative process which inspired me to find out more.

Theorists in the collaborative practice community discuss that practitioners must make a 'paradigm shift' to be effective practitioners.[29] This paradigm shift is a process of retooling, which involves learning skills and knowledge to support collaboration and the unlearning of positional adversarial skills and techniques.[30] The process of researching the collaborative practice movement has required a similar adaptation from me. This research prompted me to reconsider the fundamental goals of dispute management processes and how these are best achieved. In particular, the research process has led me to question the assumption that lawyers serve their clients best by taking a leading role in negotiations.

Reflexivity supports the exploratory research method by contextualising data gathering and analysis as regards the researcher and their involvement with the research. Recognising and accounting for the researcher's involvement can identify, and to some degree address, researcher bias, and therefore contributes to the trustworthiness of the research findings.

2.4 Ethics

Data collection, analysis, and reporting in relation to this study was conducted in compliance with relevant ethical instruments, including the *National Statement on Ethical Conduct in*

---

28 See, e.g., Michael McShane, 'Good Practice Guide (Bachelor of Laws): Appropriate Responses to Legal Issues: ADR' (Australian Learning and Teaching Council, 2013) 26.

29 See, e.g., Pauline Tesler, *Collaborative Law: Achieving Effective Resolution without Litigation* (American Bar Association, 3rd ed, 2017) 110.

30 Ibid.

Human Research 2007.[31] The study was approved by the University of Southern Queensland Human Research Ethics Committee.[32]

The research was determined to pose a low to negligible risk to participants. The survey did not cover any topics that would likely cause distress to participants. Furthermore, participants comprised educated professionals in fields such as law and psychology. Therefore, they could be expected to have a sophisticated understanding of their rights and reasonable expectations concerning the research. Participants were able to withdraw their interview data but could not withdraw anonymous survey data after they had submitted it online.

2.5 Literature Review

A literature review has been described as a 'systematic, explicit and reproducible method for identifying, evaluating and synthesising the existing body of completed and recorded work produced by researchers, scholars, and practitioners.'[33] Thus, the purpose of a literature review is to provide an overview of existing scholarly work in the research area, to identify gaps in knowledge, and to provide relevant background.[34] Ridley describes it as both 'the driving force and the jumping-off point for your own research investigation'.[35] After analysis, the literature may be revisited to contextualise the study by comparing and contrasting with the findings of 'the wider scholarly world'.[36] McGhee, Marland and Atkinson argue that the researcher should be engaged with the literature reflexively, meaning that the researcher should be aware of the influence of the literature on their thinking and its potential to impact the analysis of data collected in the field.[37] In this research, the literature was consulted both before and after the period of data collection and analysis, and at each time the researcher adopted a conscious and reflexive approach. The academic literature on collaborative practice is centred on family applications but can tell us much about what makes the process work.

---

31 National Health and Medical Research Council, Universities Australia, *National Statement on Ethical Conduct in Human Research* (2007).

32 See Appendix A: Human Research Ethics Approval; see Appendices B and C for participant information and consent documents respectively.

33 Arlene Fink, *Conducting Research Literature Reviews: From the Internet to Paper* (Sage, 5th ed, 2019) 2.

34 See, e.g., Diana Ridley, *The Literature Review: A Step-by-Step Guide for Students* (Sage, 2008) 3; Loraine Blaxter, Christina Hughes and Malcolm Tight, *How to Research* (McGraw-Hill, 4th ed, 2010) 124-6.

35 Ibid.

36 Stebbins (n 3) 44.

37 Gerry McGhee, Glen R Marland and Jacqueline Atkinson, 'Grounded Theory Research: Literature Reviewing and Reflexivity (2007) 60(3) *Journal of Advanced Nursing* 334, 335-6.df

Thus exploration of the extant academic literature provides a relevant starting point for understanding what the collaborative process can contribute more broadly.

2.6 Desk Research

The academic literature is not the only extant source of information about the use of collaborative process. The research is further informed by a detailed jurisdictional online investigation of professional websites, followed by an internal website exploration and analysis of the information provided. These include materials written for potential clients such as websites, brochures, directories and advertisements; and materials for members of professions who may have an interest in collaborative practice such as lawyers, financial planners, and accountants. Conducting content analysis on the internet and other publicly accessible materials has been identified as a means to efficiently cover ground in exploratory research.[38] Thus, including an analysis of such material allowed for a greater breadth to be covered than could be achieved if the study were to rely only on more intensive methods such as interview and survey research.[39]

2.7 Online Survey Research

Charmaz notes that 'the quality— and credibility— of your study starts with the data.'[40] It was a priority to ensure that data were collected from participants with an appropriate basis of experience in the domain of exploration to be able to inform on the subject matter. Early analysis of the literature determined that an understanding of the topic would benefit from the input of both collaborative and traditional professionals. This approach permitted the collection of data that comprised both 'insider' and 'outsider' perspectives on the collaborative process.

In practice, this involved collecting data with collaborative lawyers and coaches, usually, though not exclusively, in family law, and with traditional adversarial lawyers in a variety of areas of practice. The focus on family collaborative practitioners was not deliberate; rather, this reflects the rarity of such practitioners in other areas of disputes in Australian collaborative practice.

---

38 Robert Stebbins, 'The Internet as a Scientific Tool for Studying Leisure Activities: Exploratory Internet Data Collection (2010) 29 *Leisure* Studies 469, 471-2.

39 See, e.g., Question Pro 'Exploratory Research: Definition, Methods, Types and Examples' (2020) <https://www.questionpro.com/blog/exploratory-research/>.

40 Charmaz (n 20) 19.

An invitation to participate in the online survey was circulated to law organisations, including the Downs and South Western Queensland Law Association, and State and Territory Collaborative Practice Associations. Depending on the organisation's preference, the invitation was included either as a classified message in a circular or as a separate email directly to members. Other invitations were made directly to associates of the researcher who met the criteria, and professionals at relevant colloquia and conferences. The initial sample of interviewees was grown using snowballing. This means that participants were invited to suggest colleagues or associates whose experiences may be relevant to the study.[41]

No incentives were provided for participation. An incentive might have improved the survey response but could influence data collection. This is because participants who have received an incentive might perceive an implicit reciprocal expectation to provide data they consider to be 'helpful' to the researcher.

Thirty-two survey responses were received, including from both traditional adversarial and collaborative solicitors, mediators/coaches, and financial planners. The use of newsletter and email advertisements means that it is difficult to know how many persons opened and read the invitation to participate; thus, no response rate can be stated with accuracy. However, it is likely to be low, indicated by a modest overall response.

The survey was delivered using the 'USQ Survey Tool', a local implementation of Lime Survey open-source software.[42] The survey was hosted online on a secure University of Southern Queensland server, which also served as the initial storage location for survey results. Participants arrived at the survey landing page by clicking on a link in an invitation or advertisement. The survey had to work for a sample that included multiple professions and persons aligned with traditional and/or collaborative paradigms of practice. This necessity was reflected in the survey design. Questions were set to 'non-mandatory' in software settings meaning that participants did not need to complete each question before advancing. A participant could choose not to enter an answer to a question that they did not feel confident to respond to or they could address it after further reflection.

The survey landing page provided participants with a brief explanation of the survey purpose, and what would be required of them if they proceeded.[43] The participant information sheet was also provided as a downloadable word document. Telephone and email

---

41 See, e.g., Patricia Marshall, 'Political Competence and the Mediator: A New Strategy for Managing Complexity and Stress'(2008) *Queensland University of Technology Law and Justice Journal* 176, 180.

42 For an exported print version of the online survey, see Appendix D.

43 Ibid 1.

contact details were included for the researcher and the University of Southern Queensland Ethics Coordinator. Participants could indicate their consent and proceed to the survey questions by clicking on a button on the lower right-hand side of the page. Once submitted, the online anonymous data could not be withdrawn. Participants were advised of this in the participant information sheet and could withdraw their data at any time prior to submission.

Because the sample included persons who were solely engaged in traditional (adversarial) practice, a definition of collaborative practice was provided early in the survey, specifically the International Academy of Collaborative Professionals (IACP) 'Standards and Ethics' definition laid out below.[44]

> Collaborative Practice is a voluntary dispute resolution process in which parties settle without resort to litigation. In Collaborative Practice:
>
> 1. The parties sign a collaborative participation agreement describing the nature and scope of the matter;
> 2. The parties voluntarily disclose all information which is relevant and material to the matter that must be decided;
> 3. The parties agree to use good faith efforts in their negotiations to reach a mutually acceptable settlement;
> 4. Each party must be represented by a lawyer whose representation terminates upon the undertaking of any contested court proceeding;
> 5. The parties may engage mental health and financial professionals whose engagement terminates upon the undertaking of any contested court proceeding; and
> 6. The parties may jointly engage other experts as needed.[45]

The inclusion of the IACP definition helped to ensure that comments were directed to the research area, rather than other quite different uses of the term 'collaborative practice',[46] or 'collaboration' being understood in the ordinary meaning of the word. Participants were instructed that all questions were directed towards 'collaborative practice' as defined by the IACP.[47] It is important to note that no definition of collaborative practice (including the IACP) is universally accepted. Experienced collaborative practitioners differ in their thoughts on how the process should be defined. For this reason, a free text response window was

---

44 International Academy of Collaborative Professionals 'Standards and Ethics' (2018) 4.

45 Ibid.

46 See, e.g., Heather A McCabe, Charity Scott, 'Seminar in Public Health Law and Policy in an Interprofessional Setting: Preparing Practitioners for Collaborative Practice at the Macro Level' (2016) 44 *Journal of Law, Medicine & Ethics* 56.

47 Appendix D 1.

included below the IACP definition with an invitation to comment on whether this definition aligned with their experience or perceptions of collaborative practice. The inclusion of this option demonstrated respect for the diversity of opinions on what constitutes collaborative practice and provided a means to check the perceived fit of the definition applied in this research.

Software-based skip logic was used to ensure that participants only received questions that were relevant to their experience. For example, a lawyer who did not use collaborative practice would not be asked about their experience in the process. This practice minimised the time imposition on participants. The survey was initially piloted by two experienced practitioners who fell within the survey population. The survey was then adjusted based on feedback received, amending the order of questions slightly so that professional information was collected initially, separate from the optional demographic section which collected information on gender, age, experience, and location.

The survey comprised thirty questions clustered in six general areas of inquiry. Each cluster was presented on a separate page, except for 'Cluster C: experience with collaborative practice', which was split between two pages due to its greater length. Participants were permitted to navigate backwards and forwards through the survey if they wished to edit or expand responses on earlier pages.

Cluster A: Professional Background

This cluster gathered information on the participants' professional characteristics. Participants were asked about their primary profession and years in this profession post-qualification. A multiple-choice format was used, including an option for participants to enter a response of their choice. Only one selection was included in the hope that forcing a single selection would encourage participants to provide the professional background most relevant to their responses. Participants were also asked what areas of law they had practised in, or in the case of collaborative professionals outside of the law, which areas of law were relevant to their clients.[48]

Cluster B: Defining Collaborative Practice

This cluster explored participants' perspectives on how collaborative practice should be defined. This cluster was brief, comprising only a single open-text response question.

---

[48] Ibid 2-4; for discussion of the professional and demographic characteristics of participants, see chapter 7.1(a).

Participants were presented with the definition proposed by the IACP as described above. They were then asked how this related to their understanding of the process. For participants from a traditional lawyering background, this cluster served the additional purpose of providing basic information about collaborative practice to inform their thinking on the process.[49]

Cluster C: Experience with Collaborative Practice

This cluster collected information on experience with collaborative practice among participants. Participants were asked first about their awareness and understanding of collaborative practice in a multiple selection format. Participants who had indicated that they had been trained in, or used, collaborative practice were further asked about the number of collaborative matters they had professionally participated in, and the outcome of those matters.[50]

Cluster D: Potential of Collaborative Practice in Different Areas of Law

This cluster explored what participants thought about the use of collaborative practice outside of its present primary use in family law. Participants were shown a randomly ordered array of areas of law comprising commercial and business law, construction, conveyancing, criminal law, elder law, employment law, family law, intellectual property law, medical negligence, personal injury (non-medical), property law, tax law, and wills and estates. They were asked to rate the suitability of each area on a four-point Likert scale ranging from 'not at all suitable' to 'highly suitable'. Two free text questions asked participants about the reasons for their ratings; one directed at areas that they had rated highly, the other at areas they had rated lower. This was a way to explore the factors that participants considered important to the expansion of collaborative practice.[51]

Cluster E: Aspects of Collaborative Practice

This cluster collected participants' perspectives on various aspects of collaborative practice. These aspects included core elements of the process such as mandatory disqualification of counsel if the matter proceeds to court, and the use of interest-based negotiations. They also included aspects where desk research suggested there was regional variation, or a variety of

---

49 Ibid 5.

50 Ibid 6-7.

51 Ibid 8-13.

views in the collaborative practice community, such as the importance of a third-party neutral coach to the process. The cluster followed a similar structure to cluster D. Aspects of the process were presented in an array and rated on a four-point Likert scale ranging from 'not at all important' to 'very important'. Participants were then asked why they had rated these areas in this manner.[52]

Cluster F: Legal Professional Culture

This cluster explored participants' perspectives on how the culture of the legal profession relates to collaborative and adversarial dispute management processes. Participants were asked whether they agreed with a series of statements. Answers were recorded using a five-point Likert scale ranging from 'strongly disagree' to 'strongly agree'.[53]

Cluster G: Demographics (optional)

This cluster gathered standard demographic information about participants. This section was optional and appeared on the final page of the survey. Here, information about age, gender, and workplace location was collected to understand the general characteristics of participants and to help ensure that a wide variety of voices was included. Ranges were used for age, and the location data were collected only at a postcode level. This section confirmed that the survey reflected the views of participants with a range of characteristics.[54]

2.8 Semi-Structured Interview Research

Sampling in exploratory research is often shaped by the need to access particular types of participant rather than by true random sampling. Sue and Ritter note:

> If a survey is conducted for exploratory purposes, no attempt is made to examine a random sample of a population; rather researchers conducting exploratory research usually look for individuals who are knowledgeable about a topic or process.[55]

A variety of approaches to recruitment were adopted to establish a sample that could inform on the research area. After the online survey, participants were permitted to provide their email address if they were willing to participate in an interview to further discuss their views. Email addresses were collected using a separate form and could not be associated with

---

52 Ibid 13-15.

53 Ibid 15-17.

54 Ibid 18-20.

55 Valerie M Sue and Lois A Ritter, *Conducting Online Surveys* (Sage, 2015) 2.

individual responses to preserve the anonymous (as opposed to merely de-identified) nature of the survey. Six written survey participants provided their contact details in this manner. Other initial contacts were known to the researcher through personal or professional networks or had been met at conferences where the research design and early findings were presented.[56]

The initial sample of interviewees was grown using snowballing. This means that participants were invited to suggest colleagues or associates whose experiences may be relevant to the study.[57] In addition to suggesting participants, some interviewees revealed perspectives that might prove valuable to the research. An example was the identification of in-house counsel as a salient data source. One interview participant noted:

> …what happens is you have the lovers of conflict ending up in litigation roles and as barristers. And then you know the people who love conflict less, possibly you've got more of those people in-house... they tend to be a little bit more collaborative in the way that they work, and less conflict-ridden.

This comment led to the recruiting of further interviews from in-house counsel participants via personal contacts and snowballing. These solicitors were firmly integrated with their sole client and consequently had a deep appreciation for the medium, and of long-term effects that disputes have on businesses. In total, three of the traditional solicitors interviewed worked in this capacity. Thus the sampling strategy was successful in enabling a focus on participants who 'have had particular responses to experiences, or in whom particular concepts appear significant'.[58] The trade of for this capacity is that the sample is not random, and thus cannot be regarded as a true cross-section of the research population.

Thirteen interviews were conducted in total. Professional roles represented in the sample comprised professionals who worked in collaborative law (n=5, 38.4%), collaborative coaching (n=1, 7.7%), traditional law (n=5, 38.5%), and mediation (n=4, 30.8%). It was common for participants to identify with more than one relevant profession, both among collaborative and traditional adversarial participants, so these roles are not exclusive. In particular, collaborative lawyers were often trained as mediators.

---

56 Timothy Nugent, 'Collaborative Practice in Australian Civil Disputes' (Conference Presentation, 15 April 2019, National Mediation Conference (Australia)); Timothy Nugent, 'Opportunities for Collaborative Law in Commercial Partnerships' (Conference Presentation , 12 September 2016, National Mediation Conference (Australia))

57 See, e.g., Patricia Marshall, 'Political Competence and the Mediator: A New Strategy for Managing Complexity and Stress'(2008) *Queensland University of Technology Law and Justice Journal* 176, 180.

58 See Janice M Morse 'Ch 11. Sampling in Grounded Theory' in Anthony Bryant and Kathy Charmaz (eds) *The Sage Handbook of Grounded Theory* (Sage, 2007) 240.

Approximately half the participants (n=6, 46.2%) had received formal collaborative practice training. This allowed for both insider and outsider perspectives on collaborative practice and its potential in new areas of law. As with the written survey, no incentives were provided for participation in the interviews.

The research adopted semi-structured interviewing.[59] This means that a standard guide[60] is used for each interview, but each question is open to invite input that may not directly relate to the specific question asked. The flow of question and response in a semi-structured interview is more organic, enabling some flexibility and the provision of richer information or clarification in answers. Participants were allowed to respond to the research area in the way that felt natural to them and would often answer questions before they were asked. The general content of the interviews was described to participants ahead of time in the participant information. Providing advance information on topics addressed allowed participants to make an informed decision about their participation and permitted them greater opportunity to contemplate the topics, thereby facilitating a richer dialogue.

Interviews were scheduled at a time that was convenient for participants. A small number of participants were located near the researcher. These participants were offered the alternative of an interview in person, usually at the participant's workplace, either in their private office or a closed conference room. One interviewee preferred this option, and this interview was recorded using a portable device. All other interviews were conducted using Zoom video conferencing software or telephone. The researcher connected using a web camera and microphone in a home office environment, while the interviewee was in a place of their choosing, generally their home or office. In choosing to record in-depth interviews with collaborative practitioners, Ardagh notes that the recording of interviews may be perceived as 'intrusive' by some participants but facilitates accurate and straightforward transcription.[61]

Questions were grouped into four main topic areas: legal practice, the extension of collaborative practice, and legal professional culture. The interview flow was mostly organic; participants often moved between topic areas or provided detailed responses to one question that also answered another. Open phrasing was used to allow a broad range of responses and reduce the risk that participants would draw inferences from the phrasing of questions.

---

59 See, e.g., Tom Wengraf, *Qualitative Research Interviewing: Biographic Narrative and Semi-Structured Methods* (Sage, 1st ed, 2001).

60 See Appendix E.

61 Ardagh (n **Error! Bookmark not defined.**) 206.

Interview recordings were transcribed by the researcher, and video recordings reviewed for consideration of non-verbal communication. The resulting data were analysed using Nvivo qualitative data analysis software. A thematic coding approach was used. This means that the researcher identified elements within the text that suggested a thematic connection between the experience of beliefs of participants.[62]

2.9 Sample Size and Saturation

In quantitative research, adequate sample size is generally determined by statistical means, based on the size and variation of the target population. However, in qualitative approaches, statistical measures are of limited guidance. The size and scope of the sample are determined by the researcher, with guidance from other studies and the theoretical literature. The number of participants was not based on an initial target. Rather, data collection was guided by theoretical saturation, the point where the inclusion of further data for comparison does not reveal significant new properties or dimensions.[63] According to Aldiabat and Le Navenec, saturation is not dependent solely on the number of participants, but also on the aim of the study, the experiential base of the participants, and the nature of data collection, such as the depth and duration of interviews.[64]

The size and scope of sampling are broadly similar to studies which have sought to explore collaborative practice through varied perspectives. For example, in a mixed-methods study of Australian Capital Territory collaborative lawyers, Ardagh conducted in-depth interviews in person with seven collaborative lawyers and reviewed archival records including 'meeting memoranda, newsletters, and collaborative law training materials'.[65] In research concerning Irish collaborative practice, Healy conducted interviews with five collaborative lawyers, eight adversarial lawyers, and ten clients in collaborative matters, and obtained forty-one responses to a national questionnaire of collaborative lawyers.[66] In a grounded theory study on the role of the Mental Health Professional in United States Family Collaborative Practice, Randy Heller interviewed twelve lawyers, eleven mental health professionals, six financial neutrals, and four 'collaborative pioneers'.[67]

---

62 See, e.g., Graham R Gibbs, *Analyzing Qualitative Data* (Sage, 2007) Ch 4.

63 Flick (n 9) 544.

64 Data Saturation: The Mysterious Step in Grounded Theory Method (2018) 23(1) *The Qualitative Report* 245, 248-51.

65 Ardagh (n **Error! Bookmark not defined.**) 206.

66 Connie Healy, *Collaborative Practice: An International Perspective* (Routledge, 2018).

67 Heller (n **Error! Bookmark not defined.**).

Considering the challenges experienced in recruiting for the survey,[68] saturation was achieved mainly through the addition of further interviewees. The participants in this research had extensive experience in dispute management, and many had served in more than one professional role. Theoretical saturation was therefore achieved more quickly than may have been possible if, for example, interviews were conducted with family law clients whose experience is usually limited to a single matter, or newly admitted practitioners.

2.10 Limitations of the Methodology

The limitations of the chosen methodology are largely inherent within inductive research. Care is needed in inductive research to manage the impact of researcher bias, and to be mindful not to force the data to fit a preconceived notion of what the research should demonstrate.[69]

The research was designed to 'go wide' and include varied perspectives. While it succeeded in this aim, the scope and resources of the study were finite, and not every group whose perspective might be salient could be included. Clients who had participated in a collaborative process were initially considered and may have added a further dimension to the study but were decided against due to the potential vulnerability of parties experiencing conflict. Collaborative practice trainers and dispute management teachers and lecturers were not surveyed, except that some participants from other categories were also involved in these activities. The perspectives of persons in these roles may have provided an interesting insight into the process of becoming a collaborative lawyer and the nature of the 'paradigm shift' between adversarial and collaborative modes of practice.[70] The choice not to expand the interviews to include these participant categories was a pragmatic one, intended to maintain the research within resource limitations.

(a) Challenges with Recruiting

Challenges with recruiting were experienced in this study, especially for the online survey. In the spirit of Glaser's iconic advice that 'all is data',[71] the fact that these challenges were experienced is an appropriate subject for observation. Survey non-responses do not come with an explanation, but one common reason for non-response is that potential participants

---

68 These challenges are discussed further in section 2.10(b).

69 See, e.g., Stebbins (n 3) 48.

70 See, e.g., Pauline Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (American Bar Association, 3rd ed, 2017).

71 Barney G Glaser, 'All is Data' (2007) 2(6) *Grounded Theory Review* 1, 1.

did not consider the research to be salient to them. There was anecdotal evidence that recruiting may have been affected by the participants' impressions of the value of their experience. Several participants voiced concerns that they were not 'the right person to talk to'. This was the case both for collaborative practitioners who only handle family matters and for traditional adversarial lawyers who had little or no prior engagement with collaborative practice. Some valuable perspectives were probably missed simply because potential participants did not identify their experience as relevant to the research area.

However, a limited response is not especially surprising in light of past research involving family lawyers as participants. In 2008, Howieson wrote that 'field studies of family lawyers and their clients have had difficulty with recruitment.'[72] Possible reasons for challenges in recruitment include concerns about issues of confidentiality, and the 'busy environment that family lawyers work in.'[73] Woodward notes that 'busy lawyers in particular, are suffering from survey fatigue...'[74]

Where survey responses were modest in quantity, they did not lack in quality, including thoughtful and thought-provoking responses from a range of professions. While it would not be appropriate to draw robust quantitative conclusions from the survey data alone, those contributions received still represent the experiences and insight of a specialised expert population. These data have a valid and valuable place in contributing to the understanding or conceptualisation of the research area.

(b) Statistical Limitations of the Sample

The sampling strategy relied on a theoretical, rather than a representative sample. In other words, participants have been selected (including through peer-recommendation) to fulfil the emerging needs of the study. The use of theoretical sampling means that the sample is not randomly distributed. The views presented within this research should not be regarded as representative of the research population. Instead, the views presented are those of a sample chosen for their capacity to provide meaningful initial insights into the research area and support a tentative interpretation.

Consequently, the views presented should be understood as those of the participants. Other persons in these fields may disagree, and it is not possible to state in statistical terms

---

72 Jillian Alice Howieson, 'Family Law Dispute Resolution: Procedural Justice and the Lawyer-Client Interaction' (PhD Thesis, University of Western Australia, 2008) 99-100.

73 Ibid.

74 John Woodward, 'Walking the Tightrope: Exploring the Relationship between Confidentiality and Disputant Participation' (2019) 30 *Australasian Dispute Resolution Journal* 23, 25.

the degree to which the participants' views are representative of their fields. Statistical tests were not applied to quantitative data because it is not suggested that the sample is suited to firm mathematical proofs. Instead, quantitative data is only one of the sources relied upon in the exploratory analysis, to be considered in conjunction with qualitative survey data, and the content of the thirteen semi-structured interviews, literature review and desk research.

2.11 Chapter Summary

This chapter has described the research design. The research domain was identified as the expansion of collaborative practice into new areas of law, from which three research questions were distilled. It was noted that there is a paucity of specific empirical research on this issue; and that an exploratory research method was, therefore, an appropriate design choice. An overview of data collection was provided, including the literature review, desk research, survey and semi-structured interviews. The limitations of the methodology were identified. The research now begins an exploration of collaborative practice, starting with its origins, core principles and norms.

Chapter 3. History and Core Principles of Collaborative Practice

This research is focussed on the future of collaborative practice. However, to explore the potential of collaborative practice it is necessary to examine the context in which it emerged, the problems that it seeks to address, and the fundamental characteristics of the process that differ from other dispute management processes. To understand how collaborative practice can be applied to new disputes, it is helpful to first achieve clarity on what drives the process, how it works, and what it achieves. This information can only be uncovered by examining the experience of past and present collaborative practitioners. This chapter begins by discussing the creation of collaborative practice (as collaborative law) by Stu Webb in the United States. It then explores how the process has been defined and examines the ongoing discourse on what aspects of the process should be considered mandatory, best practice or merely optional. This contemplation of the literature provides the necessary background for the research domain exploration.

3.1 Origins of Collaborative Practice

Collaborative practice was invented by Minnesota divorce attorney Stu Webb in the early 1990s.[1] The nineties were said to have been a challenging time to be a family lawyer in the United States.[2] Clients were increasingly litigious, and matters were becoming more complex, taking longer to conclude and exposing clients to higher costs.[3] Webb has described coming into his office each morning 'like the cowboy in his boyhood movies who, before entering his shack, would put his hat on a stick and place it through the door opening to see if anyone shot at it.'[4] At this time, Webb was so dissatisfied with traditional legal practice that he was preparing to leave the profession entirely, to pursue a career in psychology.[5]

While he was training as a psychologist, Webb had an idea. He wondered whether instead of leaving the profession, he might be able to find how to work as a lawyer in a way that would fit with his values and avoid the harm caused by litigation and adversarial

---

1 See, e.g., Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49 *Family Court Review* 213, 213; Marina Tolou-Shams 'Collaborative Divorce: An Oxymoron' (2015) 31(5) *Child and Adolescent Behaviour Letter* 1, 1.

2 Robert Cochran 'Legal Ethics and Collaborative Practice Ethics' (2010) 38 *Hofstra Law Review* 537, 538.

3 Ibid; Webb and Ousky (n 1).

4 Webb and Ousky (n 1); see also Connie Healy, *Collaborative Practice: An International Perspective* (Routledge, 2017) 35-6.

5 Webb and Ousky (n 1).

negotiations.[6] He set out to develop a form of legal practice that was built with settlement rather than litigation as its focus.[7]

Webb began by questioning the conventions of lawyering. In the traditional approach to legal representation, lawyers provide advice in private, and then carefully plan how to communicate with the other side. Webb envisioned an alternative— people solving their problems in open meetings, where both parties and their lawyers would be present throughout. In these 'four-way' meetings, advice would be given in real-time, with the other side present and listening. Putting the cards on the table in this way would promote trust between participants and open up new and productive channels of communication.'[8]

Webb located a fellow family lawyer who was interested in working with the developing methodology, and together they trialled what became known as four-way meetings or four-ways, managing several matters with the approach.[9] These early efforts were not truly collaborative practice; both lawyers were under an ordinary retainer, so there was nothing to prevent their reversion to adversarial representation.[10] The design of collaborative practice was later completed by requiring both lawyers to withdraw if the matter was to proceed to litigation. Webb and Ousky explain how an unsuccessful four-way conference inspired the practice of adopting a disqualification clause:

> This case started like all the others— with good feelings and open sharing. But, when they got to the second conference, something had happened. The parties were angry, mistrustful, and refused to work together and the proceeding broke down' At that time, Stu and the other family law attorney did not have any agreement to withdraw from the case if settlement broke down. They just naturally followed the case to the trial path with all the negative trappings that went with it. It was terribly painful and had a negative effect on their attorney relationship. But, out of negative chaos can, and did, come the governing rule of collaborative law: If you're a settlement (read collaborative) lawyer, you withdraw from the case if it doesn't settle and do not participate in the litigation process.[11]

---

6 Ibid.

7 Family Law Council (Australia), 'Collaborative Practice in Family Law: A Report to the Attorney General Prepared by the Family Law Council' (2006) 15.

8 See, e.g., Julie Macfarlane, *The New Lawyer: How Clients are Transforming the Practice of Law* (University of British Colombia Press, 2008) 120; the theoretical basis for four-way meetings is explored further in section 3.4 (b).

9 Webb and Ousky (n 1).

10 Ibid 213.

11 Ibid.

On New Year's Day in 1990, Webb experienced a 'moment of reflective brilliance.'[12] He resolved that he would become a collaborative lawyer— a lawyer who manages disputes solely by negotiation and never represents clients in court.[13] Webb reached out to peers in the local area to see whether they might be interested in working with him in a settlement-only model of practice.[14] Of 'about a dozen'[15] lawyers contacted, four responded positively.[16] These lawyers provided the initial population for a small collaborative practice group. After the first year, the group comprised nine members and began formalising the structure of the group and developing the conventions and procedures associated with collaborative practice.[17]

The initial response to collaborative practice was not all positive. Webb describes the chairman of the Minnesota Alternative Dispute Resolution Committee telling him he must be 'nuts'.[18] But a more favourable response was received when he explained the process in a letter to Justice Sandy Keith, then Associate Justice of the Supreme Court of Minnesota, in an effort to obtain support for the process. The content of Webb's letter warrants particular attention because it provides insight into the rationale that underlies collaborative practice design choices, written at around the time he was making them. Webb begins by introducing collaborative process as a solution to what he perceived to be a weakness of mediation, namely the limited opportunity for positive input by lawyers:

> I think I've come up with a new wrinkle that I'd like to share with you. One of the aspects of mediation that I feel is a weakness is that it basically leaves out input by the lawyer at the early stages (sometimes that's an advantage!). By that I don't mean adversarial, contentious lawyering, but the analytical, reasoned ability to solve problems and generate creative alternatives and create a positive context for settlement….[19]

---

12 Nancy Cameron et al, *Collaborative Practice: Deepening the Dialogue* (Continuing Legal Education Society of British Columbia, 2014) 11; see also Scott R Peppet, 'The Ethics of Collaborative Law' (2008) *Journal of Dispute Resolution* 131, 132.

13 Ibid.

14 See, e.g., Stuart G Webb & Ronald D Ousky, *The Collaborative Way to Divorce: The Revolutionary Method that Results in Less Stress, Lower Costs and Happier Kids— Without Going to Court* (Penguin, 2007) xv.

15 Stu Webb, 'From the Collaborative Corner: How We Did Things' (2001) 3(2) *Collaborative Review* 27, 27.

16 Ibid.

17 Ibid.

18 Webb and Ousky (n 1) 214.

19 Stu Webb 'Letter to the Honourable AM 'Sandy' Keith (February 14, 1990) in Webb and Ousky (n 1) 214; see also Gary Voegele, Ronald Ousky, Linda Wray, 'Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes' (2007) 33 *William Mitchell Law Review* 973, 974.

Webb then reflects on moments where the parties and their lawyers within a family law matter fall into a pattern of behaviour that was positive and focused on creative problem-solving. The collaborative process is framed as a means to recreate this positive dynamic:

> …you and I have both experienced, I'm sure, those occasional times, occurring usually by accident, when in the course of attempting to negotiate a family law settlement, we find ourselves in a conference with the opposing counsel, and perhaps the respective clients, where the dynamics were such that in a climate of positive energy, creative alternatives were presented …why not create this settlement climate deliberately? [20]

This paragraph acknowledges that a positive and creative negotiating space can occur in traditional lawyering. But in traditional lawyering, these glimpses of cooperation have rarely been articulated with clarity, much less identified as an explicit goal of lawyering. Collaborative practice refocuses the role of lawyers to systematically pursue these moments of serendipity.

In Webb's vision, collaborative practice would be led by a 'coterie'[21] of specialised lawyers who would sign onto cases exclusively for the purpose of facilitating settlement.[22] If the matter proceeded to litigation, then the collaborative lawyers would step down, and the parties would hire new, traditional adversarial counsel.[23] Webb concludes his letter to the judge by outlining nine advantages of collaborative practice over the main dispute management processes of mediation and litigation.

> Each party is represented by an attorney of his/her choice. (This is usually not the case in mediation until after the mediation has been completed.)[24]
>
> This allows the lawyers to be focused in the settlement mode without the threat of 'going to Court' lurking just around the corner. In the normal situation, settlement is often by-passed initially while the parties posture and the lawyers work on discovery.
>
> There is continuity between settlement and processing the final dissolution. (This is usually not the case in mediation with the resulting problem of the lawyers not liking the mediated settlement.)

---

20 Webb and Ousky (n 1) 214.

21 Ibid.

22 Ibid.

23 Ibid.

24 In contemporary Australian practice, parties often receive legal advice while they are preparing for mediation. Lawyers are sometimes, but not always present in the mediation sessions themselves. For discussion of representation in Australian mediation, see, e.g., Bobette Wolski 'On Mediation, Legal Representatives and Advocates' (2015) 38(1) *University of New South Wales Law Journal* 5; John Woodward, 'Lawyer Approaches to Court-Connected Mediation of General Civil Cases: A New Case Study' (PhD Thesis, University of Newcastle, 23 October 2018).

> With the focus on settlement and avoiding court, the lawyers and clients are motivated to learn what works to achieve settlement; how to problem-solve without getting 'plugged in' to the emotional content (a la 'War of the Roses'). Lawyers who participate in this program will be motivated to develop win-win settlement skills such as those practiced in mediation (just like they now focus on sharpening trial skills).
>
> Lawyers are freed up to use their real lawyering skills, i.e., analysis, problem-solving, creating alternatives, tax and estate planning and looking at the overall picture as to what's fair.
>
> Four-way conferences become the norm with positive energies being generated (because that's where the creative solutions lie) as all work collaboratively for a fair settlement. As in mediation, the potential is high for the clients to have a lot of input.
>
> Clients and potential clients get an orientation in which they are advised of the advantages, including cost savings, of this approach and the kind of attitude and frame of mind that is most likely to achieve fair, prompt, efficient and positive settlements that work for both parties.
>
> When cases don't settle and new attorneys are retained for trial, the clients have had the best shot both ways, i.e., a settlement specialist and a trial specialist (in my experience they usually don't come in the same package).
>
> Settling matters on a collaborative basis is just more fun![25]

The judge replied with a note that was encouraging for Webb's experiment, lending his support to the emerging method.[26] In the early nineties, collaborative practice began to expand to other regions. Webb met with groups of lawyers in other jurisdictions, particularly on the West Coast, there, the next collaborative practice communities began to grow and flourish. Tesler notes that by 1994 there were two active collaborative practice groups in Northern California, with others in development in Ohio, Georgia, and New Hampshire. Each of these groups was constructed on the model of Webb's Minnesota group.[27]

Several of the practitioners Webb worked with around this time would go on to play significant roles in shaping the theory that underpins the collaborative practice movement. Such pioneers included Forrest 'Woody' Mosten, Chip Rose, Nancy Ross, Pauline Tesler, and Peggy Thompson.[28]

---

25 Webb and Ousky (n 1) 214.

26 Ibid 215; Voegele, Wray and Ousky (n 19) 974.

27 Pauline Tesler, 'Collaborative Law: Where Did it Come From, Where is it Now, Where is it Going' *The Collaborative Quarterly* (May 1999) 1.

28 See, e.g., Forrest Mosten, *Collaborative Divorce Handbook: Effectively Helping Divorcing Families Without Going to Court* (Jossey-Bass, 2009); Chip Rose, Collaborative Family Law Practice (1996);

The expansion of the collaborative practice movement continues to be driven by the efforts of devoted practitioners. Pioneers travel to new jurisdictions to provide collaborative training to local lawyers. Then those newly trained collaborative solicitors provide the 'critical mass'[29] for the use of collaborative practice in that region. The growth of collaborative practice has proceeded mainly within Webb's field of family law.[30] Yet Webb has long maintained its suitability for other types of dispute.[31] The lack of uptake of collaborative practice in other fields may lead practitioners to suspect that there is something about the process that is intrinsic to family law. With this thought in mind, it is time to turn to the question of what central principles are commonly held to define collaborative practice, and what norms practitioners generally comply with. These are now explored, with particular attention to whether they may hold relevance in disputes outside of the family law arena.

3.2 Definitions of Collaborative Practice

There is no universally agreed definition of collaborative practice. The term is used differently by different theorists and practitioners, and subject to regional variation. However, there is a core of approaches that are commonly held out by practitioners as the principles defining collaborative practice. At the periphery of this core, there are norms of practice that are followed in most collaborative practice matters but are not ordinarily held out to define the process. The line between what is definitional and what is normative, or best practice, in collaborative practice is blurred. Some practitioners feel that the only real requirement is disqualification of lawyers should the matter proceed to court and that 'all else is artistry'.[32] Others consider that the definition of the process is inseparable from practices such as interest-based negotiation and four-way meetings— and that practitioners who do not follow these conventions are not merely using collaborative practice poorly, they are not using collaborative practice at all. The question of whether and how collaborative practice should

---

Karen Fagerstrom, Milton Kalish, Rodney Nurse, Nancy Ross, Peggy Thompson, Diana Wilde, Thomas Wolfrum, *Divorce: a Problem to be Solved; not a Battle to be Fought* (Brookwood, 1997); Pauline Tesler and Peggy Thompson, *Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move on With Your Life* (Harper Collins, 2007).

29 Pauline Collins and Marilyn Scott, 'The Essential Nature of a Collaborative Practice Group for Successful Collaborative Lawyers' (2017) 28 *Australasian Dispute Resolution Journal* 12, 17-18.

30 See Paoloa Cecchi-Dimeglio and Peter Kamminga, 'The Changes in Legal Infrastructure: Empirical Analysis of the Status and Dynamics Influencing the Development of Collaborative Law Around the World' (2014) *Journal of the Legal Profession* 191, 218; Linda Wray, 'International Academy of Collaborative Professionals Practice Survey' (2010) 1. <http://collaborativepractice.com>.

31 See, e.g., Webb and Ousky (n 1) 219.

32 Pauline Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation* (American Bar Association, 3rd ed, 2016) 36.

be conclusively defined is discussed further in chapter four as part of the broader issue of regulation. For the purpose of this section, however, the categories of 'core principles' and 'norms' should be considered as an organisational tool rather than a conclusive taxonomy.

3.3 Core Principles of Collaborative Practice

In an analysis cited with approval in the preamble to the United States *Uniform Collaborative Law Act,*[33] Schwab identifies three core principles of collaborative practice:

i. A commitment to good-faith negotiations focused on settlement without court intervention or even the threat of litigation, in which the parties assume the highest fiduciary duties to one another;
i. full, honest and open disclosure of all potentially relevant information, whether the other side requests it or not; and
ii. if either party decides to litigate, both lawyers are automatically terminated from the case, requiring the parties to seek new counsel.[34]

These principles of good faith negotiation without the threat of litigation, full honest and open disclosure, and mandatory disqualification are reflected in both the International Academy of Collaborative Professionals ethical standards[35] (IACP Standards), and in the draft 'Australian collaborative practice guidelines for lawyers'[36] (Australian Guidelines), developed by the Australian Family Law Council. In participating United States jurisdictions,[37] the *Uniform Collaborative Law Act*[38] includes the principles of full, open and honest disclosure, and disqualification from adversarial proceedings but it does not introduce a good faith requirement. A comparison of the treatment of the 'most central principles' in these documents is included in Table 1 below.

---

33 *Uniform Collaborative Law Rules and Uniform Collaborative Law Act* 2010 (United States model legislation) 'UCLA'.

34 William H Schwab, 'Collaborative Lawyering: A Closer Look at an Emerging Practice' (2004) 4(3) *Pepperdine Dispute Resolution Law Journal* 351, 358.

35 International Academy of Collaborative Professionals 'Standards and Ethics (2018)).

36 Law Council of Australia, 'Australian Collaborative Practice Guidelines for Lawyers' (2011).

37 As of September 2020 the *Uniform Collaborative Law Act 2010* has been enacted as legislation or the alternative *Uniform Collaborative Law Rules 2010* adopted as rules of court in Alabama, Arizona, District of Colombia, Florida, Hawaii, Illinois, Maryland Michigan, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Washington, Tennessee, Texas, Utah, enacting legislation has been introduced in Colorado, Virginia, Massachusetts, and New Hampshire.

38 *Uniform Collaborative Law Rules and Uniform Collaborative Law Act* 2010 (United States model legislation).

Table 1: Central Principles of Collaborative Practice in Professional Standards

Good-faith negotiations without the threat of litigation	
Law Council of Australia Guidelines	'A collaborative practitioner will conduct the collaborative process in a procedurally fair manner and support interest-based negotiation following a discussion of interests…'10 [42] 'participants should not undermine the process by threatening litigation or taking positional stances…' 11 [49] 'A collaborative practitioner shall not threaten to undertake any contest court procedure related to the collaborative case nor shall a collaborative practitioner continue to represent a client who makes such a threat in a manner that undermines the collaborative process.' 12 [62]
IACP Standards and Ethics	'The professionals must act in good faith in all negotiations and in the Collaborative Process, and must advise the clients that the Collaborative Process requires good faith negotiation…' 6 [3] 'A collaborative professional must resign [if]… the professional's client(s) takes unfair advantage of inconsistencies, misunderstandings, inaccurate assertions of fact, law or expert opinion, miscalculations, or omissions.' 13 [3.10] [B]
Uniform Collaborative Law Act 2010	No binding provision[39]
Full honest and open disclosure	
Law Council of Australia Guidelines	'No participant in a collaborative case, whether a collaborative practitioner or a client, may knowingly withhold or misrepresent information material to the collaborative process or otherwise act or fail to act in a way that knowingly undermines or takes unfair advantage of the collaborative process…' 11 [49] 'If a client knowingly withholds or misrepresents information material to the collaborative process, or acts in a way that undermines or takes unfair advantage of the collaborative process… and the client continues in such conduct after being duly advised of his or her obligations… such continuing conduct will mandate withdrawal of the Collaborative Practitioner and the termination of the collaborative process.' 11 [50]
IACP Standards and Ethics	'The Collaborative Process requires the full and affirmative disclosure of all Material Information whether or not requested…. The Collaborative Process requires clients and professionals to comply with all reasonable

[39] The UCLA does not expressly require negotiation in good faith as a deliberate design choice— in the annotated act, the drafting committee notes that defining 'bad faith' could lead to litigation over the fine points of the boundaries of acceptable practice, contributing the exact problems that collaborative practice seeks to address: National Conference of Commissioners on Uniform State Laws 'Uniform Collaborative Law Act with Prefatory Note and Comments*'* (2010) 29.

	requests for information…' 3.1 [A], [B]. 'A collaborative professional must resign [if]… the professional's client(s) intentionally misrepresents, withholds, or fails to disclose Material Information, whether or not such information has been requested.' 3.1 [A], [B].
Uniform Collaborative Law Act 2010	'Except as provided by law other than these rules, during the collaborative law process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative law process.' s 12
Disqualification of Lawyers from Adversarial Proceedings	
Law Council of Australia Guidelines	'In a collaborative process, the clients and their lawyers contract in writing to attempt to resolve a dispute without recourse to litigation and agree in writing that the lawyers will not act for the clients if they cannot resolve their matter by collaboration and decide to litigate the dispute...' 4 [2] Undertaking any contested court procedure automatically terminates the collaborative process…' 12 [62]. 'Upon termination… the representing collaborative practitioners and all other professionals working within the collaborative process are prohibited from participating in any aspect of the contested proceedings between the parties.' 13 [63]
IACP Standards and Ethics	'…a Collaborative Professional and any other professional working in the same firm or in association with the Collaborative Professional is prohibited from participating in or providing services with respect to any Proceeding that involves substantially the same participants.'[40] 14 [3.12 A]
Uniform Collaborative Law Act	'Except as provided otherwise…[41] a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter…' s 9(a).

[40] Limited exceptions are made for proceedings necessary to render an agreement legally enforceable. Further, in the case of pro-bono representation or representation by a government body, it is permissible for a lawyer from the same firm to provide services in relation to adversarial proceedings if they have been isolated from the collaborative case [3.12 C].

[41] Exceptions comprise orders to approve an agreement reached through the collaborative process s 9(c)(1) and to seek or defend an emergency orders where no successor lawyer is immediately available s 9(c)(2).

	'except as provided otherwise…[42] a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under subsection (a).' s 9(b)

These core principles are included as binding provisions in most participation agreements.[43] This means a collaborative process must be terminated if one or both of the parties do not participate in good faith, disclose relevant information, or take unilateral action in court.[44] For clients, the dismissal of counsel is enforceable as a contractual obligation. For solicitors, failure to terminate the collaborative process in these circumstances may breach a solicitor's fundamental ethical obligations.[45] Furthermore, if the collaborative process is used dishonestly to reach an agreement, relief may be available under the doctrines of unconscionable conduct, or fraudulent misrepresentation.[46]

Collaborative lawyers and their clients take these obligations so seriously that they commit to them in writing. It is important, therefore, to understand their substance and purpose. Where does the line exist between good faith conduct and conduct that falls short? What material is sufficiently 'relevant' to disclose? What is achieved by disqualifying lawyers from proceedings in court? This section now explores what each of the core elements requires from the disputants, lawyers and other professionals to do in a collaborative process and begins to consider how they might be applied in new areas of law.

(a) Good Faith Negotiations

Good faith has a much longer history than that of collaborative practice. Gray notes that good faith as a principle in contracting 'is of ancient lineage'.[47] The idea that trading parties should

---

42 Ibid s 9(b): The exceptions outlined in s 9(c)(1-2) apply as described above. Further, in the case of pro-bono representation for low-income parties, (s 10) or proceedings where a government entity is a party, (s 11) it is permissible for the parties to waive imputed disqualification in relation to the firm representing the low income client or government entity. The adversarial lawyers from that firm must be isolated from the collaborative matter and any related matters. (s 10(b)(3), s 11(b)(2).

43 See, e.g., Queensland Association of Collaborative Practitioners 'Collaborative Contract' (unpublished, held on file by author); 'Precedent Collaborative Law Participation Agreement' in Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis Butterworths, 6th ed, 2019) 188-90.

44 Ibid.

45 As discussed in section 3.3(c)(i).

46 For the essential elements of these doctrines see, e.g., Peter Radan, John V Gooley, and Ilja Vickovich, *Principles of Australian Contract Law* (LexisNexis Butterworths, 4th ed, 2017) Pt 4.

47 Anthony Gray, 'Good Faith and Termination for Convenience Clauses in Australia' (2012) 5(4) *International Journal of Private Law* 352-353.

behave honestly and sincerely towards one another in their dealings dates to the Roman law concept of 'bona fides.'[48] A broad duty of good faith between contracting parties continues to be widely represented in civil law countries, and in international treaties. Australian and English common law has been more cautious concerning broad duties of good faith. There is no general duty in Australian law imposed on parties to act in good faith in negotiations.[49] Rather, good faith appears as an exception in limited specific circumstances. Explicit good faith requirements appear in a few specific areas of law such as in native title negotiations and preceding protected industrial action. In other matters, good faith standards may be adopted voluntarily by the parties on a contractual basis, (which is what collaborative practice does). The court has at times even been willing to recognise an implicit good faith term in specific cases including in some dispute management provisions in Australia[50] and in in English relational contracts.[51] As collaborative practice develops in new areas of Australian law, practitioners are likely to rely on both the experiences of collaborative family practitioners, and of more familiar (to them) doctrinal sources on good faith negotiation to understand the application of good faith to their work.[52] These are discussed next, beginning with the common law.

Initially, agreements to negotiate 'in good faith' were regarded as unenforceable even where parties explicitly identified such a duty.[53] Good faith negotiation provisions were rejected either as too vague to give effect or as against public policy because they were perceived to somehow abrogate freedom of contract. In *Walford v Miles,* Lord Ackner questioned whether good faith was even compatible with the act of negotiating:

> …the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position if the parties involved in negotiations… as unworkable in practice as it is

---

48 See, e.g., Martin Josef Schermaier '*Bona Fides* in Roman Contract Law' in Reinhard Zimmerman and Simon Whittaker (eds) *Good Faith in European Contract Law* (2000) 63, 77-83; ibid: citing Palmieri NW, 'Good Faith Disclosures Required During Pre-Contractual Negotiations' (1993) 24(1) *Seton Hall Law Review* 70, 80.

49 Gray (n 47).

50 *United Rail Services Ltd v Rail Corporation of New South Wales* [2009] NSWCA 177.

51 *Amey Birmingham Highways Limited v Birmingham City Council* [2018] EWCA Civ 264.

52 Ibid; *Yam Seng Pty Ltd v International Trade Corp Ltd* (2013) 1 All ER (Comm) 1321*; Bates & Ors v Post Office* [2019] EWHC 606.

53 See *Elizabeth Bay Developments Pty Ltd v Boral Building Service Pty Ltd* (1995) 36 NSWLR 709, 716; *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194, 206; Leon E Trakman and Kunal Sharma 'Agreements to Negotiate in Good Faith' (2014) 73(3) *The Cambridge Law Journal* 598, 599; however, Trakman and Sharma note some very early English cases recognise a broad duty to perform contracts in good faith: *Carter v Boehm* (1766) 97 E.R. 1162, *Mellish v Motteux* (1792) 170 E.R. 113.

> inherently inconsistent with the position of a negotiating party.[54]

More recent cases in both English and Australian jurisdictions indicate a softening of this position.[55] In *Rail Services v Rail Corporation,*[56] Allsop P. (with whom Ip J.A. and Macfarlan J.A. agreed) found that the promise to undertake good faith negotiations could, in some contexts, amount to an enforceable undertaking.[57] Allsop P. states:

> A promise to negotiate (that is to treat and discuss) genuinely and in good faith …is not vague, illusory or uncertain. It may be comprised of wide notions difficult to falsify. However, a businessperson, an arbitrator or a judge may well be able to identify some conduct (if it exists) which departs from the contractual norm that the parties have agreed, even if doubt may attend other conduct. If businesspeople are prepared in the exercise of their commercial judgement to constrain themselves by reference to express words that are broad and general, but which have a sensible and ascribable meaning, the task of the Court is to give effect to, and not to impede, such solemn express contractual provisions.[58]

Gray has argued that far from creating uncertainty, the recognition of good faith can serve to align the law more closely with the subjective intentions of contracting parties.[59] Empirical research with commercial managers has confirmed that the parties to commercial contracts form relationships characterised by honesty and mutual trust.[60] The argument that good faith recognises the parties' intent applies equally well in a collaborative practice context. Clients enter into the process with the clear expectation that their lawyers will hold them to their commitments to good faith participation, and they rely on the prospect of that enforcement to keep negotiations on a productive cooperative track.

There is, however, an important difference between collaborative practice and ordinary agreements to negotiate in good faith. A contractual provision requiring parties to negotiate in good faith applies to the dispute. Parties will breach their contract if they elect not to negotiate or leave negotiations without a 'good faith' effort. In contrast the obligation to act in good faith in a collaborative practice agreement applies only to participation in the

---

54 *Walford v Miles* [1992] 2 AC 128, 138.

55 *Yam Seng Pty Ltd v International Trade Corp Ltd* (2013) 1 All ER (Comm) 1321*; Emirates Trading Agency LLC v Prime Mineral Exports Pty Ltd* [2014] EWHC 2104; *United Rail Services Ltd v Rail Corporation of New South Wales* [2009] NSWCA 177.

56 *United Rail Services Ltd v Rail Corporation of New South Wales* [2009] NSWCA 177.

57 Ibid [74]; see also *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1; *Booker Industries Pty Ltd v Wilson Parking Pty Ltd* (1982) 149 CLR 600 per Kirby P [26].

58 Ibid [74].

59 See, e.g., Gray (n 47) 357.

60 Ibid; Stewart Macaulay 'Non-Contractual Relations in Business: a Preliminary Study' 28(1) *American Sociological Review* 55, 58-61.

process. If a party to a collaborative matter wishes to terminate the process and revert to litigation or distributive negotiations (even arbitrarily) then they will not incur any liability under the participation agreement in doing so. This distinction greatly constrains the circumstances in which a court might be called upon to interpret good faith in the collaborative process.

Thus, in a collaborative matter, what 'good faith' requires is more salient as a question for the individual collaborative lawyer than for the court. Collaborative lawyers bear responsibility for drawing the ethical line with respect to both their own and their client's conduct. In principle, a breach of this expectation could lead to formal ethical sanctions,[61] but as of yet, no such complaint has been prosecuted. In practice, the likely sanctions for poor conduct in collaborative practice are informal, such as a loss of reputation in the collaborative practice community.[62]

The question of what constitutes good faith is just as challenging for the collaborative practitioner as it is has proven for superior courts. Good faith is said to be 'capable of widely differing interpretations.'[63] Healy notes that the concept is 'like mom and apple pie—difficult to disagree with but, equally difficult to define.'[64] One way to consider good faith is to consider its opposite. What kind of conduct would clearly amount to 'bad faith' in the context of a collaborative process? The Australian Collaborative Practice Guidelines, do not define good faith, but note that practitioners should be attentive to misuses of the process such as:

> (a) delaying proceedings in the hope of reinforcing the continuation of an existing arrangement or obtain other advantage; or
>
> (b) 'buying' time in order to dissipate or conceal assets; or
>
> (c) in some other way acting in bad faith[65]

---

61 See, e.g., *Australian Solicitors' Conduct Rules 2015* r 4.1.1, which requires solicitors to 'be honest and courteous in all dealings in the course of legal practice,' and r 5.1, which requires solicitors to abstain from 'conduct…which demonstrates that the solicitor is not a fit and proper person to practice law.' To date no such case has arisen.

62 Nancy Cameron 'Collaborative Practice in the Canadian Landscape' (2011) 49(2) *Family Court Review* 221, 226: discusses the importance of reputation in relation to enforcing the participation agreement more generally; Bobette Wolski, 'The "New" Limitations of Fisher and Ury's Model of Interest-Based Negotiations: Not Necessarily the Ethical Alternative' (2012) 19 *James Cook University Law Review* 127, 138.

63 Trakman and Sharma (n 53) 599.

64 (Healy n 4): quoting in part John Lande, 'Principles for Policymaking about Collaborative Law and Other ADR Processes' (2007) 22 *Ohio State Journal on Dispute Resolution* 619.

65 Law Council of Australia (n 36) 12 s 58.

Tesler provides a more extensive list of examples of bad faith in the collaborative process:

> purposively engaging in delaying or obfuscating tactics, violating or failing to follow through with interim agreements, taking unilateral action—such as vis-à-vis community assets or concerning children-that are inconsistent with collaboration, persistently behaving with disrespect towards other participants, or refusing to share information that a reasonable decision maker would require in order to make an informed decisions on a particular subject.[66]

Some of these examples of bad faith require a substantial degree of professional judgement on factors such as where is the line between 'persistent disrespect' and ordinary antipathy in most separating couples? Another vexing question is whether 'good faith' requires something more than the absence of dishonesty, or other malicious intent.

There is authority in Australian case law for a positive duty to take the interests of other parties into consideration when performing contractual duties in good faith. For example, in *Paciocco v Australia and New Zealand Banking Group Limited*,[67] good faith was held to include: 'an obligation to act reasonably and with fair dealing having regard to the interests of the parties.'[68] The definition of 'good faith negotiation' within the IACP standards is similarly suggestive of a positive duty. It includes a requirement that 'each client and professional takes a thoughtful and constructive approach on all unresolved questions in the interest of reaching agreements.'[69] Given the importance of in-person negotiations to collaborative practice, compliance with good faith in this context should therefore be understood to require more than just the absence of culpable conduct. In order to support effective collaborative practice, good faith must impose on lawyers and clients a positive duty to consider the position of the other and actively work towards a consensual agreement.

(b) Full Open and Honest Disclosure

Parties to a collaborative process agree to full honest and open disclosure of all relevant material. Their agreement on this point is enforceable, if a party refuses to disclose relevant

---

66 Tesler (n 32) 157; see also Law Council of Australia (n 36) 12 s 58 (a)-(c).

67 *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FACFC 50; upheld *by Paciocco v Australian and New Zealand Banking Group Limited* [2016] HCA 28.

68 Ibid 288: citing *Renard Construction (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91*, Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558; *Alcatel Australia v Scarcella* (1998) 44 NSWLR 349; *United Group Rail Services v Rail Corporation New South Wales* (2009) 74 NSWLR 618.

68 Ibid 288.

69 IACP (n 35) [3.3]; note the Law Council of Australia Draft Guidelines do not attempt to define good faith: Law Council of Australia (n 36).

material, their lawyer is obliged to terminate the collaborative process. Removing the 'unknown unknowns' in the matter helps to build a working level of trust between the parties and alleviate suspicions of intrigue. [70] Furthermore, in removing the element of gamesmanship associated with adversarial discovery processes, the parties avoid a significant cause of expense and delay.

The most challenging question for practitioners in interpreting the disclosure requirement is whether particular information is material to the collaborative process. In a family collaborative law context, all information about financial circumstance and assets will be material. However, there are other types of information that may be less clear. Practitioners have questioned, for example, whether a plan to remarry is a material matter for the purpose of disclosure in collaborative practice.[71] Adopting the collaborative process in matters which involve commercial in confidence information would no doubt present its own challenges for managing open disclosure. The literature has not yet explored how these issues will be addressed in a commercial context. In the absence of significant commercial collaborative practice, it is difficult to know what challenges commercial collaborative pioneers may face. Nevertheless, it is worthwhile to explore this area, to try to reduce the uncertainty that might dissuade commercial practitioners from testing collaborative practice.

There is limited guidance on how to interpret 'materiality' in a collaborative practice agreement. The term is not defined in the Australian Collaborative Practice Guidelines. Practitioners with a background in litigation may be tempted to rely on common and statutory law in relation to discovery. The leading common law approach to discovery in Australia was established in the *Peruvian Guano Case*:[72]

> It seems to me that every document that relates to the matters in question in the action, which not only would be evidenced upon any issue, but also which, it is reasonable to suppose, contains information which may—not which must—either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary...[73]

Where the common law has been replaced by legislation, the law in some cases retains the adversarial character of the common law test. Information is coded as a weapon that advances

---

70 David A Hoffman, Andrew Schepard, 'To Disclose or not to Disclose? That is the Question in Collaborative Law' (2020) 58(1) *Family Court Review* 83, 84.

71 Ibid 89-90.

72 *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

73 Ibid.

or damages a parties' case, rather than a tool for parties working towards the mutual goal of dispute management. For example, the *Federal Court Rules 2011*[74] describe four types of documents that are considered discoverable:

> (a) the documents are those on which the party intends to rely;
> (b) the documents adversely affect the party's own case;
> (c) the documents support another party's case;
> (d) the documents adversely affect another party's case.[75]

Framing documents in adversarial terms makes sense in litigation. However, it is at odds with the interest-based philosophy of collaborative practice. This is because asking lawyers to consider documents through the lens of advantage or disadvantage to their client's case requires them to step outside of the cooperative dynamic that collaborative practice aims to maintain.

An alternative is provided in the IACP Standards and Ethics. The standards define 'material information' in a collaborative matter as 'information that is reasonably required for the client(s) to make an informed decision with respect to the resolution of the matter.'[76] This information may extend beyond what would be discoverable in court. Simmons argues that 'material information' includes not only information that is relevant from a legal perspective, but also 'settlement facts'. These are described by Menkel Meadow as facts that help to explain 'the underlying needs, interests, or objectives of the party'[77], or that 'may affect the possible range of settlements or solutions.'[78]

The United States *Uniform Collaborative Law Act*[79] recognises the importance of open disclosure in collaborative practice, but leaves the details to the parties themselves by allowing them to define the scope of disclosure on a case-by-case basis:

> Except as provided by law other than this, during the collaborative law process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. The parties may define the scope

---

74 *Federal Court Rules 2011* (Cth).

75 Ibid r 20.14.

76 IACP (n 35) 7 [D].

77 Martha Emily Simmons, 'Increasing Innovation in Legal Process: The Contribution of Collaborative Law' (PhD Thesis, Osgoode School of Law, York University, 2015).

78 Carrie Menkel-Meadow, "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyer's Responsibilities' (1997) 38 *South Texas Law Review* 407, 423.

79 *Uniform Collaborative Law Rules and Uniform Collaborative Law Act 2010* (US model legislation).

of disclosure during the collaborative law process. [80]

Leaving the scope of disclosure to the parties provides flexibility, as parties may agree to include or exclude any material that they consider appropriate. If the matter is complex, the parties to a collaborative process could even appoint a neutral third party to provide an opinion on whether information falls within the parties agreed boundaries.[81] Such an option may be of interest to commercial parties who wish to engage openly and honestly, but have material that is commercial in confidence. In doing so, however, it is important that the scope of disclosure is sincerely chosen to suit the mutual interest of the parties in efficient management, and to maintain the confidentiality of material which truly has little bearing on the matter. If informal disclosure is used to pursue partisan advantage, then the delays, costs and gamesmanship associated with formal pretrial discovery will inevitably follow.

(c) Disqualification of Lawyers from Adversarial Proceedings

The use of disqualification of counsel from adversarial proceedings is unique to collaborative practice and has been described as its 'most striking and controversial requirement'.[82] It is also the most consistent definitional element.[83] Some leading practitioners have stated that disqualification is the only truly essential element to hold out a dispute management process as collaborative practice.[84] For example, Swan notes that 'the only "requirement" of Collaborative practice is that the lawyers agree in advance they will not represent the clients in contested litigation…'[85]

The essence of disqualification is that if the parties are unable to settle the legal issues through the collaborative process, then their lawyers will not represent them in litigation. This prohibition generally extends to other processes where a third party makes a legally enforceable decision.[86] The IACP Standards, for example, prohibit participation in: 'any

80 Ibid r 12.

81 Tesler (n 32) 49: discussing limited issue arbitration generally.

82 Jill Schachner Chanen, 'Collaborative Counsellors' (June 23, 2006) *American Bar Association Journal.*

83 Tesler (n 32); Webb and Ousky (n 1), are also Law Council of Australia (n 36), *Uniform Collaborative Law Rules and Uniform Collaborative Law Act 2010* (United States model legislation) s 2(3).

84 See, e.g., Christopher Swan, 'The Interdisciplinary Collaborative Practice Model of Dispute Resolution' (2017) 39 *Bulletin (Law Society of South Australia)* 36, 36; Tesler (n 32) 36; Webb and Ousky (n 1) 216.

85 Swan (n 84).

86 See, e.g., Pauline H Tesler, 'Collaborative Family Law' (2004) 4 *Pepperdine Dispute Resolution Law Journal* 317, 319-20.

process in which a third party makes a decision that legally binds a client, including a court, administrative proceeding, arbitration, and any other tribunal…contested or uncontested.'[87]

There are a few exceptions to this rule. Uncontested proceedings are permitted in jurisdictions where these are necessary to give legal effect to an agreement reached through a collaborative process; and some processes allow collaborative lawyers to act in relation to emergency orders until subsequent (adversarial) counsel may be retained. Further, some practitioners will allow the referral of some issues to a third-party decision-maker with the consent of both parties. Gutterman discusses that if an impasse is reached on one or two clearly defined issues, then the parties may agree to put these before a third-party decision-maker, such as an arbitrator. The decision-maker may then render judgement on these specific issues, so long as the 'spirit' of collaborative practice is maintained.[88] The option of limited issue arbitration in collaborative practice is said to be exercised infrequently and only 'in exceptional circumstances.'[89] Tesler notes a growing consensus that skilled interest-based practitioners 'have little need'[90] for recourse to arbitration.

Aside from these narrow exceptions, lawyers in the collaborative process will not represent their clients in court or other determinative processes. In most collaborative processes 'imputed disqualification' rules also extend disqualification to other lawyers associated with the collaborative lawyer's firm.[91] Imputed disqualification is compulsory in United States jurisdictions that have passed the *Uniform Collaborative Law Act 2010,*[92] and under International Association of Collaborative Professionals Standards,[93] but is not addressed by the Law Council of Australian guidelines.[94]

The literature contains several rationales for mandatory disqualification. These are often interrelated, providing complementary (rather than competing) accounts of how disqualification supports the collaborative process.

---

87 See, e.g., International Academy of Collaborative Professionals 'Standards and Ethics' (2018) [1.0 F].

88 Sheila Gutterman, *Collaborative Law: a New Model for Dispute Resolution* (Bradford, 2004) 50, 132; see also Tesler (n 32) 49.

89 Tesler (n 32) 49.

90 Ibid.

91 See, e.g., Queensland Association of Collaborative Practitioners 'Collaborative Contract' (unpublished, held on file by author) 7.1; 'Participation Agreement or Stipulation and Order', Appendix 1-B in Tesler (n 32) [8.5]; cf 'Precedent Collaborative Law Participation Agreement' in Condliffe (n 43) [7(a)].

92 *Uniform Collaborative Law Rules and Uniform Collaborative Law Act 2010* (US model legislation) s 9(b).

93 IACP (n 35) 3.12.

94 Law Council of Australia (n 36).

(i) Specialisation

Webb and Ousky note that collaborative practice enables lawyers to fully specialise in the settlement process. Collaborative practice is considered to draw on a different skill set to traditional adversarial practice. Hiring an aggressive lawyer to support interest-based negotiations can be likened to employing a construction worker on the basis of their talent for demolitions.[95] Therefore, by commencing a matter with a settlement specialist, to be replaced by a litigation-oriented lawyer if necessary, the parties to a matter ensure that they are always represented by a professional specialised in working in a manner most relevant to the dispute's changing nature. This rationale fits with a long-standing trend towards increased specialisation in the legal profession. [96] Thus, the argument is made that disqualification may simply be seen as another form of limited purpose representation. A dedicated intellectual property lawyer would not typically represent a client in a personal injury matter. Why then should a collaborative lawyer represent their client in an adversarial matter (or vice versa)?

The idea of specialising lawyers in either collaborative or traditional practice is sound in theory but is only practical in jurisdictions where the collaborative process is used often enough to support dedicated collaborative lawyers from a successful business perspective. In Australia, collaborative lawyers mostly continue to work with other clients under a traditional retainer and will offer clients a choice of collaborative or traditional representation.[97] Even in the United States, where the collaborative process is more mature, Salava notes that 'many if not most'[98] collaborative lawyers must still take on traditional matters.

Even where lawyers are not wholly specialised, collaborative work may be more efficient because it allows lawyers to dedicate their whole focus and attention to the collaborate stage of the dispute management process. Zeytoonian argues that the roles of collaborative and traditional lawyers are 'two very different disciplines with different approaches, different mindsets, different focuses and different goals.'[99] Attempting to inhabit

---

95 Stu Webb and Ron Ousky, The Collaborative Way to Divorce: The Revolutionary Method that Results in Less Stress, Lower Costs and Happier Kids—Without Going to Court (Penguin, 2007) xv.

96 See, e.g., Edward O Laumann and John P Heinz, 'Specialization and Prestige in the Legal Profession: The Structure of Deference' (1977) 2(1) *American Bar Foundation Journal* 155; Bryan Pape, 'To Specialise or note to Specialise, That is the Question' (2001) 58 *New South Wales Bar Association News* 22, 2; Graham Duncan, 'Specialisation at the Bar' (2008) 5 *New South Wales Bar Association News* 9.

97 Family Law Council, 'Collaborative Practice in Family Law: A Report to the Attorney General Prepared by the Family Law Council' (2006).

98 Luke Salava, 'Collaborative Divorce: The Unexpectedly Underwhelming Advance of a Promising Solution in Marriage Dissolution' (2014) 48(1) *Family Law Quarterly* 179, 191.

99 Michael A Zeytoonian, 'What Makes Collaborative Law Collaborative Law (Really)? (2015) 15(2) *Collaborative Review* 17, 19.

both roles at once places the practitioner in 'too many minds,'[100] such that neither role is performed to the full of its practitioner's ability. Similarly, Coyne observes that 'it is difficult to do creative problem solving while beating your chest and throwing clumps of grass in the air.'[101]

(ii) Enhanced Commitment to the Collaborative Process

Voegele et al describe the disqualification agreement as 'intended to enhance the ability of all participants to make the commitment necessary to achieve the best possible outcomes.'[102] The binding nature of the disqualification provision renders it an especially effective means for all participants to commit themselves to a less adversarial approach. For parties, the prospect of withdrawal makes the reversion to litigation or positional negotiation more costly. If the collaborative process does not succeed, time and money must be spent hiring new lawyers and briefing them on the matter. Parties, therefore, find pause for thought when considering reversion to the 'painful but easy option'[103] of litigating.

For lawyers, agreeing not to represent their clients in court eliminates the incentive associated with litigation fees. Tesler describes the disqualification provision as creating a 'container' for dispute management.[104] This container, comprising 'a shared philosophy, shared goals, and shared procedural agreements…'[105] keeps the parties and lawyers together throughout the trials of the collaborative process. Tesler compares the collaborative process to the experience of training horses in a fenced arena:

> If the gate remains open, the horses may cooperate quite well with the training while they are calm, but as soon as something frightens them, they will bolt out the gate- perhaps back to the barn, perhaps further afield. The trainers must chase after them. With the gate closed, the horses will still bolt, but they will remain in the arena and will be able to get back to work with the trainers far more quickly, with far less lost time, far less frustration, and far less risk of injury to the horses.[106]

---

100 Ibid.

101 William F Coyne Jr, 'The Case for Settlement Counsel' (1999) 14(2) *Ohio State Journal of Dispute Resolution* 367, 393.

102 Voegele, Ousky and Wray (n 19) 979.

103 John Lande 'An Empirical Analysis of Collaborative Practice' (2011) 49 *Family Court Review* 257, 263.

104 Tesler (n 32) 78.

105 Ibid.

106 Ibid 348-9: Tesler thanks Larry Wilson of San Francisco for this metaphor.

By altering the incentive structure of negotiations, the disqualification agreement is claimed to not only encourage settlement but also to craft better settlement outcomes than those reached under pressure or at the courthouse steps.[107]

(iii) Creation of a safe environment outside the courtroom

Many theorists have discussed the collaborative practice agreement's capacity for allowing parties to negotiate outside of 'the shadow of the court'.[108] By removing threats of litigation from the options immediately available to participants, collaborative practice aims to create a safe environment for participants to share their perspective openly and honestly. Voegele et al write:

> In traditional negotiations, it can often seem risky to make generous proposals early in the process. This perceived risk can cause clients to hold back their best proposals, and even critical facts, believing that this will provide them with a strategic advantage.[109]

Collaborative practice can mitigate the chance that what a party shares may be exploited by the other side, both because litigation is less available and because each party and their lawyer have committed to act in good faith in their negotiations.

(iv) Overcoming the prisoner's dilemma

The prisoner's dilemma provides a means to demonstrate the value of collaborative practice in wholly objective mathematical terms.[110] The objective nature of such a 'proof' renders it particularly persuasive in the present social environment, which has been observed to place a premium on hard science explanations.[111]

The prisoner's dilemma is a mathematical concept, which is widely associated with a titular narrative.[112] The story begins with two suspects who have been accused of an armed robbery. The suspects are captured by the police with unregistered weapons, but the proceeds

---

107 See, e.g., Lisa Di Marco, 'Therapeutic Divorce: The Scope and Means of Implementing Collaborative Practice in Australia' (2010) 3 *Queensland Law Student Review* 25, 28-29.

108 See, e.g., Webb and Ousky (n 1) 217.

109 Voegele, Ousky and Wray (n 19) 980.

110 Ibid 981-3.

111 See, e.g., Janne Holmgren and Judith Fordham 'The CSI Effect and the Canadian and the Australian Jury' 56 *Journal of the Forensic Sciences* (2011) 63; Geoffrey Munro '"Soft" Versus "Hard" Psychological Science: Biased Evaluations of Scientific Evidence that Threatens or Supports a Strongly Held Political Identity' 36 *Basic and Applied Social Psychology* 533.

112 *Stanford Encyclopaedia of Philosophy*: The titular narrative of the 'prisoner's dilemma' is credited to Albert Tucker who developed the story to explain the abstract mathematical concept to psychologists at Stanford University; for other retelling of this narrative see, e.g., Condliffe (n 43) 258, Voegele, Ousky and Wray (n 19) 981.

of the robbery are nowhere to be found. It is open to the prosecutor to charge the prisoners with two offences: a serious offence in relation to the robbery, and a minor offence in relation to the possession of unregistered firearms. However, the prosecutor has a problem; without a confession, they can only charge the prisoners with the less serious firearms offence. Out of necessity, the prosecutor presents each prisoner with an unusual offer. The sentence that a prisoner receives will be based on whether they decide to cooperate with authorities, and on whether their accomplice (who is held incommunicado) decides to cooperate. The terms of this offer are as follows: (i) If that prisoner confesses and their accomplice remains silent, then the prisoner who confesses will be allowed to go free as a reward, and their accomplice will be convicted of the robbery and sentenced to five years. (ii) If both prisoners confess then both will be convicted of the robbery, but they will each receive a lesser sentence of three years. (iii) If both prisoners remain silent, they will each be imprisoned for one year for the firearms offence. The intriguing consequence of the offer is that the rational self-interested choice (to confess) does not lead to the best possible outcome for the prisoners.[113]

Gilson and Mnookin theorise that the prisoner's dilemma fits the circumstances of clients in litigation.[114] Each has the potential to benefit from cooperation to streamline the procedural course of litigation, but each is unable to trust the other. The theorists suggest that lawyers can help their clients to escape the dilemma by forming reputations for collaboration among their peers.[115] If lawyers acquire and wish to retain a reputation for cooperation, then they may use such networks to facilitate trust and therefore cooperation between their clients.

Hoffman and Ash theorise that collaborative practice is a practical example of the model that Gilson and Mnookin propose.[116] In Hoffman and Ash's iteration, two parties to a dispute must decide whether to manage the matter with negotiations in good faith or prepare for aggressive litigation.[117] The outcomes for the choices of 'cooperation' or 'litigation' are framed as the choice in a prisoner's dilemma. Again, it is in the mutual best interests of each

---

113 More strictly, the 'Pareto optimal' outcome; cf David Gauthier, Chapter 2 'How I Learned to Stop Worrying and Love the Prisoner's Dilemma' in Martin Peterson (ed.) *The Prisoner's Dilemma* (Cambridge University Press, 2015) 35, 35-53: presents an argument for rational cooperation in the prisoner's dilemma.

114 Ronald J Gilson and Robert H Mnookin, 'Disputing through Agents: Cooperation and Conflict Between Lawyers in Litigation' (1994) 94(2) *Colombia Law Review* 509, 514-22.

115 Ibid 525-7; David Hoffman and Dawn Ash, 'Building Bridges to Resolve Conflict and Overcome the "Prisoner's Dilemma": The Vital Role of Professional Relationships in the Collaborative Law Process' (2010) 2 *Journal of Dispute Resolution* 271, 278-80.

116 Hoffman and Ash (n 115).

117 Ibid.

party to cooperate, but as rational actors in a prisoner's dilemma, they will end up litigating unless provided with a means to trust one another.

Collaborative practice provides the parties with a way out of their circumstances in two ways. Firstly, it makes the litigation path less desirable. Should the matter proceed to litigation, clients will bear the additional cost associated with retaining new lawyers. Secondly, it creates social links between participants that facilitate cooperation. Through collaborative practice groups, collaborative lawyers are able to find one another and to discount lawyers who do not collaborate effectively. Gilson and Mnookin's theory of cooperation between lawyers is directed towards civil actions, not just divorce.[118] If this is the mechanism through which the benefits of the collaborative process are realized, then there is no reason that its advantages would be limited to the field of family law.

3.4 Norms of Collaborative Practice

The norms of collaborative practice are widely considered important to a successful collaborative process, but they are not usually held out as part of its definition. These norms of practice complete the picture of how collaborative practitioners do their work. Several models of collaborative practice include practitioners other than lawyers, such as financial planners, accountants, and collaborative coaches. This important innovation may be regarded as a norm but is covered in chapter 4 to enable greater exploration of the opportunities that such models present, particularly for non-family civil disputes. The remaining norms comprise collaborative practice groups, four-way meetings, and interest-based negotiations are now explored.

(a) Collaborative Practice Groups

Collaborative professionals are active in building local communities to support their work.[119] These have been described as 'collaborative law groups', 'collaborative practice groups', or in the United Kingdom 'practice and organizational development groups', usually shortened to 'pods'.[120] These small, relatively informal groups comprise collaborative practitioners from different firms, including those who might be considered commercial rivals, coming together regularly in a supportive network. Like Webb's initial group, collaborative practice

118 Gilson and Mnookin (n 114).

119 See, e.g., Laura Banks et al 'Hunter-Gatherer Collaborative Practice' 49(2) *Family Court Review* 249, 249-50.

120 See, e.g., Kate Standley, Paula Davies, *Family Law* (Palgrave Macmillan, 8th ed, 2013) 12.

groups are forums for practitioners to share professional experiences, discuss approaches, and build and maintain a collaborative legal culture.[121] According to the IACP, a collaborative practice group comprises:

> …two or more professionals who have come together for purposes of enhancing their skills and understanding of collaborative practice, educating the public, and promoting the use of the collaborative process...[122]

Professional associations are as old as the professions they serve. However, collaborative practice groups have a distinct cultural identity and perform functions that may not be so consistently expressed in law associations or Inns of Court. Collins and Scott conducted research using focus groups with collaborative practice groups; one in an Australian state capital city, and another in an Australian regional centre.[123] The researchers found support for the essential nature of collaborative practice groups for the success of the process within a region. In particular, they found that the collaborative practice groups functioned as professional learning communities.[124] They served to 'sustain the practitioners through their transitioning from being competent traditional practitioners to being equally competent collaborative professionals,'[125] and 'provide the structure in which this learning and professional development occurs.'[126] In both settings, participants described diverse but integrated functions, including community building, providing education opportunities, comprising a forum for sharing experiences from practice, and serving as a vector for change.[127] Practice groups are considered a precondition for the success of the collaborative process. As one participant noted in the research conducted by Collins and Scott: 'if you can't get the practice group right, there is no collaborative community.'[128] Other researchers have highlighted the 'gate-keeping function'[129] of collaborative practice groups, which protects the

---

121 Collins and Scott (n 29) 16.

122 International Academy of Collaborative Professionals <http://collaborativepractice.com/collaborative-practice-group-faqs>.

123 Collins and Scott (n 29) 13.

124 Ibid 15-17; the concept of a learning community is articulated by Sandeen: Sharon Sandeen, 'Professional Learning Communities and Collaborative Teams: Tools to Jump-Start the Learning Outcomes Assessment Process' (2013) *North Eastern University Law Journal* 189, 190.

125 Collins and Scott (n 29) 16.

126 Ibid.

127 Ibid 16-18.

128 Ibid 18.

129 See, e.g., Martha Emily Simmons, 'Increasing Innovation in Legal Process: The Contribution of Collaborative Law (PhD Thesis, Osgoode School of Law, York University, 2015) 25.

integrity of the collaborative process by including practitioners who are suited to collaboration and excluding those who are not.[130]

(b) Four-Way Meetings

Webb's 'four ways' meetings were the first piece of collaborative practice design and have persisted as the format of choice in the collaborative process. In four-way meetings, the clients and their lawyers meet in person for open discussions about the matter. Advice is given in the open, with the other side listening and taking notes. The four-way meeting has been described as the 'heart and soul' of collaborative divorce.[131] To understand why this is so, it may be helpful to begin by considering how advice is provided in ordinary lawyering.

It is well understood that in traditional practice, the giving of legal advice is usually cloistered, delivered from lawyer to client in a private and confidential manner. In the absence of a client's express consent or very specific limited exceptions, this is a basic ethical requirement of legal practice. In the majority of Australian States and Territories,[132] confidentiality is codified in the language provided in s 9 of the *Australian Solicitors' Conduct Rules 2015.*[133] 'A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement'; comparable rules or ethical standards govern lawyer-client confidentiality in other common-law jurisdictions.[134]

In addition to confidentiality, most communications between a client and lawyer are further protected by legal professional privilege. A court must not order parties to produce documents or other communications that are made for the 'dominant purpose of giving or obtaining legal advice or the provision of legal services…'[135] Described as an 'important common law right'[136], legal professional privilege ensures that parties can 'communicate

---

130 Ibid.

131 Tesler and Thompson (n 28).

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

133 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* s 9; Australian barristers' conduct is similarly governed by the: *Legal Profession Uniform Conduct (Barristers) Rules* 2015 r 114.

134 See, e.g., American Bar Association, *Model Rules of Professional Conduct* 2018 r 1.6; Solicitors Regulation Authority (England and Wales) *SRA Code of Conduct 2011* ch 4; Bar Standards Board (England and Wales), *Code of Conduct for Barristers BSB Handbook* (1 July 2019) s C15.

135 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543: per Gleeson CJ, Gaudron, Gummow and Hayne JJ; see also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 73: per Gleeson CJ, Gaudron and Gummow JJ.

136 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 [11].

freely and frankly with their lawyer so that they can receive full and proper advice'.[137] Together, confidentiality and privilege protections satisfy a public policy interest in facilitating the settlement of disputes by enabling clear communication between lawyers and clients

The protections offered by confidentiality and privilege are lost if a party communicates the protected information with the other side.[138] Thus, while any or all legal advice may be shared with a client's informed consent, in practice, such disclosure is handled in a cautious and strategic manner. As Tesler notes, 'information is a weapon… and good [traditional] lawyers know how to keep…the gun safe securely locked'.[139] To keep tight information controls, traditional lawyers may favour unilateral communication such as letters and emails, where each missive can be carefully drafted and receive express client consent on the precise wording. This instinct for tight information controls has been found to be a governing principle even in lawyer participation in non-litigation dispute management processes. For example, Rundle found that Australian lawyers are reluctant to allow their clients to take an active role in mediation out of concern that they may make a disclosure that will harm their own interests.[140]

In contrast to the taciturn conventions of ordinary legal practice, the four-way meeting allows for simultaneous communication across six different types of channels. In the one room, it is possible to communicate client to client, client to their own lawyer, client to other client's lawyer, and lawyer to lawyer as illustrated in Figure 2 below.[141]

---

137 Law Council of Australia 'Protocol to Provide Balanced Framework for Legal Professional Privilege Claims' (Media release, 26 July 2019) <https://www.lawcouncil.asn.au/media/media-releases/protocol-to-provide-balanced-framework-for-legal-professional-privilege-claims>.

138 Note such communications may still be protected by settlement privilege at common law, or as codified in statute: e.g., *Evidence Act 1995* (Cth) s 131.

139 Pauline Tesler, 'The Evolving Role of the Divorce Financial Planner in Collaborative Practice' (2010) (unpublished).

140 Olivia Rundle, 'Barking Dogs: Lawyers Attitudes Towards Direct Disputant Participation in Court Connected Mediation of General Civil Cases' (2008) 8 *Queensland University of Technology Law and Justice Journal* 77, 85-6.

141 Pauline Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (American Bar Association, 3rd ed., 2017) 45-6; Pauline Tesler 'Collaborative Law: A New Paradigm for Divorce Lawyers' (1999) 5(4) *Psychology, Public Policy, and Law* 967; see also Marilyn A Scott, 'Collaborative Law: Dispute Resolution Competencies for the "New Advocacy" (2008) 11 *Queensland University of Technology Law Journal* 213, 233.

Traditional advocacy **Four-ways**

Figure 2: Communication in traditional advocacy and four-way conferencing[142]

Since the advent of interdisciplinary collaborative practice, the terms 'five ways',[143] 'six-ways', and higher are sometimes used to describe collaborative process meetings that include coaches or third-party neutral professionals in addition to the lawyers for each party. In such use, the number of 'ways' reflects the number of people included in meetings.

There are two main advantages to the open meeting structure used in four-way conferencing. Firstly, communicating across several channels simultaneously prevents unnecessary repetition, saving time and helping to ensure that parties negotiate from a common basis of information.

Secondly, the transparency of four-way meetings mitigates suspicions of intrigue. Even where both parties are honest with one another, negotiations may break down if parties are unable to credibly demonstrate their candour to the other party. Parties who hear the advice provided to the other side directly are more likely to feel they are getting the full story. Because meetings are typically held in person, the parties may communicate through both verbal and non-verbal cues, allowing for nuances that are important to communicating emotion. As Tesler notes 'there is nowhere to hide in collaborative negotiations'.[144]

Four-way meetings are generally protected by settlement privilege, meaning that information provided in meetings may not, in the absence of an established exception, be relied upon in proceedings between those parties.[145] This means that if the collaborative process is unsuccessful, reports and opinions cannot be used to press an advantage in subsequent litigation except under limited prescribed circumstances.[146] This expectation is

142 Adapted from Tesler (n 32) 45-6.

143 Ibid 108.

144 Tesler (n 32) 234.

145 *Evidence Act 1995* (Cth) s 131.

146 *Evidence Act 1995* s 131 (a)-(k): these subsections define several exceptions to the general rule that evidence of settlement negotiations may not be adduced. These include, inter alia, (j) where the communication was made in connection with fraud, (h) where the communication is relevant to determine costs, (g) where evidence that has been adduced may mislead the court if the communication is not adduced to 'contradict or qualify' that evidence.

made clear to clients. For example, the Queensland Association of Collaborative Professionals Model's 'Collaborative Contract' includes the following clause:

> The Parties understand and agree that the Collaboration is an attempt to negotiate a settlement within the meaning of s 131 of the *Evidence Act 1995* and any communication between the parties and a third party including each of the lawyers and Experts and any document that has been prepared in connection with the Collaboration cannot be used by either of them if either of them goes to Court except with the written consent of both parties and where relevant, the expert.[147]

This protection is substantial but not complete. Not every communication in a dispute management process will attract the privilege. For example, in *Hera Resources Pty Ltd v Gekko Systems Pty Ltd*[148] a technical report and letter were found not to attract the privilege because they 'were not themselves directed at an attempt to negotiate a settlement of the dispute even though they provided context in which settlement discussions could occur…'[149]

It is open to the parties to negotiations to contract to expand upon the scope of settlement privilege and confidentiality.[150] The participation agreement provides a natural opportunity for parties to strengthen privilege and confidentiality to support their needs. For example, Cameron notes the importance of clarifying where a collaborative process begins and ends for the purpose of confidentiality.[151] The capacity to fine-tune privilege is likely to be important to practitioners as the process is adapted to new uses.

(c) Interest-based Negotiations

Dispute management literature suggests that negotiations are characterised by two 'main approaches':[152] positional negotiation and interest-based negotiation.[153] In positional negotiation, the parties negotiations are based on the exchange of demands for a particular outcome, described as their 'position'. Negotiations proceed as a series of concessions, each

147 Queensland Association of Collaborative Professionals, 'Collaborative Contract' (unpublished, held on file by author) 2 H.

148 *Hera Resources Pty Ltd v Gekko Systems Pty Ltd* [2019] *NSWSC 37.*

149 Ibid.

150 *789TEN v Westpac* [2004] NSWCA 594.

151 Nancy Cameron, 'Collaborative Practice in the Canadian Landscape' (2011) 49(2) *Family Court Review 221,* 225.

152 Bobette Wolski, 'The "New" Limitations of Fisher and Ury's Model of Interest-Based Negotiations: Not Necessarily the Ethical Alternative' (2012) 19 *James Cook University Law Review* 127.

153 Ibid: also described as distributive and integrative negotiation respectively.

party giving up part of their position until a consensus is achieved somewhere between the opening positions. In the positional approach to negotiations, a common strategy is to begin with an exaggerated position, colloquially a highball or lowball offer, to allow some room for movement in the subsequent trading. The principal disadvantage of positional negotiations is that in the strategic effort to defend their positions, parties may lose sight of the interests that motivate them.

Interest-based, or integrative negotiations were articulated in Mary Parker Follet in the 1920s.[154] The approach then achieved prominence with the publication of 'Getting to Yes', by Fisher and Ury in the 1980s.[155] The interest-based approach is widely encouraged in mediation and is the principle approach that new mediators are trained in. In interest-based negotiations the parties begin by identifying their interests— the fundamental needs or desires that are at the heart of the dispute. The parties then work together to generate options that are mutually amenable. The interest-based approach is facilitating the parties to develop outcomes that are suited to their circumstances.[156]

Positional and interest-based are differentiated by their approach to value. Positional negotiation sees negotiations as centered on a fixed pool of resources.[157] Negotiators in a positional approach focus their efforts on claiming the largest possible share. In contrast, the interest-based approach posits that by sharing underlying interests and working together, parties are able to create value through the process of negotiation itself. The exchange of information in interest-based negotiations may uncover hidden assets or opportunities for mutual benefit that would not be discovered in a positional approach.[158]

Interest-based negotiations are considered to be the most helpful approach to follow in collaborative four-ways meetings. The Australian Guidelines state that 'the collaborative process supports interest-based negotiation. Competitive negotiation strategies and tactics are antithetical to the collaborative process.'[159] The transparency and trust-building functions of the collaborative process provide an ideal structure for interest-based negations. Four-way in-

---

154 Mary Parker Follet, 'Constructive Conflict' in Henry C Metcalf (ed), L Urwick (ed) *Dynamic Administration: The Collected Papers of Mary Parker Follett* (Harper & Brothers Publishing, 1942) in Kenneth Thompson (ed) *The Early Sociology of Management and Organisations* (Routledge, 2014); Mary Parker Follet, *Creative Experience* (Longmans, 1924).

155 Roger Fisher, William L Ury, and Bruce Patton, *Getting to Yes: Negotiating an Agreement Without Giving* In (Houghton Mifflin, 3rd ed, 1991) 23-30.

156 Ibid.

157 Ibid.

158 Larry Crump and Jeff Giddings, 'Strategy, Choice and the Skilled Legal Negotiator' (2005) 11 *Monash Law Journal* 258, 260.

159 Law Council of Australia (n 36) 4[3].

person negotiations, and the open cooperative approach to discovery ensure that all of the relevant information is readily available. Interest-based negotiations are about discovering opportunities, and the collaborative process provides the basis of information necessary to do so.

3.5 Applications Outside of Family Law

Given the need to remain open to the data, it is not appropriate to adopt firm positions on the research questions at this early stage. However, it is important to take note of what the exploration has revealed thus far, and what this might mean for the expansion of the collaborative process.

Firstly, it is noted that the collaborative process is predominantly the work of a single designer. This differs from processes that have evolved over a much longer period, such as mediation and arbitration. It also raises the question of how its creator's experiences have informed the design. Webb does not consider the collaborative process to be just for family law, but he did create it with reference to the family law arena. It would not be surprising if the aspects of the collaborative process that are ideal in this setting required some reworking to assist in different types of disputes. Advice to maintain flexibility with regard to the process is, therefore, especially salient.[160]

Secondly, this broad sweep of the process has not identified any principles or norms that suggest it is a process exclusively for the domain of family law. Concepts such as good faith and interest-based negotiation have much to contribute in trade, commercial negotiations, and employment matters. Good faith, in particular, has an even longer tenure in the commercial world than in family matters.[161] Likewise, there is no reason that the dynamics of meeting in person, or open information sharing would only be of benefit for family law clients. This overview therefore bodes well for using the collaborative process in non-family civil disputes and presents no insurmountable hurdles at this stage.

3.6 Chapter Summary

This chapter has focused on the origins and essential characteristics of collaborative practice. It has explored the central principles that guide collaborative practice, described in the literature as good faith negotiations, open and honest disclosure, and disqualification of

160 Webb and Ousky (n 1) 217.

161 See, e.g., Gray (n 47) 353.

lawyers from adversarial representation. Furthermore, it has discussed norms of practice comprising collaborative practice groups, and the use of four-way meetings. Reviewing the nature of collaborative practice as it is presently applied contributes to the deep understanding necessary to explore its application in new fields. The discussion now continues this review of present practice. It turns now to the most important innovation to collaborative practice since its creation, the development of process models that include professionals from areas other than law.

Chapter 4. Interdisciplinary Collaborative Practice

The research exploration now turns to these processes to examine how professionals from different disciplines have contributed to the collaborative process. This continues the examination of the process that began in chapter three, and further contributes to the deep understanding of the process necessary to consider its application in new areas of law.

After Webb's creation of collaborative practice, the most important refinement of the collaborative process has been the development of interdisciplinary models.[1] In addition to the parties' legal representatives, an interdisciplinary collaborative process includes professionals from disciplines other than law. These professionals are engaged jointly by the parties to provide specialist advice and support in relevant domains.

Interdisciplinary collaborative professionals are included in some collaborative processes to ensure that non-legal aspects of the dispute are adequately addressed. They have expertise in fields which enable them to provide helpful advice on the whole dispute, so their independent perspective helps to overcome impasses and provide holistic support for aspects of disputes, which fall outside the bounds of traditional legal training.[2] In the case data collected by the International Academy of Collaborative Professionals, nearly half of collaborative matters involved an interdisciplinary process.[3]

One way to view interdisciplinary collaborative practice is an expansion of the dispute management process to address more than just the legal aspects of the dispute. Sinclair, Peters and Philips, architects of the 'Melca' model, note that 'a collaborative team will see your separation as primarily an emotional crisis, with legal and financial consequences, rather than the other way around.'[4] Reconsidering divorce in this way changes how services are delivered. It may be the case, for example, that some team members provide support for participants, even after the substantive legal issues have been addressed.[5] Nurse and Thompson note that ongoing emotional support is essential in separations because the

---

1 See, e.g., Christopher Swan, 'The Interdisciplinary Collaborative Practice Model of Dispute Resolution (2017) 39 *Bulletin (Law Society of South Australia)* 36, 36-7; Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49 (2) *Family Court Review* 213, 216; Laurence Boulle and Rachel Field, *Australian Dispute Resolution Law and Practice* (LexisNexis Butterworths, 1st ed, 2017) 246.

2 Swan (n **Error! Bookmark not defined.**).

3 Linda Wray, 'International Academy of Collaborative Professionals Practice Survey' (IACP, 2010) 1-2.

4 Tina Sinclair, Tricia Peters, Marguerite Picard, *Breaking up Without Breaking Down: Preserving Your Health, Your Wealth and You Family* (Grammar Factory, 1st ed, 2017) v-vi.

5 Rodney Nurse, Peggy Thompson, 'One Perspective: Coaching to the "End": Expanding the Goal' (2010) *Collaborative Review* 14.

adjustment period in the year that follows divorce is often more disruptive for family members than the divorce itself.[6] Proponents argue that the comprehensive approach of interdisciplinary collaborative practice enables the parties to maintain a mutually beneficial future relationship and less likely to have difficulty enforcing undertakings made to one another.[7] In the case of divorce or other separations, the non-adversarial nature of the collaborative process reduces the psychological burden on others involved, such as children and grandparents.[8] None of this is exclusive to family disputes and can be equally applicable to most other disputes.

Another way to view interdisciplinary practice is to consider it as a means to coordinate all the types of services a client needs to understand and address their circumstances. Sinclair, Peters, and Picard frame the collaborative interdisciplinary process as a means to facilitate cooperation between all of the professionals, which is needed throughout a dispute/divorce.[9] Professionals such as psychologists, lawyers and financial planners will often be necessary to support and advise separating couples. However, in the traditional approach to separation, they work quite independently from one another without meaningful coordination or knowledge sharing. They may therefore provide contradictory guidance or miss important matters of context. Sinclair, Peters and Picard note:

> In every other approach to divorce …professionals work quite separately, each doing their job independently without knowledge of what the others are doing. The risk is that without a holistic view of everything that's going on, they may not be positioned to give you the best advice for your family's future. An integrated collaborative team, on the other hand, will assist you and your family with every aspect of your separation and settlement in a seamless, coordinated way. They work as a team, rather than working in isolation, to help you create integrated agreements for your family's needs.[10]

Thus, interdisciplinary models of the collaborative process may be perceived either as a 'rights-plus' expansion of legal dispute management or as the integration of otherwise discrete professional services within a comprehensive multidisciplinary process. In either conception of the process, interdisciplinary collaborative practice models address wider

---

6 Ibid.

7 See, e.g., Boulle and Field (n 1) 247 [6.117].

8 See, e.g., Susan Gamache, 'Collaborative Practice: a new opportunity to address children's best interest in divorce' (2005) 65(4) *Louisiana Law Review* 1455; Ja Robinson, 'The Adversarial System and the Best Interests of the Child in Divorce Litigation: Some Thoughts Regarding Collaborative Law as a Means to Resolve Parental Disputes' (2016) 18(5) *Potchefstroom Electronic Law Journal* 1527.

9 Sinclair, Peters and Picard (n 4) 127-8.

10 Ibid.

aspects of disputes and provide more extensive support than is possible through traditional lawyering. They acknowledge and treat the whole dispute, in much the same way as health professionals now recognise that using multidisciplinary teams of expertise when treating a patient's health condition creates better outcomes if the whole person is being treated, which is the reflected in their mental and physical body, rather than focusing on particular skill expertise or a single condition.[11]

4.1 Origins of Interdisciplinary Collaborative Practice

The first interdisciplinary collaborative process model was developed by a group led by California family psychologists Peggy Thompson and Rodney Nurse in 1992.[12] Thompson and Nurse began by exploring the possibilities for a 'team model' for divorce with a group that included lawyers and financial professionals.[13] The group was further enriched by collaboration with Nancy Ross, a clinical social worker. Since 1993, Ross had been exploring opportunities for collaboration between divorce lawyers and psychologists in Santa Clara County.[14] The initial model of 'Collaborative Divorce' did not involve lawyers.[15] Thompson and Nurse had included a lawyer in their early meetings, but they found the lawyer to often be at an impasse with the members from mental health fields. They explain that the lawyer's understanding of their role as an advocate was often inconsistent with other group members' suggestions for collaborative ways to resolve matters.[16] In the unrepresented model of Collaborative Divorce, clients participated in interdisciplinary meetings with psychologists and financial planners. However, because lawyers were not involved, clients needed to leave the confines of the collaborative structure for legal advice— usually obtained from lawyers with little understanding of the nature or purpose of these collaborative meetings. This schismatic approach led to frustration as clients shifted back and forth between two very

---

11 See Martha E Simmons, 'Collaborative Law at 25: A Canadian Study of a Global Phenomenon' (2016) 49 *University of British Colombia Law Review,* 669, 675; Pauline Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (American Bar Association, 3rd ed, 2017) 51-3; for an introduction to interprofessional collaboration between health professionals, see, Margaret M Slusser et al, *Foundations of Interprofessional Collaborative Practice in Health Care* (Elsevier, 2019).

12 International Academy of Collaborative Professionals 'history' (nd) <http://collaborativepractice.com>.

13 Webb and Ousky (n 1) 216.

14 Ibid; Nancy Cameron et al, *Collaborative Practice: Deepening the Dialogue* (Continuing Legal Education Society of British Columbia, 2014) 16.

15 Pauline Tesler, 'It takes a System to Change a System: An Interview with Peggy Thompson PhD Co-creator of the Collaborative Divorce Model' (2002) 4(2) *Collaborative Review* 1, 2.

16 Ibid.

different approaches to divorce. As Thompson explains: 'we… were finding that as soon as the clients consulted legal counsel, our process would come to a complete halt.'[17]

For Thompson and Nurse's group, the collaborative law concept was a revelation. Webb's distinctive version of legal practice was compatible with the goals and approach of Collaborative Divorce. Webb's 'collaborative lawyers' had the skills and values to work with a team of interdisciplinary professionals in a seamless, positive and creative manner. Thompson notes that discovering the collaborative process was '…an "aha" moment. The collaborative lawyers were the key to making the interdisciplinary team model work.'[18]

A complete Collaborative Divorce team comprises 'two collaborative divorce coaches, a child specialist, a neutral financial consultant, and sometimes a meta-mediator'.[19] Coaches in the Collaborative Divorce model have a significant role in leading the collaborative process. This extends to taking on administrative functions that are usually performed by lawyers in other models. Gutterman notes: 'rather than the lawyers serving as the 'hub' around which the professional team assembles, in collaborative divorce, the divorce coaches take the lead role.'[20]

In the Collaborative Divorce model, each party has their own coach to focus on their challenges and needs and support them throughout the process.[21] Other non-lawyer collaborative professionals such as the financial planner or child specialist are retained in a shared, neutral capacity. The Collaborative Divorce model is based on family systems theory.[22] This body of knowledge conceptualises the family as a system of individuals who interact with one another in a systematic manner.[23] The conflict inherent in separation means that families have often fallen into a pattern of behaviour that comprises a 'dysfunctional system'. Thompson believes that an interdisciplinary team is needed to help a family to 'regulate and re-form themselves into a functional system that can effectively provide parenting for children after divorce.'[24] A common aphorism in Collaborative Divorce circles is: 'it takes a system to change a system'.[25]

---

17 Ibid.

18 Ibid.

19 Pauline Tesler, 'Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts' (2008) 1 *Journal of Dispute Resolution* 83, 92.

20 Sheila Gutterman, Collaborative Law: A New Model for Dispute Resolution (Bradford, 2004) 90.

21 Collaborative Practice Marin 'Understanding Divorce Coaching' (1 October 2019) <http://collaborativepracticemarin.org>.

22 Gutterman (n 20) 15-16, 179-80.

23 Ibid.

24 Tesler (n 15) 3; Cameron (n 14) 16.

25 Tesler (n 15) 3.

The Collaborative Divorce model is no longer the only form of interdisciplinary practice. In Australia, particularly, a single coach referral model is the most widely applied interdisciplinary process. However, Collaborative Divorce continues as a common process choice in several North American jurisdictions, especially in British Colombia (Canada), and Washington State (United States).

4.2 Interdisciplinary Roles

Given the paucity of non-family collaborative practice matters, our best understanding of how these professionals contribute is drawn from a family context. This section explores the experience of family collaborative practitioners and theorists with interdisciplinary roles, as evidenced by the professional and academic literature.

Unlike collaborative lawyers, most interdisciplinary collaborative professionals are retained in a single neutral role, such as neutral financial advisors, mediators, and coaches. The work output of interdisciplinary collaborative professionals is usually treated as a confidential document made in connection with an attempt to negotiate a settlement in the same manner as the work of collaborative lawyers.

It has been argued that using an interdisciplinary team creates (and perhaps even forces) opportunities for reflection and learning from mistakes in the collaborative process.[26] Tesler notes, '…real experts are intellectually honest and brutally self-critical with themselves.'[27] An interdisciplinary team provokes reflection among all of its constituents, 'examining mistakes promptly and forcing contemplation of one's own failure to master the choreography or to perform the dance skilfully'.[28] Sikorske et al provide a practical example of this kind of self-reflection and interdisciplinary learning that an effective collaborative practice team can support.[29] They describe a note penned by a lawyer following a collaborative 'four-way' meeting:

> It was a learning experience for me to appreciate that we would not and could not solve the living situation at the table yesterday. We are all so accustomed to being fixers and thinking that once the problem is identified and the options put out there that the problem should and

---

26 Pauline Tesler, 'Goodbye Homo Economicus: Cognitive Dissonance, Brain Science, and Highly Effective Collaborative Practice' (2009) 38(2) *Hofstra Law Review* 635, 661.

27 Ibid.

28 Ibid; see also Pauline H Tesler, 'Informed Choice and Emergent Systems at the Growth Edge of Collaborative Practice' (2011) 49(2) *Family Court Review* 239, 244-5.

29 Caroline Black Sikorske et al, 'Advanced Negotiation: Understanding and Using Team Dynamics in Collaborative Practice' (Conference Presentation, May 17 2013, Collaborative Family Law Council of Florida, Inaugural Collaborative Family Law Conference: Collaborative Practice: The Future is Now!')

must be solved and that the clients need and expect resolution from us. You correctly identified that they were not ready and that it was not ours to drive to the finish line and that further massaging of the problem would not be productive in that regard. [30]

So, the reasons for including professions other than law within the collaborative process are to allow for an integrated approach to all issues affecting disputants, whether legal, interpersonal, or financial; and to support interdisciplinary learning, reflection, and personal accountability for parties and professionals.

The capacity to integrate legal advice with the recommendations and findings of members of professions other than law is a key strength of collaborative practice, which has been developed in the family law arena. Exploring the contribution of interdisciplinary professionals in family matters is an important step in understanding how they could assist in other types of dispute. The professionals associated with collaborative family matters have been categorised as mental health professionals (including coaches, counsellors and child specialists), and financial neutrals (including financial planners, and accountants). These roles are discussed next.

(a) Mental Health Professionals

Under the International Academy of Collaborative Professionals Standards, coaches, child specialists, and other counsellors are categorised under the common label of mental health professionals.[31] They are required to maintain a professional license in good standing in a clinical mental health field such as Social Work, Counselling, Family Therapy, or Psychology.[32] Mental health professionals play an important role in the functioning of the team, and in attending to non-legal aspects of the dispute. Heller writes that they 'not only regulate emotions but also attend to the personal dynamics, interactional patterns, communication skills, parenting skills, and emotional needs of all of the participants, in order to best prepare them and guide them through this process.'[33] Mental health professionals in the collaborative process fall within two main roles: collaborative coaches, who are responsible for facilitating communication, serving as process guides, and providing

30 Ibid.

31 Some sources use 'mental health professional' as synonymous with coach: see, e.g., Connie Healy, *Collaborative Practice: An International Perspective* (Taylor and Francis, 2017) 49.

32 International Academy of Collaborative Professionals 'Standards and Ethics' (2018) 3.1.

33 Randy Heller, 'Exploring Competency and the Role of the Mental Health Professional in Interdisciplinary Collaborative Family Law: What Do "They" Do?' (PhD Thesis, Nova South-eastern University, 2011) 69.

emotional support for the parties; and child specialists, who are focussed on managing the role of children in the process.

(i) Collaborative coaches

In some models of the collaborative process, parties are further supported by a role particular to the collaborative process— the collaborative 'coach'. The term 'coach', was first articulated by Thompson and Ross to describe the distinct role of mental health professionals within the process.[34] Collaborative coaches are often trained in psychology, social work or mediation, but they perform a distinct professional role. Coaches provide acute support for the parties and assist them with communicating constructively in an emotionally charged environment. Their role in the process has been characterised as drawing upon both clinical therapeutic knowledge and theory from other fields, including communication, mediation, parent education, and life coaching.[35] Gamache proposes the following definition of coaching:

> …a process, facilitated by a family therapist, that seamlessly integrates the appropriate professional knowledge bases, services and interdisciplinary processes and forums, calibrated to the clients(s)' unique combination of characteristics, capacities, complexities and commitments, in order to resolve the tasks of parental separation and divorce so as to encourage the highest possible level of wellbeing post-separation for all family members, especially the children. [36]

In Australia, several different terms are used for the coach or a role that is strongly analogous. In South Australia, Swan describes a 'family relationship consultant' as a process facilitator who assists with the 'emotional aspects of the transition of the relationship', and where there are children, to help parties to 'co-parent and communicate well with each other, consistently focusing on the best interests of the children.'[37] Similarly, the Victorian Association of Collaborative Professionals describes the role of a 'family counsellor' thus:

> The family counsellor is a psychologist, therapist or social worker, who is experienced in the dynamics of separating families and the impact on children. The family counsellor offers coaching in conflict management and communication skills, to assist with the collaborative

---

34 See, e.g., Susan Gamache, 'Collaborative Divorce Coaching: Working Toward a Definition and Theoretical Location for the Family Therapist' (2013) 13 *Collaborative Review* 24, 24.

35 Ibid 24-5.

36 Ibid 25: in the context of the 'Collaborative Divorce' model.

37 Swan (n 1) 37.

process.[38]

The knowledge and skill bases covered by such descriptions are similar to North American descriptions of a collaborative practice coach. Thus, terms such as 'family counsellor' and 'family relationship consultant' are more likely to be intended to convey the concept of coaching in a manner that suits an Australian professional audience than to describe a distinct professional role.[39] Outside of the family law domain, coaching has as the potential to guide parties through the emotional and relationship-related aspects of their disputes. In some matters, such as those in wills and estates, these may be family relationships. However, these are not the only types of dispute where relationships are relevant. Employers must maintain an ongoing relationship with their employee. Many businesses have integrated supply chains that make changes to supply relationships very costly, or in some cases impossible. If the individuals in such matters have fallen into an adversarial and unproductive pattern of behaviour towards one another, then coaches are well positioned to support and maintain the change that is necessary to cooperate effectively both within and subsequent to the matter. In doing so, the parties may open up mutually beneficial opportunities that are rarely granted in litigation[40] such as reinstatement, specific performance[41] or re-engagement.[42] If the parties are committed to a solution that will allow them to cooperate in the future, then coaching during, and perhaps even after, the conclusion of the legal dispute may prove effective.

(ii) Child specialists

Child specialists provide support and advocacy for the children of a family throughout a collaborative process.[43] They may also be described as teen or youth specialists when the matter involves older children.[44] Their role may involve counselling sessions with the children of divorcing couples. Techniques such as art or play therapy may be used to provide children with an opportunity to express a voice in the process.[45] Gamache describes an eight-

---

38 Victorian Association of Collaborative Professionals <http://vacp.com.au/collaborative-professionals>.

39 An analysis of the different terms for interdisciplinary collaborative professionals in Australian jurisdictions is provided in section 5.2.

40 *JC Williamson v Lukey* [1931] 45 CLR 282 [298] per Dixon J: The court will not order specific performance in matters that would require the courts' continued supervision.

41 Rory McMorrow 'Collaborative Practice: A Resolution Model for Irish Employment Disputes (Master of Business Studies Thesis, Letterkenny Institute of Technology, 2012) 133: noting the perceived suitability of reinstatement or re-engagement as outcomes of the collaborative process.

42 Ibid 133.

43 Connie Healy, 'The Child Specialist' (2012) 12(1) *Collaborative Review* 22; Cameron et al (n 14) Ch 10; Sinclair, Peters and Philips 117-21, Healy (n 31) 50.

44 Cameron et al (n 14) 138-48.

45 Ibid 147.

year-old child's drawing, which emerged through art therapy.[46] The child's parents were separated and would fight when he was transitioned as part of their shared-parenting arrangements. The child illustrated his experience at pick-ups and drop-offs as being a ping-pong-ball batted back and forth across a net. When his parents were shown the image, titled 'my life as a ping pong ball', it served as 'a wake-up call'.[47] They changed their approach to transitions between their households and adopted a more collaborative posture in their separation. In collaborative meetings, child specialists assist parents and other team members in understanding the impact each option will have on their children, and provide insight into the importance of 'reducing conflict' and achieving a 'healthy restructuring of the family'.[48]

The child specialist is of course particular to disputes where there are children who will be affected by the decisions the parties make. However, there is a clear opportunity for an analogous role in matters where a party or relevant third-party has diminished capacity. Even where this is not the case, interdisciplinary collaborative professionals may be helpful in facilitating communication between parties with different cultural backgrounds. For example, a cultural advisor could be mutually appointed to help parties understand one another's values and approaches in international trade, or in a land use dispute between traditional owners and a lease holder.

(b) Financial Neutrals

Financial neutrals provide the parties to a collaborative process with skills, knowledge, and insight into the new financial circumstances inherent in their divorce or separation.[49] The Australian Association of Collaborative Professionals notes that financial professionals 'assist the parties in the information gathering in a neutral way'[50], and later assist them to generate and test options that will make the most of their financial assets.[51]

Sinclair, Peters and Picard describe a financial neutral as assessing the overall financial position of the parties, and helping both parties to plan for expenses, set budgets for the parties and their children, and understand their financial situation moving forwards.[52] In

---

46 Ibid 144, 147.

47 Ibid.

48 Susan Hansen, Jeanne Schroeder, Kathy Gehl, 'The Child Specialist Role in Client Choice of Process: Focusing on the Children and Enhancing Value' (2013) 13(1) *Collaborative Review* 13-15.

49 Cameron et al (n 14), Healy (n 31) 49.

50 Australian Association of Collaborative Professionals, 'Submission to the ALRC Enquiry into the Family Law System' (8 November 2018).

51 See Chapter 4, 4.3.

52 Sinclair, Peters and Picard (n 4) 114-6.

cases where there is a difference in knowledge or experience in relation the marital assets, the financial planner can aid in educating the party who is at a disadvantage, and improving their capacity to make an informed decision.[53]

Based on international (predominantly North American) data, IACP research found that the use of a financial professional is correlated to both income level and the size of the marital estate. Among collaborative processes involving estates worth less than $200,000 (USD), thirty-four percent included a financial professional.[54] The use of financial professionals increases with the size of estates. In matters where the estate is worth greater than $1 million (USD) fifty-seven percent included a financial professional.[55]

There has been no inquiry into the frequency of inclusion of financial professionals in Australian collaborative processes. However, their membership in Australian collaborative practice groups suggests that they are actively used.[56] Parties to will and estate matters may well benefit from similar types of financial advice to that which is offered in family collaborative processes, for example, by structuring payments or proprietary interests in a way that meets family members' needs or reduces their tax liability. In other types of dispute, more abstract considerations of the contribution of the financial specialist suggests an opportunity for independent experts more generally. The appointment of a joint expert to support negotiations is likely to be a well-received aspect of the collaborative process because it is a logical extension of what some lawyers are already doing. In construction law, for example, jointly appointed independent experts may be called upon in 'dispute resolution boards' to reduce the disruption of legal disputes to large construction projects.[57] Depending on the model used, the decisions of board members may be advisory, binding as arbitral awards below a certain value, or binding for any value. A collaborative process could expand upon the advisory model to include participation in four-way negotiations. This would mean that their skills and expertise may be applied not only to the 'diagnosis' and attribution of problems, but also the development of creative solutions.

---

53 Ibid.

54 Gaylene A Stingl 'Statistical Data Regarding Financial Specialists as Team Members in CP Cases' (2012) 12(1) *Collaborative Review* 24, 24.

55 Ibid.

56 See Chapter 5, 5.2.

57 Sergio Capelli, Shaun Gallagher, 'Dispute Resolution Boards—Prevention is Better than a Cure (2009) 128 *Australian Construction Law Newsletter* 24, 25.

4.3 Variation in Interdisciplinary Collaborative Practice

There are different ideas on how and when coaches, financial neutrals, child specialists and other third-party professionals should be included in collaborative processes (if at all) and to what extent each role should be responsible for exercising leadership or administrative functions. In North America, processes vary markedly between practice groups.[58] The range extends from groups that prefer a lawyer only model, to those that will recommend a full team of interdisciplinary professionals as a standard practice.[59]

As collaborative practice matures in Australia, a range of models continue to emerge. Sourdin notes that early use of interdisciplinary collaborative processes 'tended to only involve joint meetings between lawyer and their clients where particular issues were referred to experts.'[60] Moreover, practitioners have embraced a broader range of models, some of which take a more integrative approach to the involvement of professionals from disciplines other than law.[61] Lande describes three dimensions in which the collaborative process varies:[62] (i) whether disciplines other than law are included; (ii) whether such additional professionals are retained at the outset (team models), or in response to the evolving needs of the matter (referral models); and (iii) whether the coaching role is performed by a single neutral coach who serves both clients (shared coaching), or by separate coaches each retained by, and aligned with, a particular client (allied coaching).[63] Each of these dimensions is now explored with a view to the research question and how the attributes of a multidisciplinary team could be usefully adopted in a more diverse range of disputes.

---

58 See, e.g., Cameron (n 14); Brett Raymond Degoldi, 'Lawyers Experiences of Collaborative Family Law' (LLM thesis, University of British Colombia 2007); Marilyn Scott 'Collaborative Law: Dispute Resolution Competencies for the "New Advocacy"' (2008) 11 *Queensland University of Technology Law Journal* 223; Simmons (n 11): Simmons proposes a typology based on holistic approaches in medicine: unidisciplinary, multidisciplinary, interdisciplinary, and transdisciplinary.

59 Gary Voegele, Ronald Ousky, Linda Wray, 'Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes' (2007) 33 *William Mitchell Law Review* 973.

60 Tania Sourdin, *Alternative Dispute Resolution* (Lawbook Co, 5th ed, 2016) 122.

61 Ibid.

62 John Lande, 'An Empirical Analysis of Collaborative Practice' (2011) 49 *Family Court Review* 257, 257.

63 Ibid; Rodney Nurse, Peggy Thompson, 'One Perspective: Coaching to the "End": Expanding the Goal' (2010) *Collaborative Review* 14: Nurse and Thompson were instrumental in establishing coaching as a distinct profession.

(a) Interdisciplinary or Lawyer Only Collaborative Practice

A pragmatic reason that lawyers or parties may prefer to work alone or make only 'auxiliary'[64] use of other professionals is a perceived reduction in costs paid by the parties. Involving fewer professionals means that fewer hourly rates need to be paid for each meeting. Some North American commentators have noted that interdisciplinary teams are capable of placing the collaborative practice beyond the financial means of some parties. [65] Simmons notes that 'the greatest concern that has been raised is the potential increase in economic burden associated with bringing on additional professionals.'[66] Abney argues that some collaborative lawyers 'have done a genuine disservice to the collaborative process by implying that no one can participate without the aid of additional professionals.'[67]

Proponents of interdisciplinary practice argue that the savings in lawyer only models of practice are a false economy. If the matter is suited to interdisciplinary practice, then any reduction in fees is offset by a limited attendance to the (quasi) therapeutic and other non-legal aspects of a dispute.[68] Furthermore, the process places a higher onus on lawyers— both to engage with aspects of the dispute that fall outside of expertise in law, and to manage their own emotions and behaviours within the process.[69] Theorists have questioned whether lawyers have an appropriate professional basis to fill the quasi-therapeutic role that a 'rights-plus' approach to law entails.[70] Reflexivity in practice is especially important for lawyers who work at the boundary of therapy. Daicoff notes that lawyers must recognise 'when they are in over their heads and should refer to professional therapy or counselling.'[71]

Cameron compares the lawyer-only approach to cycling through the woods on a unicycle— very challenging but perhaps possible for an 'extremely skilled individual.'[72] In contrast, most people, especially those with a predisposition for conflict, will benefit from the 'mountain bike' of interdisciplinary practice.[73] In contrast Kha argues that an independent

---

64 Cameron et al (n 14) 19.

65 Simmons (n 11); Lande (n 62) 276.

66 Simmons (n 11).

67 See, Sherrie R Abney, *Civil Collaborative Law the Road Less Travelled* (Trafford, 2011) 226.

68 Simmons (n 11) 330: notes anecdotal evidence that the benefits outweigh the costs of the team approach.

69 Healy (n 31) 137

70 Ibid 28.

71 Susan Daicoff, 'Law as a Healing Profession: The "Comprehensive Law Movement"' (2005) 6(1) *Pepperdine Dispute Resolution Journal* 1, 55; see also Marilyn Scott, 'Dispute Resolution Competencies for the New Advocacy' (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 213, 231.

72 Cameron et al (n 14) 30.

73 Ibid.

coach increases costs and would be 'an indictment on the ability of lawyers to perform the basic tasks of the collaborative process.'[74]

One step removed from lawyer only models are processes that include the services of non-legal professionals, but only in a limited way, such as to provide expert advice in relation to a matter of impasse, or to meet with clients in a separate meeting to discuss an interpersonal dimension of the dispute.[75] Cameron argues that the fragmented approach of such models can lead to inconsistencies in advice:

> …without the team building that happens in a collaborative divorce team or an interdisciplinary group, therapists… are only seeing one side of the conflict. Since there is no team … a holistic understanding of the family and family system is not available. This can sometimes work against the collaborative underpinnings, in that an 'auxiliary' professional may be giving the client advice or direction contrary to that which he or she is receiving from other professionals.[76]

It may be that for new practitioners and new practice groups, this limited style of interdisciplinary collaborative practice provides a starting point for a more integrated approach. Tesler notes that 'novice' collaborative lawyers often prefer coaches to work "out there" rather than 'to integrate that coaching into the collaborative law process.'[77] Sourdin notes that this auxiliary approach to interdisciplinary work characterised the early collaborative practice movement in Australia. Greater variation, including more integrative approaches, emerged later, once collaborative lawyers had built trust and effective working relationships with colleagues in other professions.[78]

The experience of family collaborative practitioners has highlighted the contribution that non-lawyers can make to dispute management processes. While a lawyer-only model of the collaborative process would be viable in non-family disputes, it may be a missed opportunity in some situations. For example, in a commercial matter, a collaborative coach could assist the parties with the human aspects of negotiation, such as managing emotions like anger, which have been documented to have a detrimental influence on negotiations.[79]

---

74 Henry Kha, 'Evaluating Collaborative Law in the Australian Context' (2015) 26 *Australasian Dispute Resolution Journal* 205.

75 See, e.g., Sourdin (n 60).

76 Cameron et al (n 14): discussing the 'lawyers working with other professionals' model in particular.

77 Tesler (n 26) 656.

78 Ibid.

79 Alison Wood Brooks, 'Emotion and the Art of Negotiation' (December 2015) *Harvard Business Review* 55.

(b) Referral Model or Team Model

According to Gutterman, the referral style of interdisciplinary collaborative practice emerged as the preferred model of practice in Colorado and is for this reason sometimes termed the Colorado model. [80] Neutral professionals are typical of similar categories to those used in other models, such as financial professionals, mental health professionals, and coaches. The key distinction is that referral models do not begin with a full collaborative team in place.[81] Instead, the collaborative team is formed progressively by referral from existing team members. Any jointly appointed experts or other third parties retained to assist become part of the collaborative team. Thus, the referral model anticipates and accommodates changes to the team throughout the process. The team composition may fluctuate, as non-lawyer members are retained in response to the emerging needs of the parties. All are expected to have completed specialised collaborative practice training. Cameron describes this as the 'lego approach'— the team is gradually constructed from components similar to how lego bricks are chosen and combined for a particular build.[82] The emphasis in this model is on constructing a process that is carefully matched to the needs of the parties.

The choice of an interdisciplinary group model places the initial member of the team in a default leadership position because they will be responsible for advising on what other members might be added to the team. In most models, this coordinating and gatekeeping function is performed by collaborative lawyers.[83] Alternatively, coaches may perform this role.[84] According to Gamache, in Vancouver, British Colombia, collaborative lawyers and coaches work as equals, and clients initiate the process through divorce coaches or through a collaborative lawyer.[85] Where the process is initiated through coaches, lawyers are still considered integral to the process and thus always retained.[86]

Team models of collaborative practice are distinguished by using a multidisciplinary collaborative team that is established from the outset and is present in most 'four-way'

---

80 Sheila M Gutterman, *Collaborative Law: A New Model for Dispute Resolution* (Bradford, 2004) 89; cf Tesler uses 'referral' to describe an approach that makes only 'auxiliary' use of non-legal roles.

81 Healy (n 31).

82 Cameron et al (n 14).

83 Robert Joseph Merlin, 'The Collaborative Law Process Rules: This is how we do it' (April 2018) *Florida Bar Journal* 36.

84 See, e.g. Raymond LaPerriere, 'How Does a Coach Select a Lawyer?' (2001) 3(2) *Collaborative Review* 10, 10-11.

85 Gamache (n 34).

86 Ibid.

meetings.[87] The roles within the team usually include two or more members from disciplines other than law. Team models of practice follow a 'fixed menu' philosophy. Their understanding is that while every dispute is unique, people within a particular type of dispute (such as a separation) tend to be similar in the types of expertise and support they find helpful. Therefore, these models focus on constructing a systematic approach to the types of issues that affect most parties. While the team may be added to, based on the needs of the party, most professionals who work with a team model are hesitant to participate in a process which subtracts any of the roles commonly used within that model.

There are sound reasons to prefer a systematic approach. Maintaining a standard team composition allows the professionals to build a consistent understanding of how responsibilities are divided and when it is appropriate to defer to one another's judgement. Furthermore, because non-legal professionals are involved from the commencement of a matter, they are positioned to take on a more involved role. If the coach is present from the beginning, then they are perceived as an ordinary part of the process rather than a response to a particular issue or shortcoming. Scott and Collins note that the majority of practitioners in their focus groups preferred the coach to be present from the first 'four-way' meeting so as to normalise their contribution.[88] They quote a focus group participant:

> …it is very difficult to bring a coach in after the first meeting because then the clients think they have some sort of problem or they haven't performed very well… you just have to tell them straight up we are getting a coach and we all meet at the first meeting.[89]

Team models are characterised by their preference for a systematic approach and a relatively fixed team composition for each model. Thompson describes the Collaborative Divorce team of two coaches, a financial neutral and a child specialist (where there are children) as 'the irreducible minimum for a high-quality transition to post-divorce parenting.'[90] Alaskan collaborative family lawyer, Ryan Roley notes a typical Six-Way team comprises the two parties, their attorneys, a mental health professional, and a financial professional.[91] Other neutral professionals may be retained on a bespoke basis, including child therapists, substance abuse counsellors, employment consultants, or budget planners.[92] Roley describes the use of

---

87 See, e.g., Sourdin (n 60).

88 Marilyn Scott and Pauline Collins, 'The Challenges for Collaborative Lawyers in Providing CP Processes' (2017) 31 *Australian Journal of Family Law* 27, 39.

89 Ibid.

90 Tesler (n 15).

91 Ryan Roley 'The Alaska Model for Collaborative Law' (2014) <http://ryanroley.com>.

92 Ibid.

diverse roles as a means to divide the labour of dispute management in a manner that dovetails with the skills and experience of professionals, and does not overburden team members:

> When we involve several professionals in the process, we are ensuring the team sees the nuances of the situation that can and do make the process challenging. We have members of the group who facilitate an understanding of the conscious and unconscious factors at play. We also have members of the group who focus on the more technical/logistical aspects of a separation. Responsibilities are appropriately delegated and not one person bears the full weight.[93]

The main difference between the Six-Way and Collaborative Divorce models of practice is their approaches to providing psychological support. Unlike Collaborative Divorce, Six-Way uses only a single coach. Consequently, all non-lawyer practitioners in Six-Way are jointly retained and do not form an alliance with a particular party.[94]

There is little data on which to base a conclusion about the relative effectiveness of referral and team based collaborative practice. Proponents of each approach present a clear rationale for its use and anecdotal evidence of its effectiveness. Empirical research suggests that clients are generally satisfied with the collaborative process, regardless of the specific model chosen.[95]

(c) Shared or Allied Coaching

In North America, one and two coach models of practice have evolved, which are described as shared-coaching and allied-coaching.[96] In shared-coaching, one coach is shared between the parties. In allied coaching, two coaches are retained, each focusing on the needs and challenges of a particular party. There are advantages and disadvantages to each approach. Where the coach is shared, they are better positioned to be perceived as 'neutral'.[97] A communication coach who is perceived not to have a side may be more readily accepted as providing an independent perspective in the case of an impasse between parties.

On the other hand, allied coaching means more professionals to share the workload, which may support a stronger professional relationship between each coach and their primary

---

93 Ibid.

94 Ibid.

95 Wray (n 3).

96 Nurse and Thompson (n 5) 14: Nurse and Thompson were instrumental in establishing coaching as a distinct profession.

97 For a discussion of neutrality in a one coach process, see, Barbara Kelly and Linda Solomon, 'The Nuances of Neutrality for the Neutral Mental Health Professional' (2013) 13(1) *Collaborative Review* 16.

client. Mosten notes that the two-coach model 'gives a client an important ally that a neutral cannot provide'.[98] Similarly, Nurse and Thompson note:

> the two-coach approach provides the opportunity to build more individuation and disengagement during the process of assisting each parent to think about their individual future, think through new behaviour and practice new communication patterns.[99]

The bond between the individual coach and client in the two-coach system is arguably analogous to the 'therapeutic alliance'[100], which has been identified as 'a main curative component' in clinical psychotherapy.[101] Proponents of allied coaching will often recommend the practice for most of their matters, but additional support has been argued to be especially valuable in highly emotional cases.[102]

Some collaborative practitioners have sought to provide the best of both worlds by a process that includes both two allied coaches and a neutral facilitator, sometimes termed a 'meta-mediator'.[103] Descriptions of Australian interdisciplinary collaborative practice are usually consistent with a shared (one coach) approach. However, practitioners are aware of two-coach models through interactions with North American trainers and practitioners.

Australian Family Collaborative Practitioners have settled on a one coach model, but this should not lead to the assumption that other applications of collaborative practice are best served by a single neutral coach. The practice of allied coaching could provide parties who are used to positional negotiations with a valuable guide to the interest-based approach. This possibility is explored further in chapter eight with the benefit of empirical data.

4.4 The Costs Debate

There are differing perspectives on the effect that including professionals from disciplines other than law has on the cost of matters. The teamwork means that cost, efficiency and time is not easily compared with a normal litigated family matter, as time spent with financial

---

98 Ibid: Allied coaching is an exception to the general rule that professionals from other disciplines are retained as 'neutrals'. However, even though allied coaches work with a particular client, it is in a pseudo-therapeutic role rather than as an advocate for their principal's interests.

99 Tesler (n 15).

100 Michael J Lambert, Dean E Barley, 'Research Summary of the Therapeutic Relationship and Psychotherapy Outcome' (2001) 38(4) *Psychotherapy Theory Research & Practice* 357, 357.

101 Ibid.

102 See, e.g., William RJP Brown, Lauren Gehrman, and Jeffrey Zimmerman, 'Duel or Dual: An Interdisciplinary Approach to Parenting Coordination for Uber-Conflicted Parenting Relationships' (2017) 55(3) *Family Court Review* 345, 346-7.

103 Tesler (n 26).

planners, psychologists and councillors is never factored into the legal costs and time in such dispute processes. These are all applied separately.

Ardagh identifies the criticism that team models of collaborative practice are 'costly and lengthy and perhaps unnecessary to the needs of parties'.[104] IACP research found that the inclusion of further professionals was associated with an increase in costs. Average costs for collaborative matters were $15, 667 in lawyer-only matters, $22, 030 in interdisciplinary matters that used a referral model, and $34, 071 in interdisciplinary matters that used a team model.[105]

Proponents of interdisciplinary collaborative practice argue that a collaborative process using coaching manages matters more reliably, produces outcomes that better suit the parties, and/or reduces the emotional impact of the dispute. Collaborative process associations provide anecdotal support for the idea that the involvement of coaches in the collaborative process can save time. For example, Collaborative Divorce Vancouver notes:

> The Collaborative Process is focused on settlement, with everyone working together towards the same goal, so it can be more efficient… The emotional support of Divorce Coaches can help you move through conflict that otherwise might keep you stuck for months or even years.[106]

Similarly, Collaborative Professionals New South Wales suggests: 'a coach/facilitator assisted collaboration usually reduces the number of '5-way' meetings'.[107] Sinclair Peters and Philips claim that couples who use the Melca full team model of collaborative practice spend up to sixty per cent less than their 'best alternative'.[108]

No research has provided a clear understanding of costs in Australian collaborative practice (interdisciplinary or otherwise).[109] It is important that the costs are properly contextualised against the benefits achieved. The inclusion of a financial neutral may identify opportunities for restructuring, which could provide a benefit that exceeds the associated fees. In a similar vein, providing emotional support for divorcing couples may well have long-term

---

104 Anne Ardagh, 'Evaluating Collaborative Law in Australia: A Case Study of Family Lawyers in the ACT' (2010) 21 *Australasian Dispute Resolution Journal* 204, 251.

105 Linda Wray, 'IACP Research Regarding 'International Academy of Collaborative Professionals Practice (Basic Findings)' (2012) 12(1) *Collaborative Review* 6; see also Lande (n 62) 270.

106 Collaborative Divorce Vancouver, 'Frequently Asked Questions' [emphasis added] <http://collaborativedivorcebc.com>.

107 Collaborative professionals NSW, 'What is Collaborative Practice?' <http://collabprofessionalsnsw.org.au>.

108 Sinclair Peters and Phillips (n 4) 28-9.

109 See, e.g., Ardagh (n 104).

effects on well-being and productivity, through less reliance on mental health support systems.[110] Internationally, practitioners have explored alternative service models to provide collaborative practice to low income families. Pro bono or reduced-fee[111] collaborative practice clinics have been developed in several states in the United States, as well as in Ramat Gan, Israel.[112] Such clinics have arisen in different ways, funded variously by collaborative practice groups, bar associations, and government bodies.[113]

4.5 Interdisciplinary Practice Beyond the Family Sphere

The use of neutral professionals in civil non-family disputes remains largely unexplored.[114] There are some aspects of divorce that have strong equivalents elsewhere. Tax planning, for example, is often as important in commercial matters as it is in family matters. However, the use of neutrals in family law demonstrates only one instance of their potential. The nature of a commercial dispute may suggest there is value in including a professional from a different discipline to those utilised in family matters. With this in mind, it may be helpful to begin by considering how non-legal professionals contribute to the collaborative process in an abstract sense, independent to the family context.

Abney proposes that experts in civil (non-family) collaborative matters are distinguished more by their function rather than their expertise.[115] She describes three functional types of the civil collaborative expert: retained, consulting only, and outside legal opinion. Retained experts are chosen and retained jointly by the parties to the dispute. The costs of retained experts are shared evenly, except perhaps in cases where one party is at such a financial disadvantage that it is pragmatic for the other to cover the total fee.[116] Retained experts have open access to the 'parties, witnesses, lawyers, and the information that the parties have gathered'.[117] This means that they participate in four-way meetings, and outside of meetings may communicate with the parties, lawyers, and others involved in the dispute. They have access to information exchanged as part of the collaboration. The 'purpose and

110 Healy (n 43) 23: notes some benefits may only be realised when the children of a divorcing couple commence their own romantic relationships.

111 Colloquially 'low bono' clinics.

112 Jeff Seigle, 'Creative Approaches to Providing Collaborative Services to People of Modest Means' (2014) 14(1) *Collaborative Review* 24-26.

113 Ibid.

114 Abney (n 67) 214.

115 Ibid 219-21.

116 Ibid.

117 Ibid.

content' of any communication made with the retained expert outside of four-way meetings is disclosed to the collaborative lawyers. Depending on the role a retained expert is chosen to fulfil, they may serve to facilitate communication between the parties or to provide an independent non-partisan report on an issue of factual material to the dispute.[118]

Consulting only experts, Abney explains, are hired by an individual party, who is responsible for their full fee. They may serve in a support role, like that of a coach, or provide an independent opinion for a particular party, such as, for example, the tax implications of a proposed solution. The decision to retain a consulting only expert must be made transparently, including identifying the professional hired to fulfil this role. Once hired, consulting only experts are in contact with the hiring party, though they may, in Abney's model, have access to the reports of retained experts, or the notes of collaborative meetings with the consent of the other party. Outside legal opinion experts are lawyers who are retained by a particular party to provide an additional opinion on the relevant law.[119] The use of partisan experts differs from leading models of collaborative family law, where experts must be retained in a neutral capacity.[120] As new interdisciplinary roles are developed to suit the needs of all parties, it is important that they are integrated in a manner that supports the values and philosophy of the collaborative process. In particular, the literature suggests it is valuable to ensure that participants have received specific training in the collaborative process.

The author agrees with Abney that contemplation based on function, rather than professional background is the preferable theoretical approach to interdisciplinary roles. However, unlike Abney, the author does not agree that this is particular to civil (non-family) practice. A functional perspective enhances our understanding of interdisciplinary roles in collaborative practice whether in the family sphere or elsewhere. Indeed, since most collaborative practice matters have involved family law, this area is the richest source of experience for theorising about the contribution of non-lawyers in collaborative practice.

Drawing from the family collaborative practice literature it is argued that there are four functions that non-lawyer professionals contribute to the collaborative process. These functions are not mutually exclusive, one professional may perform several functions. Only

---

118 Ibid.

119 Ibid 224.

120 See, e.g., Cameron (n 14); Queensland Association of Collaborative Practitioners Lawyers' Collaborative Law Participation Agreement (unpublished, held on file by author) [9]: 'the parties will use only neutral experts'.

the most extensive models of interdisciplinary collaborative practice provide a different professional for each function.

(a) Subject matter expert

First, they may provide information or expert advice on the subject matter of the dispute. This function is performed, for example, by an expert tasked with providing an evaluation of an asset such as a house or business. In family matters, advice may be provided on financial planning and on the tax implications of possible solutions. The expert role also provides a strong opportunity for use in other areas of law. Lawyers are familiar with the inclusion of experts in litigation and some forms of non-litigation dispute management such as expert-appraisal.[121] Parties to a patent dispute, for example, might invite a patent attorney to provide independent advice on the function and scope of patent claims. As noted, an international trade dispute may benefit from the inclusion of a cultural specialist who may act as an intermediary between parties of different cultural backgrounds to forge a mutually satisfactory agreement.

(b) Neutral Facilitator

Second, they may facilitate interest-based discussions between the parties; this function is performed by the coaching role in a shared-coach process. The neutral facilitator role does not provide advice on the subject matter of the dispute, or on substantive legal issues. Their role is limited to assisting the parties and counsel to communicate with one another in a manner that is likely to resolve or manage the dispute between them. This function is analogous to, if not coextensive with the role of a mediator in interest-based or facilitative mediation.

(c) Party Support

Third, they may provide coaching and support for a particular party, as in the case of an allied coach. Legal disputes are challenging circumstances for most parties. Conflict tends to bring out strong emotions, which require personal regulation and management to keep negotiations on track. Helping clients navigate the emotional aspects of legal matters has long been a part

[121] See, e.g., Boulle and Field (n **Error! Bookmark not defined.**) 336-40.

of legal work. An implication of support is located in the traditional conception of the lawyer's role as a 'special purpose friend'. However, most lawyers have received only limited training in supporting parties through the non-legal aspects of their dispute. Where resources permit, professionals from disciplines such as psychology or conflict-coaching may be better equipped to support a party in the emotional and interpersonal part of their dispute.

(d) Third Party Representative

Fourth, they may be tasked with identifying and advising on the interests of a third party to the process. This role is particular to the child specialist in a collaborative family process, but there are many other types of disputes where it is valuable to consider third party interests. For example, a merger or major corporate dispute may benefit from the involvement of an employee representative or union official to consider how the outcomes will affect the workforce.

4.6 Chapter Summary

This chapter has explored the development of interdisciplinary collaborative practice. The experience of family collaborative practitioners provides a valuable example of how professionals from different backgrounds can work together to address all aspects of a dispute. The literature suggests that the use of interdisciplinary collaborative practice in commercial disputes is largely untested. Yet by abstracting the roles of non-legal professionals in family collaborative matters we can see how the functions that they serve may be of considerable benefit in other contexts. Where there is a difference on a technical point of fact, an independent expert can help the parties to reach a common understanding. Facilitative roles such as coaching may also yield benefit in guiding parties through the interpersonal aspects of disputes. This potential will be explored further in chapter eight, with the benefit of empirical insight.

Collaborative practice was developed in North America, and so much of the theoretical literature is engaged with the United States and Canadian experiences, and with models that have developed within these jurisdictions. It is now time to gain an understanding of how collaborative practice and its models have fared in the Australian legal environment, and in particular what they can bring to a wider array of disputes or why they may not have been used to date.

Chapter 5. The Australian Experience

The research exploration is now directed towards the emergence of the collaborative process in Australia. Surveying the local development and growth of collaborative practice completes the exploration of the research area and provides the relevant framework to understand the challenges that practitioners in new areas of law may experience in pioneering new applications of the collaborative process. This chapter reports on evidence from desk research and available Australian reports and literature sources. These sources provide an incomplete picture of the practices of collaborative practitioners. The experience of individual practitioners will vary, and there is insufficient literature to draw firm conclusions on how well it reflects the day-to-day experience of individual practitioners. There is an ongoing need for a national empirical research effort to explore how collaborative practice is used in practise in different Australian jurisdictions.

The literature suggests Australian collaborative practice movement has been lawyer-led and has benefitted from North American examples.[1] As in the United States, training conducted by pioneering lawyers and firms was instrumental to its development and expansion within Australian jurisdictions. As Lavi notes:

> Collaborative law has been promoted mainly through training meetings for those working in collaborative law, held in a number of states in Australia, in commercial centres, universities, and the offices of collaborative law attorneys.[2]

Stu Webb and Marion Korn conducted the first training in Australia in 2005.[3] Other North American collaborative pioneers have since provided training in Australia including Pauline Tesler, and Linda Solomon.[4] These North American pioneers have trained Australian lawyers mainly in the models they used in their own jurisdictions. This has resulted in some variation in the training provided.[5] Collins and Scott describe different approaches of early

---

1 Henry Kha, 'Evaluating Collaborative Law in the Australian Context (2015) 26 *Australasian Dispute Resolution Journal* 178, 178-9.

2 Dafna Lavi, 'Can the Leopard Change his Spots?! Reflections on the 'Collaborative Law' Revolution and Collaborative Advocacy (2011) 13 *Cardozo Journal of Conflict Resolution* 61, 78.

3 Australian Association of Collaborative Professionals 'AACP Submission to the ALRC Enquiry into the Family Law System' (28 November 2018) <http://collaborativeaustralia.com.au> 8-12; ibid 78.

4 Pauline Collins, Marilyn Scott, 'The Essential Nature of a Collaborative Practice Group for Successful Collaborative Lawyers' (2017) 28 *Australasian Dispute Resolution Journal* 12, 14.

5 Ibid 14; Anne Ardagh, 'Repositioning the Legal Profession in ADR Services: The Place of

collaborative process trainers who came from Canada, California and Texas.[6] Marion Korn (Canada) introduced a 'lawyer-centric' approach, Pauline Tesler (California) an interdisciplinary team approach, and Linda Solomon (Texas) a 'single coach neutral' approach.[7] Thus, a diversity of approaches has been integrated into Australian collaborative practice.

Experienced Australian practitioners have since begun to offer training domestically. Most training has focused on family law, but since 2018, training focused on estate law has also been offered in Queensland.[8] Further wills and estates training events were scheduled in 2020 to be held in Adelaide, Brisbane, Melbourne, Perth, and Sydney. However, this training was announced prior to the COVID-19 pandemic and has now been replaced with national web-based training.[9]

The development of wills and estates training indicates a slow acceptance of collaborative practice in areas beyond family law dispute management. But there is not yet any record of commercially focused collaborative practice training in Australia. Notwithstanding, there is evidence that some practitioners have experimented with the concept of commercial collaborative practice. A rare example was reported in New South Wales by collaborative solicitor Robert Lopich.[10] In that case, the parties were involved with a family business in which one party had made unauthorised personal use of some of the business's assets.[11] It was a priority for the parties that the dispute did not result in conflict in their extended family or result in litigation'.[12] The parties agreed to use a collaborative process, including the use of a binding participation agreement.[13] In the first meeting, the parties agreed to the use of a financial expert to value the assets that were the subject of the dispute.[14] In the second meeting, the parties were able to resolve the matter by settlement, having reached an agreement that was 'commercially sound and acceptable to the parties'.[15]

Collaborative Law in the New Family Law System in Australia' (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 238, 251.

6 Collins and Scott (n 4) 14.

7 Ibid; Ardagh (n 5) 251.

8 Resolve Estate Law, 'Collaborative Practice Training for Wills and Estates: Beginning, Building and Sustaining a Peace-making Practice' (2020) <http://resolveestatelaw.com.au/collaborative-training>.

9 Ibid.

10 Robert Lopich, 'Collaborative Law— an Australian Experience' (2008) *Alternative Resolutions* 14.

11 Ibid.

12 Ibid 15.

13 Ibid.

14 Ibid.

15 Ibid.

This is indicative of the possibilities, and although connected to a family matter, it was a commercial dispute. Nevertheless, it is a small exception to a relative lack of uptake of collaborative practice in a wider array of disputes.

It is not possible to provide a definitive number of solicitors and other professionals working within the collaborative process in Australia— there are no formal registration or membership requirements.[16] However, since undertaking collaborative practice training is generally required of members of voluntary collaborative practice associations, the membership of such associations provides an indicative approximation of the numbers of professionals trained in the collaborative process. According to the Australian Association of Collaborative Professionals (AACP), approximately 500 to 600 lawyers trained in collaborative practice are registered with State-based organisations or collaborative practice groups.[17] The National Profile of Solicitors listed 76, 303 practising solicitors in Australia in 2018;[18] so the AACP estimate corresponds to a little under 1% of the profession.

5.1 State and Territory Associations

Administrative support for the collaborative process grew in the mid to late 2000s, including through the founding of collaborative practice associations in several Australian States and Territories.[19] Professional collaborative practice training is now available in the majority of Australian capital cities. These associations exercise considerable influence over the norms of collaborative practice that emerge within their respective jurisdictions through the organisation of training and development of guidelines, recommendations, and standards. Nevertheless, no State or Territory association exercises regulatory power. Collaborative professionals are free to adapt collaborative methods to the extent that they can convince clients and other professionals to come on board. What follows is a State and Territory analysis of the practice.

(a) Australian Capital Territory

Collaborative practice in the Australian Capital Territory (ACT) began with the formation of the 'National Centre of Collaborative Law' (NCCL) in 2005, by Canberra law firms Farrer

16 But see Tanya Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 5th ed, 2016) 136: membership of a practice group may be expected in some regions and is necessary for advantages such as inclusion in the Law Institute of Victoria list of collaborative practitioners.

17 AACP (n 3) 8-12.

18 Urbis, 'National Profile of Solicitors 2018' (2019) 5: report commissioned by the Law Society of New South Wales on behalf of the conference of Law Societies.

19 AACP (n 3).

Gesini & Dunn and Dobinson Davey.[20] Pollard describes the Centre as comprising 'the first groups of collaborative lawyers to form in Australia.[21] It was the NCCL founders' intent that the organisation would serve as a national body to 'represent and develop collaborative law.'[22] Its early membership included lawyers and accountants from the Australian Capital Territory, New South Wales, Queensland, and Tasmania.[23] The NCCL was active in providing skills training and precedent materials for practitioners and was likely the catalyst for the formation of the 'Canberra Collaborative Law Practice Group' around this time.[24]

Ardagh describes tensions among early ACT collaborative lawyers over what process conventions should be adopted.[25] Some practitioners considered that a cooperative[26] rather than a truly collaborative process should be adopted, that is, a process which sets out to construct a settlement environment without the use of a participation agreement, or, as one participant put it without 'those stupid contracts'.[27] Other practitioners described a unique fault-based form of disqualification, which would require a party that withdrew from the process to pay the other's costs.[28] Collaborative Practice Canberra (CPC) now facilitates collaborative practice in the ACT.[29] The public directory lists twenty lawyer members, and there is provision for 'other professional members', but none are publicly listed.[30] The description of 'Collaborative Law' provided on the CPC website describes a lawyer-only model of collaboration without mention of interdisciplinary professionals.[31]

(b) New South Wales

Justice Robert Benjamin, then president of the NSW Law Society, brought collaborative practice to the attention of his peers, having encountered the concept at the American Bar

---

20 Mary Rose Liverani, 'Canberra Law Firms Set the Pace on Collaborative Law' (2005) 43 *Law Society Journal* 20, 20; Anne Ardagh, 'Evaluating Collaborative Law in Australia: A Case Study of Family Lawyers in the ACT' (2010) 21 *Australasian Dispute Resolution Journal* 204, 205.

21 John Pollard, 'Collaborative Law Gaining Momentum' (2007) *Law Society Journal* 68, 69.

22 Ibid 70.

23 Ibid.

24 Ibid.

25 Ardagh (n 20)

26 See, e.g., John Lande, 'Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203.

27 Ibid 211.

28 Ibid 212.

29 Collaborative Practice Canberra <www.collaborativepracticecanberra.com.au>; Peta Burton 'Interview with Juliet Ford Farrar, Gesini and Dunn and Phil Davey, Dobinson Davey Lawyers [now DDCS Lawyers]' *State Focus* (Southern Cross Ten).

30 Collaborative Practice Canberra (n 29).

31 Ibid; Pollard (n 21) 70.

Association Conference in 2003.[32] This has been described as the first introduction of the concept to the Australian legal community.[33] Pollard describes the Law Society of New South Wales Dispute Resolution Committee as being 'enthusiastic about the new concept'[34] but identifying 'philosophical issues'[35] to be addressed in relation to the disqualification provision.[36] The NSW Law Society then created a 'collaborative law' sub-committee to evaluate different models of collaborative practice.[37] Marilyn Scott[38] chaired this sub-committee and later guided the development of the first collaborative practice training by an Australian university, namely the University of Technology, Sydney in July of 2006.[39]

Collaborative Professionals New South Wales frames interdisciplinary collaborative practice as a subset of collaborative practice. In addition to lawyers, potential team members mentioned in the process description comprise a 'coach/facilitator (usually a social worker or psychologist)'[40] who is shared by the parties, a 'financial planner or accountant',[41] and a child specialist. Elsewhere, a benefit of the collaborative process is mentioned as allowing for the 'parties to engage experts such as counsellors, child experts, valuers, business coaches, accountants, financial planners and the like'.[42] There are no compulsory non-legal team members. If a coach/facilitator is included in the team, they are described as facilitating meetings: 'The coach/facilitator attends all meeting and is the team leader. Between 5-way meetings, the coach/facilitator may work with one or both clients to prepare them for making decisions.'[43] Relationships Australia New South Wales offers a form of interdisciplinary

---

32 Lorraine Lopich, 'Collaborative Practice — 'We Already Do That'' (2007) 9(9) *ADR Bulletin* 1, 5; Lorraine Lopich 'How Was Collaborative Law Introduced to Australia' <lopichlawyers.com.au> (2012) <lopichlawyers.com.au>; Pollard (n 21).

33 Pollard (n 21) 70. Lopich (n 32)

34 Pollard (n 21) 70.

35 Ibid.

36 Ibid.

37 Family Law Council (Australia), 'Collaborative Practice in Family Law' (2006) 29.

38 Scott has written several articles that relate to collaborative law in an Australian context, e.g., Marilyn Scott, 'Collaborative Law: A New Role for Lawyers', (2004) 15 *Australasian Dispute Resolution Journal* 207, Marilyn Scott, 'Collaborative Law: Dispute Resolution Competencies for the "New Advocacy"' (2008) 8(1) *Queensland University of Technology Law Review*.

39 John Pollard, 'History of Collaborative Law' (2006) *Television Education Network Public Papers* <https://www.tved.net.au/PublicPapers>.

40 Collaborative Professionals New South Wales (2020) <http://collabprofessionalsnsw.org.au>.

41 Ibid.

42 Victorian Association of Collaborative Professionals, 'How it Works' <http://vacp.com.au>.

43 Ibid.

collaborative practice,[44] which includes two collaborative lawyers, a 'coach' or 'case manager', and may include a financial specialist or child consultant.[45]

(c) Victoria

In Victoria, Tania Sourdin, and Cincinnati attorney Sherri Goren Sloven conducted early training in the collaborative process through the Law Institute of Victoria.[46] The Law Institute of Victoria maintains a collaborative practice section, led by an interdisciplinary executive committee.[47] The Institute also supports collaborative practice by facilitating a three-day collaborative practice training workshop in partnership with Monash University.[48]

The Victorian Association of Collaborative Professionals (VACP) is the Victorian state-level collaborative practice association.[49] The VACP describes collaborative practice as a process that may be commenced with a referral from any collaborative professional: 'you may be referred into a collaborative process by your collaboratively trained psychologist, financial professional or lawyer'.[50] There are no compulsory team members (other than lawyers). However, the language used in their description anticipates the involvement of (at a minimum) psychologists, financial professionals, and lawyers. In its practitioner directory, VACP uses the term 'Family Counsellor'. The role of the Family Counsellor may be performed by a psychologist, therapist, or social worker, and is described in terms that resemble the role of a collaborative coach.[51] The VACP website indicates an administrative role for the psychologist (including presumably a 'family counsellor') in chairing meetings:

> Where there is a psychologist on the team, that person will chair the meetings and will also assist in resolving issues around time with children. Where there is a financial professional involved, they will assist in helping the parties work through budgeting and household finance issues as well as presenting the financial impact of possible options for property settlement.[52]

---

44 Relationships Australia NSW uses the term 'collaborative practice' as exclusive of lawyer only models of practice.

45 Relationships Australia New South Wales, 'Collaborative Practice' <http://relationshipsnsw.org.au>.

46 Lorraine Lopich 'How Was Collaborative Law Introduced to Australia' (2012) 5 <lopichlawyers.com.au>.

47 Caroline Counsel, 'What is this Thing Called Collaborative Law' (2010) 85 *Family Law Matters* 77, 78.

48 Ibid.

49 Victorian Association of Collaborative Professionals, 'Collaborative Professionals' (2020) <http://vacp.com.au>.

50 Ibid.

51 Ibid.

52 Ibid.

Victoria is also home to the Melca,[53] a private interdisciplinary collaborative process model. Developed in Melbourne, the Melca model makes use of a full interdisciplinary team as standard, and all are involved from the outset. The standard team comprises a lawyer for each party, a singular 'family consultant', who is qualified as a psychologist or counsellor, and a neutral financial planner.[54] A separate child specialist is also included if the family includes younger children, or 'therapeutic work on family relationships' may be offered for families with older children.[55]

(d) Queensland

The Queensland Association of Collaborative Practitioners (QACP) is the Queensland state-level collaborative practice association. QACP information and marketing materials are suggestive of a referral model. [56] Lawyers are described as facilitating discussions, with other professionals brought in as needed. Professionals mentioned in the website materials include 'accountants, financial advisers, mediators, psychologists and counsellors.'[57] Coaching is not discussed in such terms; however, psychologists and counsellors may perform an analogous role, seemingly in a shared, rather than allied, capacity. The QACP process description notes:

> …The lawyers support the negotiations by providing the partners with not only legal advice. Other professionals such as accountants, financial advisers, mediators, psychologists and counsellors are brought in when necessary to provide advice to assist with any financial, emotional, or other issues which may arise in the process. The lawyers facilitate discussions to reach agreement with the benefit of other professionals' skills and advice.[58]

This description suggests that lawyers usually administrate the collaborative process and are the main professionals responsible for suggesting or making referrals to other professional services. Queensland Law Society was the first law society to issue a formal opinion on

---

53 Etymologically, the 'Melbourne Collaborative Alliance', however generally treated as a neologism term rather than an acronym.

54 Tina Sinclair, Tricia Peters, Marguerite Picard, *Breaking up Without Breaking Down: Preserving Your Health, Your Wealth and Your Family* (Grammar Factory, 2017) 113-4.

55 Ibid.

56 Queensland Association of Collaborative Professionals (2017) 'How Does the Process Work' <www.qacp.org.au/process-works>. Queensland Association of Collaborative Professionals 'The Respectful Way to Separate for You and Your Family' (brochure, 2014), <http://issuu.com/queenslandcollaborativelaw/docs/qcl_a5_online_brochure/0>.

57 Ibid.

58 Queensland Association of Collaborative Professionals, 'How Does the Process Work' <www.qacp.org.au/process-works>.

collaborative practice, finding that, with fully informed consent, it complied with a solicitor's duties.[59]

(e) South Australia

In 2006, the South Australian chapter of the Association of Dispute Resolvers (LEADR)[60] conducted a seminar on collaborative law. Early family collaborative practice was supported by Relationships Australia South Australia (RASA). Collaborative SA (CSA) has since emerged as a state-level collaborative practice association. CSA conducts two seminars each month for separating couples to inform them of the process options available to them. The issues covered in these seminars include the advantages and disadvantages of various dispute management options for separation, such as unassisted negotiation, negotiation with lawyers, litigation, and collaboration. Furthermore, the seminars address non-legal aspects of separation such as 'the emotional process of separation', 'impact on children', 'benefits of working with a Family Relationship Consultant', and 'benefits of working with a 'Financial Expert'.[61]

Collaborative SA describes the steps of a collaborative process as contacting a collaborative lawyer, inviting the other party, and then engaging a team of neutrals. On the topic of interdisciplinary practice, Collaborative SA writes that 'not every matter will require a full team of neutrals but many will.'[62] Neutrals mentioned in the process description comprise financial neutrals and 'family and relationship specialists', described alternatively as 'family consultants' in the South Australian practitioner directory.[63]

(f) Western Australia

Collaborative Professionals WA (CPWA) was established in 2007, by a group who had received training from Canadian collaborative family lawyer, Marion Korn.[64] Collaborative Professionals WA promote an interdisciplinary process as normative, and a collaborative

---

59 Queensland Law Society, 'Guideline on Collaborative Law' (2008): endorsed by the QLS Council, 31 January 2008: The QACP opinion is discussed further in section 5.6.

60 Since merged with the Institute of Arbitrators and Mediators Australia (IAMA) to form the Resolution Institute.

61 CollaborativeSA <http://collaborativesa.com.au>.

62 Ibid.

63 Ibid: A note in the website FAQ describes the team is described as potentially comprising collaborative lawyers, mental health professionals, coaches, child specialists and financial specialists.

64 Collaborative Professionals WA, 'About Us' <http://collaborativeprofessionalswa.com.au>.

team is described as usually including a 'counsellor and a financial expert',[65] in addition to the lawyers for either side. The Western Australian Association includes a particularly high proportion of members from disciplines other than law. Its practice directory lists, twenty-eight lawyers, eleven professionals from an accounting or personal finance discipline, and nine from a mental health, mediation, counselling, or family dispute resolution discipline.[66] This reflects the use of interdisciplinary collaborative practice in this region.

In addition to its main organisation website,[67] Collaborative Professionals WA maintains a client-focused portal titled 'breaking up together'. This provides information on using the collaborative process for divorce and separation and includes a facility to invite a spouse to attend a collaborative practice information session using a template email.
One commentator has characterised the 'Columbus Project' in Western Australia as trialling a 'systemic, institutionalised' iteration of collaborative law.[68] This was a pilot programme developed by the Family Court of Western Australia,

> with the objectives of assisting, enabling, and encouraging separated parents to acknowledge the debilitating effects of continuing conflict, violence, or abusive behaviour on their children and to encourage parents to resolve their differences without resorting to prolonged litigation in the family court.[69]

The Columbus Process did share some process features and theoretical foundations with collaborative practice. Similar to interdisciplinary collaborative practice, the pilot programme integrated support services from a range of professions, and the process was intended to support a less adversarial dynamic in negotiations.[70]

However, there were enough differences to make the characterisation of the Columbus Process as 'collaborative practice' misleading. In the Columbus Process, matters were managed within the judicial system, through case conferences were led by family court

---

65 Collaborative Professionals WA 'Breaking up Together' <http://breakinguptogether.com.au>: 'You both have your own lawyers, and usually also a counsellor and a financial expert assisting you.'

66 Ibid 'Find a Collaborative Professional in WA': Professionals define their practice area in their own terms, so these categories are generalised from varied descriptions. For example, accounting and financial professionals includes also 'financial wellness specialist'.

67 Ibid.

68 Lavi (n 2) 76.

69 Lisbeth Pike, Paul Murphy, 'The Columbus Project in the Family Court of Western Australia' (2006) 44(2) *Family Court Review* 270, 270; see also Lisbeth Pike, Paul Murphy, 'The Columbus Pilot in the Family Court of Western Australia: What the Parents Said' (2004) 10(2) *Journal of Family Studies* 239. David K Malcolm CJ, 'Protecting Abused Children in the Family Court: Towards Best Practice' (Speech, 7 October, 2003, Child Protection Forum in Family Court Matters).

70 Ibid.

registrars.[71] The process was used only for matters involving allegations of abuse, neglect or family violence, and conferencing was focused on parenting matters. In contrast, collaborative practice is intended to resolve both parenting and property matters in a broad range of circumstance and takes place outside the formal justice system.

(g) Other Australian States and Territories

In 2006, the Family law council noted that to its knowledge, there were 'no collaborative, lawyers or practice groups in Western Australia, South Australia, Tasmania or the Northern Territory.'[72] While the collaborative process has since emerged in Western Australia and South Australia, this does not appear to be the case in the Northern Territory or Tasmania. The IACP website lists a sole member in the Northern Territory and another in Tasmania;[73] however, each of these members are associated with an interstate collaborative practice group. Neither a search of the IACP register nor a general desktop search of sites on the internet was able to locate any collaborative practice organisations or firms offering collaborative practice in these regions.

5.2 Interdisciplinary Collaborative Practice in Australia

There are both similarities and differences in how Australian collaborative practice associations describe interdisciplinary professionals. Each state or territory association's literature is consistent with a practice model where interdisciplinary (non-lawyer) professionals may be included in the process, but are not considered compulsory, and all Australian processes identified in this research favour a single neutral coach. The websites of collaborative practice associations tend to present the single coach referral model as if it were the sole form of interdisciplinary collaborative practice. With the notable exception of the Melca team model, the referral model appears to be the predominant form of interdisciplinary collaborative practice in Australia.

There is a difference between associations in the degree of emphasis placed upon interdisciplinary practice. Some materials treat interdisciplinary practice as normative and highlight the benefits of each of the professionals who might be involved in an interdisciplinary matter. Others briefly note that an interdisciplinary process is an option

---

71 Ibid: the Columbus Process Pilot ended in 2002 as scheduled, however, findings that emerged from the pilot have informed the ongoing practices of the Family Court of Western Australia.

72 Family Law Council (n 37) 29 [4.19].

73 International Academy of Collaborative Professionals 'members' (January 2020) <http://collaborative practice.com/members>.

available to parties, but it is focussed on the role of the lawyer. Differences in the importance ascribed to interdisciplinary collaborative practice suggest that the regional variance in collaborative practice training has had a persistent effect on the Australian collaborative practice landscape.[74] As Ardagh points out, because Australia only has a single federal family law jurisdiction, the need for substantial regional variation is unclear.[75] There is therefore likely to be a benefit in determining which model or models suit Australian couples, and working towards a national consensus on practice.

One important step towards consensus is clarity on the terminology to describe interdisciplinary collaborative practice in Australia. The main roles described in Australian interdisciplinary collaborative processes are child specialists, financial planners, accountants, and coaches. The terminology surrounding legal and financial professionals is similar across jurisdictions for lawyers and financial neutrals. However, there is substantial variation in titles for the professional responsible for facilitating communication. Examples include ‘case manager, (clinical) psychologist, (communication/collaborative) coach, family consultant, and (clinical) counsellor.

These terms are not truly synonymous, in that some, such as ‘psychologist’, refer to professional qualifications, but they do reflect similar roles. The table below shows the terminology that the websites of collaborative practice associations use to describe interdisciplinary roles practice landscape.[76]

---

74 See, e.g., Collins and Scott (n 4) 14.

75 Ardagh (n 5) 249; even in the United States where there are distinct State jurisdictions, it has not been conclusively demonstrated that the differences in practice models have formed on the basis of differences in law.

76 See, e.g., Collins and Scott (n 4) 14.

Table 2: Professional Role Terminology in Collaborative Practice Association Membership Directories

Group	**Role type**		
	Legal	*'Mental health' professionals*	*Financial professionals*
CP NSW	lawyer	coach	financial neutral
RA NSW	lawyer	coach, case manager	financial specialist
QACP	lawyer	mediator, psychologist	accountant financial adviser
VACP	family lawyer	family counsellor	financial professional
MELCA[77]	lawyer	communication coach child specialist	financial planner
CSA	lawyer	family consultant	financial adviser
CPWA[78]	lawyer	coach clinical counsellor clinical psychologist family consultant mediator family dispute resolution practitioner	accountant financial adviser financial wellness specialist self-managed superannuation fund specialist adviser

There are practical advantages to improving consistency in how interdisciplinary collaborative practitioners are titled. The National Alternative Dispute Resolution Advisory Council (NADRAC) has argued that consistent terminology serves four purposes:[79]

(i) It helps participants in dispute management processes and professionals who refer clients to develop an accurate perception of processes.

(ii) It helps Courts and other authorities make better decisions when referring or mandating dispute management methods for particular disputes.

(iii) It helps professionals 'develop consistent and comparable standards',[80] and provides clarity in interpreting dispute management terms in contracts.

(iv) It helps researchers and policy-makers, by providing a 'basis for policy and programme development, data collection and evaluation'.[81]

---

77 Melca does not provide a public directory of collaborative professionals, instead maintaining a central point of contact. Terminology is instead inferred from public marketing and informative materials: Melca <http://melca.com.au>, Melca 'Family is Family' (big picture storytelling, 2019) (documentary); Melca 'Breaking Up Without the Earthquake: Preserving Your Health, Your Wealth and Your Family' (brochure).

78 Collaborative Professionals WA (2020) <http://collaborativeprofessionallswa.com.au>: appears to allow members to describe professional roles in their own terms, leading to greater variability.

79 National Alternative Dispute Resolution Advisory Council 'Dispute Resolution Terms' (2003) <http://ag,gov.au> 1.

80 Ibid.

81 Ibid: These purposes must balance against the need to 'recognise the diversity, flexibility, and dynamism of dispute resolution terms.'

A consistent national approach to collaborative practice terminology would therefore assist clients in making an informed choice about collaborative practice, and would support analysis, and decision making.

For the purpose of interstate comparison, the descriptions in Table 2 have been mapped to the general categories used by the IACP.[82] Tabled terms reflect those used to describe members in the public directory because this is the resource most likely to be relied upon by parties making initial contact with a collaborative professional. Categorising professionals in this way permits some comparison of the membership of collaborative practice organisations. While such comparisons are not truly like-for-like, this analysis can still identify some general trends.[83]As shown in Table 3, in all associations, the majority of members are lawyers. The weighted average proportion of lawyers was 76%; implying around three in four members of collaborative practice groups nationally are members of the legal profession. However, there is substantial regional variation; lawyer representation for State level organisations ranged from 57% in Western Australia to 82% in New South Wales, and South Australia.

Table 3: Professional Members Listed by State and Territory Collaborative Practice Associations as at 14 February 2020

	Legal	Mental Health Professional	Financial Professional	Total members	% of lawyer members[84]
ACT[85]	20	*	*	20	na
NSW[86]	102	14	8	124	82%
QLD[87]	89	26	25	123	73%
VIC[88]	25	6	4	35	71%
SA[89]	18	1	3	22	82%

82 IACP (n 73).

83 Because the conditions and nature of membership differ between organisations, comparisons are imprecise, particularly between organisations that do, and do not, allow members to list multiple professions.

84 Lawyers as a proportion of total membership, this includes lawyers who also list a second profession e.g., lawyer/mediator.

85 Collaborative Practice Canberra (14 February 2020) 'Find a Lawyer': Membership is open to other professions, however, only lawyer members are listed. According to a CPC booklet, other collaborative professionals may be involved including 'accountants or financial advisors', 'psychologists', 'real estate agents' and 'other collaboratively trained professionals': Collaborative Practice Canberra, 'Collaborative Law: A Better Way to Settle Your Family Law Matter' (2013).

86 Collaborative Professionals (NSW) Inc, 'Find a Practitioner' (14 February 2020).

87 Queensland Association of Collaborative Practitioners, 'Find a Member' (14 February 2020).

88 Victorian Association of Collaborative Professionals, 'Find a Collaborative Practitioner' (14 February 2020), Melca does not maintain a public directory of members.

89 Collaborative SA, 'Find a Practitioner' (14 February 2020).

WA[90]	28	9	12	49	57%
Sum	282	56	52	373	76%

*Data not available.

5.3 Australian Collaborative Practice Groups

As in other jurisdictions, collaborative practice groups are active in Australia, seemingly everywhere that there are collaborative practitioners working. Tesler has described practice groups as 'inseparable from the practice of collaborative law'.[91] Collaborative practice, she explains, 'spread[s] not from individual to individual, but from spontaneous practice group to spontaneous practice group'.[92]

The International Association of Collaborative Professionals (IACP) maintains a list of their members' collaborative practice groups. IACP membership is held by only a minority of collaborative professionals in Australia (n=80), so this list may be incomplete. The IACP lists a single collaborative practice group each in the Australian Capital Territory and Western Australia, five groups in New South Wales, five in Queensland, two in South Australia, and two in Victoria.[93] These practice group listings are consistent with the view that collaborative practice groups are integral to the use of collaborative practice within a jurisdiction. Certainly, the group listings generally align with the areas where the collaborative process is known to be in use. While each Australian state or territory contained at least one IACP member, no groups were listed in the Northern Territory or Tasmania.

Collaborative practice group listings referred to a geographic location, with the exception of Pearson Emerson and Meyer, which appears to be linked to its namesake firm. Some groups, such as Divorce Solutions, or Western Sydney Family Collaborative Lawyers are expressly focused on family law. However even where this is not the case, such a focus is likely to be reflected in the fields of expertise of most members. If the collaborative process achieves greater use in areas of law other than family law, there is an open question as to whether there is a need for practice groups specialised in these areas or if existing groups can expand to accommodate the diverse range of collaborative practitioners.

---

90 Collaborative Professionals WA, 'Find a Collaborative Professional' (14 February 2020).

91 Pauline H Tesler, 'Goodbye Homoeconomicus: Cognitive Dissonance, Brain Science, and Highly Effective Collaborative Practice' (2009) 38(2) *Hofstra Law Review* 635, 656; Collins and Scott (n 4).

92 Tesler (n 91).

93 International Academy of Collaborative Professionals, 'Collaborative Practice Groups' (14 February 2020) <http://collaborativepractice.com/collaborative-practice-groups?country=1013>.

Table 4: Australian Collaborative Practice Groups Listed by the International Association of Collaborative Professionals as at 14 February 2020

	IACP Members[94]	**Collaborative practice groups**
ACT	2	Collaborative Practice Canberra, Canberra
NSW	39	Central Sydney Collaborative Forum, Darlinghurst Collaborative Professionals Northern Sydney, Milsons Point Western Sydney Collaborative Family Lawyers, Sydney Collaborative Professionals (NSW) Inc, Kogarah Pearson Emerson Meyer Collaborative Practice Group, Sydney
NT	1	No practice group
QLD	15	Gold Coast Collaborative Practice Group, Surfers Paradise Divorce Solutions, Noosa Heads North Brisbane Collaborative Practice Group, Albion Queensland Association of Collaborative Practitioners, Southport Toowoomba and Surrounds Collaborative Practice Group, Toowoomba[95]
VIC	11	Collaborative Professionals Victoria
SA	9	Adelaide Collaborative Practice Group, Adelaide Resolution SA, Adelaide
TAS	1	No practice group
WA	2	Collaborative Professionals WA, Subiaco
Total	80	14 groups

A review of the literature did not uncover any substantive quantitative research into Australian collaborative practice groups. Qualitative research into practice groups in Australia has provided insight into the 'essential' role that they play in supporting the development of collaborative practice. Collins and Scott's research found that practice groups were essential to maintaining interest in collaborative practice and in supporting ongoing learning and trust relationships.[96] One focus group participant observed:

> I think community after community, and not just in Australia, but around the world has experienced a similar evolution and that is, if you can't get the practice group right, there is no collaborative community. Sometimes they get off to a great start, sometimes they die and when they die, so does the community. So, it is all about the practice group.[97]

The literature indicates a strong connection between the success of collaborative practice and the presence of active collaborative practice groups to support them. If collaborative practice is to achieve a foothold in other areas of law, it will likely require the support of collaborative practice groups. Collaborative practice groups are well positioned to maintain commitment to

---

94 Including solicitors and other collaborative professionals but omitting student or academic memberships.

95 Personal communication indicates that the Toowoomba and Surrounds Collaborative Practice Group is effectively no longer operating.

96 Collins and Scott (n 4) 13-4.

97 Ibid 18.

the process, establish and enforce group norms, and support ongoing training for their membership.

There is an open question as to whether collaborative lawyers in new fields are best served by integrating with existing practice groups and institutions (which are presently family-focussed), or by the development of new structures that are specialised in particular types of dispute. On the one hand, a strong link between new and existing users of collaborative practice ensures that norms, experiences and expectations are passed on, helping to maintain the integrity of the collaborative process. On the other, an expansion into new areas of law may strike some family practitioners as premature, especially where they are still developing their collaborative business.

5.4 Collaborative Practice and Australian Legal Institutions

Australian legal institutions have generally been receptive to collaborative practice. In December 2006, the Family Law Council provided the Attorney-General with a report on 'Collaborative Practice in Family Law'.[98] The Council was supportive of collaborative practice, in which it saw 'the potential to deliver ongoing benefits to the general public and Australian professionals in the family law area…'[99] Since this time however, few steps have been taken to integrate the collaborative process with statutory law. No Australian jurisdiction has followed the US example made by the *Uniform Collaborative Law Act.* Collaborative practice negotiations are treated as any other lawyer-assisted negotiation, and collaborative practice agreements as any other contract. In 2019, the Australian Law Reform Commission noted several submissions that recommended direct statutory integration of collaborative practice but, based on the information available, was 'not persuaded that collaborative practice should be treated differently from ordinary negotiations.'[100]

Law societies in several Australian jurisdictions include collaborative practice sections. For example, the New South Wales law society includes collaborative practice among the process option described on its public website. Collaborative practice is described as 'the process of choice when neither litigation nor mediation quite fits the bill'.[101] The

---

98 Family Law Council (Australia), 'Collaborative Practice in Family Law: A Report the Attorney General' (2006) <http://ag.gov.au>.

99 Ibid 9.

100 Australian Law Reform Commission, 'Family Law for the Future—An Inquiry into the Family Law System' (ALRC Report 135, March 2019) 257.

101 Law Society of New South Wales 'Collaborative Law' (2019) <https://www.lawsociety.com.au/advocacy-and-resources/publications-and-resources/my-practice-area/collaborative-law>; see also

recognition of collaborative practice by law associations helps to normalise the process for both clients and lawyers, and therefore reduces the cultural resistance to its use.

The approach of Australian courts to collaborative practice remains largely uncharted. Australian Superior Courts have not had occasion to interpret the standards set by the participation agreement in a collaborative matter.[102] The lack of case law in this area speaks to the success of the collaborative process in keeping parties out of court. However, it does leave some uncertainty as to how such obligations might be enforced. Outside of the collaborative process, courts have sometimes expressed concern about agreements that may disqualify counsel. In *Georges (Liquidator), in the matter of Sonray Capital Markets Pty Ltd (in liq)*,[103] Finkelstein J questioned a clause within a mediation agreement that would require Sonray and its lawyers 'not to make use of any information obtained during the mediation process.'[104] The Judge noted that the clause would burden the party and its lawyers' freedom to act, including conceivably the possibility that information revealed in the mediation process might form the basis for restraining them from commencing litigation or continuing to be represented by their lawyers. He stated that 'no rational person with equal bargaining power would agree to a provision which could have that effect.'[105] The collaborative process may, however, be distinguished from other agreements that might disqualify counsel because disqualification in the collaborative process is supported by a clear and consistent rationale. There is no doubt that the parties to a properly constituted collaborative matter intend to disqualify their lawyers from litigation, and negotiating theory, such as the prisoner's dilemma, provides an explanation for why they would choose this path.

The collaborative process has sometimes received passing mention in Australian matters that have ended in litigation after attempts to manage the dispute through collaborative practice.[106] In such cases, the court has acknowledged the process straightforwardly, without any suggestion that a settlement agreement, reached through a collaborative process, would be treated differently to any other. In at least one case it has

---

Queensland Law Society 'Alternative Dispute Resolution' (2019) <https://www.qls.com.au/For_the_community/Legal_brochures/Alternative_dispute_ resolution>.

102 Tania Sourdin, *Alternative Dispute Resolution* (Lawbook co, 5th Ed, 2016) 132.

103 *Georges (Liquidator) in the matter of Sonray Capital Markets Pty Ltd (in liq*) [2010] FCA 1371.

104 Ibid [23].

105 Ibid [24].

106 See, e.g., *Hillam & Barret* [2019] FamCA 193; *Curtain v Curtain* [2016] FamCa 577; *Fairleigh & Wills and Ors* [2011] FamCA 431.

received endorsement. Cronin J described the efforts of the parents to resolve their matter through a collaborative process as 'commendable'.[107]

Noting the lack of Australian case law on collaborative practice, jurisdictions in which the process is more developed may serve to predict the types of issues that may emerge. In North American jurisdictions, the court has on several occasions been called upon to enforce the disqualification of a lawyer from a (purported) collaborative process. The Canadian matter *Ponder v Therrien*[108] involved a petition in divorce proceedings following an unsuccessful 'collaborative' process. The petitioner sought an order to have the respondent's lawyer withdrawn on the basis of a collaborative process agreement. The parties disagreed as to the terms which had been agreed. In negotiating the choice of process, two versions of the 'collaborative law' participation agreement were contemplated. The petitioner maintained that the parties had agreed to the true collaborative law version, which disqualified lawyers from representation in any litigation between the parties. The respondent claimed that the parties had settled on a version of 'collaborative law' that did not require withdrawal.[109] It was ultimately unnecessary to decide the petition, as the respondent agreed to be represented by a different lawyer.

Contention in relation to the effect of participation agreements has also arisen in US appellate jurisdictions. In *Mabray,*[110] what purported to be a 'collaborative law contract' was held to be only cooperative, and therefore did not require lawyers to step down. In *Mandell v Mandell,*[111] attending an initial four-way meeting without signing the participation agreement was held not to require counsel to step down.

Matters from jurisdictions where collaborative practice is more established indicate the types of issues that may arise in Australian jurisdictions as the process matures. In particular, such matters highlight the need for a clear mutual understanding and unambiguous documentation of the disqualification provision, especially in matters where the parties are considering the collaborative process as an alternative to cooperative practice, or traditional lawyer-assisted negotiations. The development of collaborative practice legislation following

---

107 *Fairleigh & Wills and Ors* [2011] FamCA 431 [31].

108 *Ponder v Therrien* (2006) KJQB 176.

109 I.e. 'Cooperative practice' within the terminology followed in the thesis; see, e.g., John Lande 'Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin' (2008) 1 *Journal of Dispute Resolution* 203; Marion Korn, 'Fitting the Fuss to the 'Form': The Ethical Controversy Over Collaborative Law Contracts' (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 279, 281.

110 *In Re Mabray* (2010) 366 D.W.3d 16 Tex. App Houston 1st Dist.

111 *Mandell v Mandell* (2010) 36 Misc. Ed 797 Sup. Ct.

the example of several US jurisdictions could help to avoid uncertainty by standardising aspects of the collaborative process.

5.5 Collaborative Practice and Australian Legal Education

The collaborative process has received minimal specific recognition in universities, despite the introduction of dispute management courses into law school curricula.[112] A desk search of the terms 'Collaborative Law' and 'Collaborative Practice'[113] on the '.edu.au' domain revealed two courses expressly focussed on the collaborative process. The University of Technology Sydney has developed a subject titled 'Collaborative Law', which was last offered in 2018.[114] According to the course prospectus, its learning objectives are as follows:

(i) Recognise, reflect upon and respond to the ethical issues likely to arise in the multidisciplinary professional context of the Collaborative Practice process in ways that evidence professional judgment, promote justice and serve the community.
(ii) Identify, compare and assess complex ethical issues that arise in Collaborative Practice and generate appropriate responses to professional problems;
(iii) Identify, research, evaluate and synthesise relevant factual, ethical, legal and policy issues in Collaborative Law;
(iv) Analyse and critique cases and issues from a range of perspectives, including ethical, strategic, creative and legal, when considering Collaborative Practice;
(v) Effectively and persuasively communicate argument and theory both orally and in writing.[115]

Similar objectives and outcomes are listed for 'Collaborative practice', a postgraduate course offered at Monash University.[116] Teaching collaborative practice as an elective is an important step. It contributes to normalising the collaborative process within the legal profession and provides students with early access to an alternative conception of legal professional identity.

---

112 See, Pauline Collins, 'Resistance to the Teaching of ADR in the Legal Academy' (2015) 26 *Australasian Dispute Resolution Journal* 64, 64-6; Rachel Field and James Duffy 'Law Student Psychological Distress, ADR and Sweet-minded, Sweet-eyed Hope' (2012) 23(3) *Australasian Dispute Resolution Journal* 195.

113 The term 'collaborative practice' is popular in a wide variety of contexts which are unrelated to dispute management, so a variety of law related terms were used to refine this latter search.

114 University of Technology Sydney, '79247 Collaborative Law' (2019) *UTS Handbook 2020* (15 January 2020) <http://handbook.uts.edu.au/subjects/details/78247>.

115 Ibid.

116 Monash University 'LAW5410 – Collaborative Practice' *Monash University Handbook* (2020) (15 January 2020) <https://handbook.monash.edu/2020/units/LAW5410>.

In other Australian Universities, collaborative practice is not taught as a dedicated subject. The collaborative process may, however, receive attention in a more general discussion of dispute management options.[117] In Australia, degrees must include prescribed areas accredited for admission to legal practice (colloquially known as the 'Priestly eleven'[118]). 'Alternative dispute resolution' has now been included as a required topic within the civil procedure 'prescribed area of knowledge', meaning that students must receive some exposure to dispute management concepts.[119] Admission rules allow law schools broad discretion as to how topics are covered.[120] Schools may meet the criteria by including dispute management within a Civil Procedure course or similar. McShane casts doubts on the effectiveness of such courses in introducing dispute management concepts: 'the overriding tendency is to privilege the litigious aspects of the discipline.[121] Other Australian universities choose to cover dispute management as a distinct compulsory course.[122]

Regardless of the way dispute management is offered, longer-established processes such as mediation and arbitration are likely to receive more attention in the curriculum than collaborative practice. Yet even where collaborative practice receives limited express mention, dispute management courses have an important role in introducing students to non-adversarial approaches and philosophies. Discussion of topics such as interest-based negotiations provides scaffolding for later study in collaborative practice. In a qualitative study of dispute management teaching in Australian law schools, Douglas found that models of negotiation and mediation that follow the 'integrative bargaining philosophy' formed the 'basis for the majority of ADR courses'.[123] Teaching non-adversarial methods of dispute

---

117 See, e.g., University of Southern Qld School of Law and Justice, 'Legal Conflict Resolution Law 1122' (2019).

118 *Legal Profession Uniform Admission Rules 2015* 'Schedule 1 – Academic Areas of Knowledge.

119 Ibid s 11 (l).

120 Ibid s 2: 'although the topics… are grouped for convenience under the headings of particular areas of knowledge, there is no implication that a topic needs to be taught in a subject covering the area of knowledge in the heading rather than in another suitable subject.'

121 Michael McShane, 'Good Practice Guide (Bachelor of Laws): Appropriate Responses to Legal Issues: ADR' (Australian Learning and Teaching Council, 2013) 26: citing Jean R Sternlight, 'Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia,' (2004-5) 80 *Notre Dame Law Review* 681.

122 See, e.g., National Alternative Dispute Resolution Advisory Council 'Teaching Alternative Dispute Resolution in Australian Law Schools' (Australian Government, 2012).

123 Kathy Douglas, 'The Teaching of Alternative Dispute Resolution in Selected Australian Law Schools: Towards Second Generation Practice and Pedagogy' (PhD Thesis, RMIT University, 2012) 265-6; see also Kathy Douglas, 'The Evolution of Lawyers' Professional Identity: The Contribution of the ADR in Legal Education' (2013) 18(2) *Deakin Law Review* 315, 322-4, Tom Fisher, Judy Gutman and Erika Martens, 'Why Teach Alternative Dispute Resolution to Law Students? Part One: Past and Current Practices and Some Unanswered Questions' (2006) *Legal Education Review* 125.

management has been identified as an important means to develop and foster a non-adversarial culture.[124] If, as has been suggested, this is beneficial,[125] then it is preferable that new lawyers are exposed to less-adversarial perspectives on legal professional identity as early as possible.[126] Furthermore, dispute management should be compulsory, 'not merely as an "add on" but as an integration of a range of dispute resolution theory and skills in order to combat the adversarial culture of much of law teaching.'[127]

The literature has identified that some law schools are impacted by obstacles to the inclusion of dispute management within law degrees.[128] NADRAC suggested that these obstacles fall within two themes: 'insufficient recognition' of the value of teaching dispute management within law degrees,[129] and insufficient resources to support the teaching of dispute management.[130] NADRAC noted that these two concerns are interconnected because the value perceived to result from teaching dispute management will affect the willingness of law schools to devote resources to it.[131] Collins argues that resistance to the teaching of dispute management is centred in fears of the uncertainty that may accompany disruption to the status quo.[132] The academy has the capacity to provide support for collaborative practice by making future lawyers aware of its possibilities and applications, both within and beyond its present main applications. At a minimum, undergraduate degrees should make students aware of the option of collaborative practice and provide them with an opportunity to critically reflect on the role of the lawyer.

---

124 See, e.g., Kathy Douglas, 'The Role of ADR in Developing Lawyers' Practice: Lessons from Australian Legal Education' (2015) 22(1) *International Journal of The Legal Profession* 71, 84.

125 Ibid, Pauline Collins, 'Student Reflections on the Benefits of Studying ADR to Provide Experience of Non-Adversarial Practice' (2012) *Australasian Dispute Resolution Journal* 204.

126 See, e.g., Leonard Riskin and James Westbrook, 'Integrating Dispute Resolution into Standard First Year Courses: The Missouri Plan' (1989) 39 *Journal of Legal Education* 509.

127 Susan Douglas and Kathy Douglas, 'Re-imagining Legal Education: Mediation and the Concept of Neutrality' (2014) *Journal of the Australasian Law Teachers Association* 1; see also James Duffy and Rachel Field, 'Why ADR Must be a Mandatory Subject in the Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-Believer' (2014) 25(1) *Australasian Dispute Resolution Journal* 9.

128 There is extensive literature exploring the challenges which attend the teaching of dispute management in Australian law schools, a comprehensive exploration of this topic would require a separate monograph, see, e.g., Tania Sourdin, 'Not Teaching ADR in Law Schools? Implications for Law Students, Clients and the ADR Field' (2012) 23 *Australasian Dispute Resolution Journal* 148; Kathy Douglas, 'The Teaching of ADR in Law Schools: Promoting Non-Adversarial Practice in Law' (2011) 22 *Australasian Dispute Resolution Journal* 49, Pauline Collins, 'Where Have all the Flowers Gone? The Future for Academics' in Stewart Riddle, Marcus Harmes, Patrick Danaher (eds), *Producing Pleasure in the Contemporary University* (Sense, 2017) 121-35, Collins (n 112).

129 NADRAC (n 122) 13.

130 Ibid.

131 Ibid.

132 Collins (n 112) 70-3.

5.6 Collaborative Practice Ethics in Australia

Collaborative practice represents a new way of doing things. It may not be surprising therefore that the collaborative process, and particularly the disqualification provision, has been viewed with suspicion by some traditional practitioners.[133] The most serious challenge to collaborative practice in any jurisdiction occurred in 2007 in the United States. The Colorado Bar Association Ethics Committee found that the participation agreement creates an 'impermissible and unwaivable conflict of interest for lawyers'[134] by creating obligations between the lawyer and the other party to the dispute. However, the American Bar Association formed a different opinion, finding that the collaborative process was, in effect, a novel form of limited purpose representation.[135] As with other forms of limited retainer, collaborative practice was ethical so long as the client is provided with appropriate advice and is able to give their informed consent. [136]

Collaborative practice in Australia has not been subject to the same degree of controversy. The 2006 Family Law Council report found that the 'Australia's legislative regime and court processes do not present any significant impediments to collaborative practice'.[137] In 2008, the Queensland Law Society (QLS) issued an ethical guideline supporting the collaborative process.[138] The Law Society's core concern was that there might be harm to the client's interests as a consequence of mandatory withdrawal if the matter was not resolved through the collaborative process. Its recommendations were focused on

---

133 See, e.g., Subramaniam Shankar 'Farewell Justice, Hello Collaborative Law'(12 October 2007) *Christian Science Monitor* 222: editorial comment in response to David A. Hoffman 'A Healing Approach to the Law: Collaborative Law Doesn't Have to be an Oxymoron' (9 October 2007) *Christian Science Monitor* 9; Zalusky Berg, Nancy, 'Drinking the Kool-Aid' (2009) in Wray, Linda and Zalusky Berg, Nancy, 'Point Counter-Point: Collaborative & Cooperative Law', 17 November 2010 Minnesota Bar Association: presented as an informal debate between the authors.

134 Colorado Bar Association Ethics Committee, 'Formal Opinion 115: Ethical Considerations in the Collaborative and Cooperative Law Contexts' (2007); for discussion of the Colorado and ABA opinions see, e.g., Scott R Peppet, 'The Ethics of Collaborative Law' (2008) *Journal of Dispute Resolution* 131, 132; 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, 248; Pauline Tesler, '*Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation'* (American Bar Association, 3rd ed, 2017) 177.

135 American Bar Association Committee on Ethics and Professional Responsibility, 'Formal Opinion 07-477' (2007).

136 Ibid.

137 Family Law Council (Australia), 'Collaborative Practice in Family Law: A Report to the Attorney General' (2006) 41: the family law council considered, inter alia, claims that the collaborative process creates a conflict of interest, power imbalance, and the risk that clients might agree to the process without fully appreciating its limitations.

138 Queensland Law Society, 'Guideline on Collaborative Law' (2008): endorsed by the QLS Council, 31 January 2008.

ensuring informed consent and awareness of alternatives. QLS outlines a list of matters that clients must be fully informed of:

i. the limitations on representation created by the participation agreement, including that the practitioner will need to withdraw from representing the client if the collaborative process 'fails' and the matter is litigated;
ii. the possibility of additional costs to be incurred if it is necessary to locate new legal counsel if collaborative lawyers are required to withdraw; and
iii. the availability of other forms of 'non-court dispute resolution, including mediation[139]

Practitioners are advised to obtain written consent that includes a recognition that the client has been advised of these matters, and consents to the collaborative process.[140]

The QLS statement provides Queensland lawyers with an assurance that collaboration is considered a valid and ethical form of practice. However, it is in part redundant given the general ethical obligation to advise clients of the alternatives to litigation available to them. For example, the *Australian Solicitor's Conduct Rules* provide that:

> A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the matter.[141]

The QLS guideline also misses the opportunity to note the reciprocal obligation of lawyers to inform clients of the availability of collaborative practice to manage their dispute. As collaborative practice grows and becomes 'reasonably available' for other types of dispute, so too does the expectation that clients must be informed of it as an option. Acceptance of the collaborative process by organisations has a strong legitimising effect on the collaborative process but has not fully quelled criticism. Wolski argues that the process raises new ethical issues for practitioners.[142] Identified issues include: (i) lack of clarity in relation to the

---

139 Ibid.

140 Ibid.

141 *Australian Solicitor's Conduct Rules 2015* r 7.2: equivalent provisions are in force in Australian jurisdictions which have not adopted the uniform rules; there is a concurrent information requirement for matters arising under the *Family Law Act 1975* (Cth) s 12B – s 12E, however, the act requires only information which relates to arbitration, family counsellors, and family dispute resolution practitioners to be provided, no mention is made of collaborative practice.

142 Bobette Wolski, 'Collaborative Law: An (Un)ethical Process for Lawyers?' 20 (2017) *Legal Ethics* 224.

obligations created by the contracts that support the collaborative process[143]; (ii) potential conflicts of interest between client and lawyer; (iii) the potential use of a forced termination to exert settlement pressure on the other side; (iv) the potential for lawyers to exert pressure to accept an unbalanced settlement on their own client; (v) and issues in relation to informed consent.[144]

In summary, collaborative practice has gained acceptance as an ethical practice in the Australian legal environment. However, despite the endorsement of the process by law societies and the Family Law Council, there are still pockets of criticism of collaborative practice, and in particular of the disqualification provision. The collaborative process has survived challenges to the ethicalness of its use in family law, and it is therefore unlikely to be halted in Australia from development into new fields on ethical grounds.

5.7 Regulation of Collaborative Practice

In Australia, collaborative practice remains largely unregulated. Since 2011, lawyers have had access to draft guidelines developed by the Family Law Council, but these are not binding. Limited self-regulation occurs where professionals participate in voluntary organisations. However, outside of these, there are no compulsory requirements for a lawyer to hold themselves out as a collaborative practitioner, or to hold out a process as collaborative practice. Kha argues that the lack of a legislative framework has impaired the growth of collaborative practice in Australian jurisdictions.[145]

If it is accepted that legislation is necessary to achieve consistency in collaborative practice, the question arises as to what is required for a method to be held out as a collaborative process? Is there a need for strong prescriptivism to ensure greater consistency of approach? Conversely, would it be more important that collaborative process be a broad church to foster creativity and variation? Webb and Ousky appear to tend towards the latter, arguing that pluralism should be accommodated in our understanding of the collaborative process:

> For collaborative professionals who have found success with particular methods that they use in their own practices, it is tempting to promote a certain methodology as the 'one true way.' If this urge is not resisted, we fear that factions will develop among collaborative professionals

143 Including both the participation agreement and limited purpose representation agreements.

144 Ibid.

145 Kha (n 1) 183.

and this great engine for creating new peacemaking tools be limited.[146]

This perspective supports a 'thin'[147] definition, where the only inviolable requirement is that a collaborative process must disqualify lawyers from representing parties in litigation. Tesler offers similar advice in her seminal work 'Collaborative Law', describing mandatory disqualification as the 'irreducible minimum condition for calling what you do collaborative law.' [148] All else, Tesler says, is 'artistry'[149] and free to be accepted, rejected or adapted by individual practitioners.

There are arguments for and against a minimalist approach to regulation. As Webb and Ousky note, the main advantage of the 'one rule' is that the process remains flexible. This is an important precondition for innovation and expansion in collaborative practice. It would not be surprising, for example, if commercial practitioners found that what works in collaborative processes in a divorce context needs some adaptation when restructuring a business or resolving an employment dispute. A prescriptive definition based on what works well in family matters might therefore close off avenues that could prove viable or necessary in other matters, such as the practice of limited issue arbitration.

The disadvantage of minimal regulation is that the core concept of collaborative practice may be diluted by diverse interpretations. A definition that focuses solely on disqualification would not, for example, require that they follow an interest-based approach—widely considered essential to an effective collaborative process.[150]

5.8 Expansion and Growth

The process has grown in family law and has taken initial steps in other areas such as succession. Australian collaborative practice associations at the state and national levels focus on the family law area, which reflects the overwhelming majority of their membership. However, they do make mention of the capacity of collaborative practice to address other types of disputes. For example, the Australian Association of Collaborative Practitioners (AACP) includes a commercial law section on its website:

---

146 Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49 *Family Court Review* 213, 217.

147 A term borrowed from discourse on the definition of political concepts such as 'the rule of law', and 'democracy'; see, e.g., Tom Bingham, *The Rule of Law* (Penguin, 2010).

148 Tesler (n 134) 36; Nancy Cameron et al, *Collaborative Practice: Deepening the Dialogue* (Continuing Legal Education Society of British Columbia, 2014) 13: 'The defining feature… irrespective of the model'.

149 Ibid.

150 For further discussion of regulation, see Chapter 8, 8.5(d).

> Commercial law touches many parts of Australian society, such as commercial contracts, partnership agreements, workplace relations, building and construction, planning and environment, and wills and estates. Collaborative practice can be applied to each of these in a way that benefits all parties.[151]

As practitioners from other fields make use of the collaborative process, it is important that they have strong linkages to the existing collaborative practice community in order to maintain the principles and norms of collaborative practice.

5.9 Chapter Summary

The literature suggests that the import of collaborative practice has been a success as regards family law. The process has been adopted within the Australian legal system in much the same form as it has been used in North America, including, in most regions, adherence to the concept of disqualification of solicitors and their firms if a matter proceeds to litigation. Interdisciplinary practice is widely used in Australia, usually in a single coach, referral model. Professional literature normally refers to the use of a financial neutral, a child specialist where relevant, and a professional focused on facilitating communication, such as a 'collaborative or communication coach', 'psychologist', or 'family consultant'.

The Australian collaborative practice movement maintains a grassroots self-organized structure. Collaborative practitioners themselves have formed state and national associations, and many smaller informal practice groups. Despite early efforts at a national approach through the NCCL, leadership in the collaborative process has been focused at the state level, and there are differences in what is common practice between states, especially as regards interdisciplinary practice. The development of the Australian Association of Collaborative Professionals has recently emerged as a new national collaborative practice organisation and has the potential to facilitate a new level of conversation between State bodies. Work between state collaborative practice associations, especially with regard to research, is important as a means to build understanding and consensus around which collaborative practice models are best suited to Australian conditions, and why.

Litigation has been identified to be at the core of the problem that collaborative practice aims to address. Moving a still largely adversarial trained legal profession to take up non-adversarial ways of practice is a long-term project. The next chapter now turns to exploration of this phenomenon. It investigates the nature of litigation in the adversarial legal

---

[151] Australian Association of Collaborative Professionals (2020) <http://collaborativeaustralia.com.au>.

system to better understand potential resistance to advances in collaborative practice, and how collaborative practice may advance the reshaping of the culture and conventions of legal practice.

Chapter 6. Contextualising Collaborative Practice

This chapter seeks to further the research by contextualising the collaborative process among the ever-developing spectrum of approaches to legal disputes. Civil justice systems in common law countries have been going through a transformation over several decades. The chapter follows this transformation. It begins by discussing the traditional adversarial system, and the role of the lawyer as an advocate, both in litigation and in negotiations in the shadow of the court. This is important in relation to the exploratory research on collaborative practice because collaborative practice is, in essence, a counterpoint to traditional legal practice. Therefore, examining traditional legal practice provides an understanding of the problems that collaborative practice aims to overcome. Furthermore, because any new approach will be compared to established processes, traditional legal practice provides the primary standard against which collaborative practice can be benchmarked and judged.

The chapter then considers the evolution of new, more client-centred dispute management processes. Mediation warrants attention here due to its role in leading the way in popularising concepts such as client-centred dispute management and interest-based negotiations. These concepts form much of the theoretical basis for how communication is conducted in collaborative practice.

6.1 Traditional Legal Practice

The founder of the collaborative process, Stu Webb, notes that collaborative practice was devised as a response to 'the negative practices of litigation.'[1] Discontent with traditional legal practice continues to be a key reason that lawyers choose to engage with the process.[2]

---

1 Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49 (2) *Family Court Review* 213, 215; Stu Webb, 'Collaborative Law: A Practitioner's Perspective on its History and Current Practice' (2008) 21 *Journal of the American Academy of Matrimonial Lawyers* 155, 156; Lisa Di Marco, 'Therapeutic Divorce: The Scope and Means of Implementing Collaborative Practice in Australia' (2010) 3 *Queensland Law Student Review* 25, 25.

2 Nancy Cameron et al, *Collaborative Practice: Deepening the Dialogue* (Continuing Legal Education Society of British Columbia, 2014) 10-11; Bobette Wolski, 'Collaborative Law: an (Un)ethical Process for Lawyers' 20 (2017) *Legal Ethics* 224: a further reason for the development of collaborative practice is its capacity to ensure negotiations occur in person with both parties and their lawyers are present during negotiations; Judy Gutman 'Litigation as a Measure of Last Resort: Opportunities and Challenges for Legal Practitioners with the Rise of ADR' 14(1) *Legal Ethics* 1: more broadly dissatisfaction with adjudication and other determinative processes has led to the 'emergence and rapid rise of alternative dispute resolution' (2010); cf Larry R Spain 'Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation can be Ethically Incorporated into the Practice of Law' (2003) 56(1) *Baylor Law Review* 150 Spain argues that the collaborative law movement may have arisen as 'a natural response to the "liti-mediation" culture.

Cameron notes that 'an increasing number of lawyers have become dissatisfied with adversarial practice, particularly in the area of family law.'[3] Similarly, Macfarlane found 'widespread disillusionment among collaborative law lawyers with litigation as a tool for family conflict resolution… the intensity of the revulsion expressed towards litigation is sometimes startling.'[4]

The antipathy that collaborative lawyers have towards traditional practice is thus directed not towards traditional practitioners so much as towards the impact on clients and lawyers that litigation brings. Collaborative practitioners are frustrated by the cost, adversarialism, and delays that litigation brings, and by the influence that the availability of litigation has on negotiations that are intended to manage a matter amicably. The next section investigates the literature further to understand why litigation has prompted such a visceral response from the collaborative practice community.

6.2 Litigation

Litigation is widely familiar and deeply ingrained within the culture of both the legal profession and society. However, despite this familiarity, it is appropriate to begin by reviewing its treatment in the literature on dispute management theory. This is relevant when addressing the participants' responses in the empirical component of the research because litigation has been identified as the root cause of many of the problems that the collaborative process is intended to address.

Boulle and Field describe litigation as 'the sets of procedures conducted by and through Courts and tribunals, commencing with the initiation of legal proceedings and culminating in a hearing and judicial or tribunal determination.'[5] Litigation is considered a determinative dispute resolution method because it involves an authoritative third party who is empowered to make a binding decision.[6] In this sense, litigation is categorised as being one step above arbitration,[7] a process where parties agree to accept the judgement of a third party in a private process.[8]

---

3 Cameron et al (n 2).

4 Julie Macfarlane, 'The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases' (Department of Justice, Canada 2005) 5-6.

5 Laurence Boulle and Rachel Field, *Australian Dispute Resolution Law and Practice* (LexisNexis Butterworths, 1st ed, 2017) 389.

6 Ibid 51.

7 Tania Sourdin, *Alternative Dispute Resolution* (Lawbook co, 5th Ed, 2016) 204.

8 National Alternative Dispute Resolution Advisory Council 'Dispute Resolution Terms' (2003) 4 <http://ag.gov.au>.

However, litigation is distinct in that it takes place in a public court hearing under government authority, rather than by consent or prior agreement between the parties. The trial is administrated by the judicial branch of government, occurs in public, and is backed by the coercive force of the state.[9] Consequently, litigation performs a public role— even in the resolution of private disputes. The public nature of courts ensures justice is *seen to be done*. In other words, the public trial serves as a demonstration that all are treated equally by the law and provides an example of the standards to which society is held to account. As Spiegelman CJ (extracurially) notes:

> A court is not simply a publicly funded dispute resolution centre. The enforcement of legal rights and obligations, the articulation and development of the law, the resolution of private disputes by a public affirmation of who is right and who is wrong, the denunciation of conduct in both criminal and civil trials, the deterrence of conduct by a public process with public outcomes… constitute, collectively, a core function of government… The judgements of courts are part of a broader public discourse by which a society and polity affirms its core values, applies them and adapts them to changing circumstances.[10]

Thus, the fact that the court system comprises one of the three key arms of Government gives it a particular relevance.

The 'pre-eminence'[11] of the Court System is further reflected in, and reinforced by, the extensive portrayal of litigation in literature and popular culture. Courtrooms provide the settings for a wide range of books, television programs and films.[12] Barristers and trial lawyers (especially flawed ones) are often the subject of detailed character studies.[13] Even when portrayed outside a trial setting, dramatised lawyers will often behave in a manner that emphasises rights-based legal positions, aggression and conflict.[14]

---

9 See, e.g., Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis Butterworths, 6th ed, 2019) 159.

10 James Spiegelman CJ, 'Judicial accountability and performance indicators' (Speech, 10 May 2001, 1701 Conference: The 300th Anniversary of the Act of Settlement); see also Owen M Fiss 'Against Settlement' 93 (1984) 93 *Yale Law Journal* 1073-90.

11 Susan Blake, Julie Browne & Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (Oxford, 4th ed, 2011) 4 [1.03].

12 See, e.g., Charles Dickens, *Bleak House* (1853); Harper Lee, *To Kill a Mockingbird* (JB Lippincott & Co., 1960): adapted for film in 1962 by Brentwood Productions and Pakula-Mulligan, and for Broadway theatre in 2018 by Aaron Sorkin, *And Justice for All* (Colombia Pictures, 1979).

13 See, e.g., Richard Beasley 'Muse: Rake ABC Television' (2010) *Bar News: The Journal of the NSW Bar Association* (Winter 2010) 115-16; Michael Connelly, *The Lincoln Lawyer* (Little, 2005): adapted for film in 2012 by Lionsgate and Lakeshore Entertainment.

14 Carrie Menkel-Meadow, 'Legal Negotiation in Popular Culture: What Are We Bargaining for?' (2005) *Law and Popular Culture* 583: argues persuasively that there is a need to explore the diversity of legal

It may seem curious that litigation retains this central position in the public imagination when litigation is responsible for the management of only a fraction of disputes.[15] As Boulle and Field note:

> Most disputes are not taken to lawyers, most matters that are referred to lawyers do not proceed to litigation, and most cases in which litigation is commenced do not result in hearings and judgements. However, while law and legal proceedings are atypical dispute resolution phenomena in qualitative terms, litigation retains a dominant normative status in domestic dispute resolution.[16]

This apparent contradiction may be resolved by considering the influence that the availability of litigation has on parties' efforts to manage the matter consensually. There are three main ways that settlement negotiations remain 'entwined' with litigation. First, lawyers often contextualise their advice with respect to settlements against what might be achieved in a full trial. The predicted outcome of litigation is regarded as significant throughout negotiations, both as a focal point— a 'coordinating concept which may be followed by mutual assent without necessarily requiring communication between parties,[17] and as a standard against which parties may assess the normative quality of outcomes. A 'fair' result in this way of thinking is considered to be one that looks like a potential judicial determination. Thus, the outcome of litigation takes the place of subjective notions of justice or morality. Murphy J notes that 'in a secular and diverse political context— our context— law may be the only agreed upon "authority" for a heterogeneous community.'[18]

Second, communication with the other side is carefully managed to present the impression of a strong case should the matter proceed to trial. Each side aims to convince the other that the law is on their side, or at least that they are willing and able to engage in protracted litigation to argue the point.

---

professional approaches in popular media, especially, there is a need to portray the use of interest-based methods; see also Martin L Karp, 'One Bar Association's Odyssey' (2018) 57(2) *Judge's Journal* 24, 25.

15 Wayne Martin CJ, 'Managing Change in the Justice System' (Speech, 14 September 2012, 18th Association Internationale des Jeunes Avocats Oration).

16 Boulle and Field (n 5) 390 [10.3]; Tania Sourdin, 'Civil Dispute Resolution Obligations: What is Reasonable?' (2012) 37 *University of New South Wales Law Journal* 894.

17 Thomas Schelling, *The Strategy of Conflict* (Harvard University Press, 1960).

18 Ronalda Murphy, 'Is the Turn Toward Collaborative Law a Turn Away from Justice?' (2004) 42(3) *Family Court Review* 460, 462.

Third, settlement negotiations may be misused as an opportunity to gather the information that can be used to pursue a partisan advantage in litigation.[19] Negotiation in the environment that is influenced by litigation has been characterised as 'bargaining in the shadow of the law' or as 'litigotiation', an amalgam of 'litigation' and 'negotiation'.[20]

6.3 The Adversarial System

Litigation in countries that follow the common law tradition is conducted as an adversarial process.[21] When used as a legal term of art, 'adversarial' means that parties are responsible for presenting evidence in court in an opposing fashion, either through legal counsel or as a self-represented litigant. The Encyclopaedic Australian Legal Dictionary, for example, defines adversarial as 'a mode of dispute resolution in which the parties present their competing claims and evidence, usually through legal representatives, before an impartial and disinterested third party with the power to impose an authoritative determination.'[22]

In the adversarial system of trial, the parties (or their counsel) present two opposing accounts of the facts and law. Proceedings are partisan debates, where arguments are made to further one's own account or rebut another's. The adversarial system stands in contrast to inquisitorial systems where the matter is investigated by a professional judiciary in an inquiry in which the judge asks many questions. Lord Denning provides a seminal description of the rationale and function of the adversarial system in *Jones v National Coal Board*:[23]

> In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question 'How's that?' His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon L.C. who said in a notable passage that 'truth is best discovered by powerful statements on both sides of the question'? And Lord Greene M.R. who explained that justice is best done by a judge who holds the balance

---

19 Olivia Rundle, 'Lawyers' Perspectives on "What is Court-Connected Mediation for?"' (2013) 20(1) *International Journal of the Legal Profession* 33, 50.

20 John Lande, 'Taking Advantage of Opportunities in "Litigotiation"' (2015) 21 *Dispute Resolution Magazine* 40; Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88(5) *Yale Law School* 950-97.

21 See, e.g., Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial: Volume 2, Judgement and Calling to Account* (2006) 223-4.

22 'Adversarial System' *Encyclopaedic Australian Legal Dictionary* (Lexis Advance, 2020).

23 *Jones v National Coal Board* [1957] 2 QB 55.

> between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, 'he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict.'[24]

This description can tell us a great deal about the qualities of the adversarial system. First, it sets out the goal of the adversarial system, to 'find truth',[25] and then to 'do justice according to law'.[26] In the adversarial judicial system is understood in an objective sense.[27] The outcome is reached by the rational application of rules that are said to represent the standards held by society. It then sets out how this goal is to be attained. The truth is said to be discovered by 'the sharp clash of proofs presented by adversaries',[28] rather than by a body or representative independently tasked with pursuing the true facts.

However, the adversarial trial's emphasis on truth has been held by some contemporary jurists as little more than a convenient fiction.[29] It has been argued that the adversarial system is really about managing matters in a manner acceptable to the parties and the public, rather than a search for an elusive objective truth. Sir Anthony Mason notes (extracurially):

> Within the adversarial system…the function of the courts is not to pursue the truth but to decide on the cases presented by the parties. Whether European courts are effective in investigating the truth and actually finding out what is the truth is a vexed question… Although there are those who assert that the European system is not notably successful on this score, it is probably rather more successful in this respect than the adversarial system.[30]

A similar comparison of the adversarial and civil systems and the (then nascent) option of mediation was attributed to the rapporteur at the Fifteenth Conference of the International Bar Association in Vancouver, 1974:

---

24 Ibid: per Denning LJ with reference to Greene MR in *Yuill v Yuill* [1945] All ER 183 and Eldon LC in *Ex Parte Lloyd* [1822], reported as a note in *Ex parte Elsee* (1830) Mont 69, 72.

25 Ibid.

26 Ibid; Kenneth S Klein, 'Truth and Legitimacy (in Courts)' (2016) *Loyola University Chicago Law Journal* 1, 3: there are questions as to whether truth as a philosophical concept may even be defined.

27 Ray Finkelstein, 'The Adversarial System and the Search for Truth' (2011) 37(1) *Monash University Law Review* 135.

28 Stephen Landsman, 'A Brief Survey of the Development of the Adversary System (1983) *Ohio State Law Journal* 713.

29 See, e.g., Finkelstein (n 27) 135, Carrie Menkel-Meadow, 'The Trouble With the Adversarial System in a Postmodern Multicultural World (1996) 38 *William and Mary Law Review* 5, 6.

30 Sir Anthony Mason, 'The Future of Adversarial Justice' (Speech, 17 August 1999, 17th Annual Australian Institute of Judicial Administration Conference); see also Ray Finkelstein (n 27) 135; cf David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988) 92.

> … the following generalisation is offered for discussion: the mediation system is the best means of resolving disputes to the satisfaction of the parties, the inquisitorial system is the best means of finding the truth and the adversary system gives the most impressive display of 'justice being seen to be done.'[31]

If there is reason to doubt that the adversarial trial provides the best means to reveal the truth of a matter, then what else is it about this system that makes it acceptable to parties, or to the general public? The literature provides several explanations as to why the adversarial system has stood the test of time. One such explanation is that the adversarial system has proven acceptable to parties and the public because of its emphasis on procedural fairness. Blake, Browne and Sime explain that the adversarial system of litigation 'ensures that the case for each side is fully presented and effectively challenged'.[32] Since parties are responsible for presenting their own case, they may be assured that their interests are represented within the process, even if the state does not approve of their character or actions. In modern times, the court system provides a degree of protection for litigants from minority or disadvantaged positions. Field notes that litigation is open to public scrutiny, which introduces a measure of accountability to 'prevent unjust or inappropriate outcomes for women participants.'[33] Furthermore, the presentation of evidence in a partisan manner provides inherent protection against bias, because even unpopular or systematically disadvantaged parties can be assured that their position will be aired and considered.[34]

Another possible reason for the continued acceptance of adversarial trials is that they offer a form of agency to the parties. In principle, parties can choose how to present their case.[35] This freedom is consistent with Western libertarian and individualist philosophies because it vests control of the matter in the parties rather than the state. The adversarial system of litigation has even been argued to sublimate the urge for violent reprisal against the

---

31 Peter Connolly, 'By Good Disputing Shall the Law be Well Known' (1975) 49 *Australian Law Journal* (1975): the rapporteur does however advise caution on reaching a definitive conclusion due to cultural differences between countries; see also Peter Connolly, 'The Adversary System— Is It Any Longer Appropriate' (1975) 49 *Australian Law Journal* 439, Ian Morley, *The Devil's Advocate: A Short Polemic on How to be Seriously Good in Court* (Sweet & Maxwell, 2nd ed, 2009).

32 Blake, Browne, and Sime (n 11) 7.

33 Rachel Field, 'Using the Feminist Critique of Mediation to Explore "The Good, The Bad, and The Ugly" Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia' (2006) 20(5) *Australian Journal of Family Law* 44; but see Wanda Wiegers, Michaela Keet, 'Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities' (2008) 46 *Osgoode Hall Law Journal* 733: 'many judges… remain insensitive to the impact of systemic inequalities and to the host of process-based shortcomings that plague female litigants'.

34 See, e.g., Australian Law Reform Commission, 'Review of the Federal Justice System' (1999) 102-3.

35 Ibid.

other party. Nettle J (extracurially) has endorsed Jolowicz's view that the adversarial trial may be attractive to litigants as a socially acceptable means to achieve retribution:

> If parties to a dispute are to be persuaded to submit to the non-violent dispute settlement process of a court, it is not reasonable to suppose such a process will prove the more acceptable the more it is constructed so as to allow each party to fight his own corner so that, in effect, the court becomes a non-violent substitute for the duelling ground?[36]

Whether retribution achieved through litigation is as cathartic as disputants envision is a deeper question. In the aftermath of World War II, George Orwell witnessed the reprisals of past victims against fascist forces. His conclusion was that revenge was only truly enjoyed in anticipation. He wrote: 'revenge is an act which you want to commit when you are powerless, and because you are powerless, as soon as the sense of impotence is removed, the desire evaporates also.'[37] In a 2016 review of victim's roles in the criminal justice system, the Victorian Law Reform Commission noted that victims were rarely interested in retribution.[38] Their interest in the justice system was instead centred on 'justice, healing, offender accountability, public acknowledgement'[39] or to 'protect themselves and others.'[40]

6.4 Critical Views of the Adversarial Justice System

The search for a solution necessarily begins with identifying a problem. The early impetus for the collaborative process, and for innovation in dispute management systems more broadly, was a perception of widespread dissatisfaction with litigation as the primary means of legal dispute management. The Australian Productivity Commission summed up these troubles in a single sentence: 'There are widespread concerns that Australia's civil justice system is too slow, too expensive, and too adversarial'.[41] The Productivity Commission outlines three

---

36 Geoffrey Nettle J, 'Ethics – The Adversarial System and Business Practice' (2005) 10(1) *Deakin Law Review* 67 citing John Jolowicz, 'Adversarial and Inquisitorial Models of Civil Procedure' 52 *International Civil Law Quarterly* 281; Menkel-Meadow considered the duelling metaphor to be equally apt for the negotiations described in older texts: Carrie-Menkel Meadow, *Dispute Processing and Conflict Resolutions* (2003) 47.

37 George Orwell, 'Revenge is Sour' *Tribune* (9 November 1945) in Sonia Orwell and Ian Angus (eds), *The Collected Essays, Journalism and Letters of George Orwell* (Harcourt, Brace and World, 1968); many revered literary works have explored similar themes, see, e.g., Alexandre Dumas, *The Count of Monte Cristo* (1844); Herman Melville, *Moby Dick* (1851); Emily Bronte, *Wuthering Heights* (1847); Ian McEwan, *Atonement* (Jonathan Cape, 2001); Donal Ryan, 'The Squad' in *A Slanting of the Sun* (2015).

38 Victorian Law Reform Commission, 'Victims of Crime in the Criminal Trial Process' (VLRC report 34, August 2016) [3.23].

39 Ibid.

40 Ibid.

41 Australian Government Productivity Commission, 'Access to Justice Arrangements' (2014) 2.

criticism which are commonly made in relation to the traditional adversarial justice system. These issues are now considered in turn.

(a) Too Slow

Justice delayed has commonly been regarded as 'justice denied.'[42] At a minimum, the time it takes to resolve a legal dispute is 'critical'[43] to a litigant's perception of justice being done. In the financial year 2018-2019, the Supreme Court of Queensland reported a twelve-month backlog rate of 26.8% and a twenty-four-month backlog rate of 9.1%.[44] This means that around a quarter of ongoing matters had been active for more than a year, and just under a tenth for more than two years. The average for Australian Supreme Courts is slightly timelier, with a twelve-month backlog rate of 15.8% and a twenty-four-month backlog rate of 3.4%.[45] However, even this still falls short of the benchmark set for most Australian courts, which is no more than 10% of lodgements pending completion after twelve months, and none still pending at twenty-four months.[46]

As an abstract concept, the public is in favour of timely justice, whether in criminal matters or in the management of civil disputes. However, the position is more nuanced for the litigants in a particular matter. The urgency with which a party seeks a judgement is shaped by their circumstances, and what they stand to gain or lose in the final determination. Plaintiffs are likely to wish for a quick outcome. However, for defendants demonstrably in the wrong, the adversarial system of litigation may provide tools to forestall or resist losses.[47] Tactical reasons for delay include retaining the use of a contested asset while the matter is

---

42 See, e.g., Tania Sourdin and Naomi Burstyner, 'Justice Delayed is Justice Denied' (2014) 4(1) *Victoria University Law and Justice Journal* 46-60.

43 Ibid.

44 Catherine Holmes CJ, *Supreme Court of Queensland Annual Report 2018-19* (2019) 28; backlog statistics are based on matters filed and so do not discriminate between matters which are managed by settlement, and those which are fully heard.

45 Australian Productivity Commission, 'Report on Government Services*'* (2020) Table 7A.21 'Backlog Indicator, Civil': Statistics are based on the reporting of individual courts, see, e.g., Catherine Holmes CJ, *Supreme Court of Queensland Annual Report 2018-19* (2019) 28; O'Brien CJ, *District Court of Queensland Annual Report 2018-19*. These statistics are based on matters filed and so do not discriminate between matters which are resolved by settlement, and those which are fully heard.

46 Ibid: 'Courts Interpretive Material' [7.2] 12: The benchmark applies to the Federal Court, district or county courts, family courts, coroners' courts and all courts of appeal. Magistrates' Courts, Children's Courts and the Federal Circuit Court work toward a more stringent benchmark of no more than 10% of matters that have been pending for six months and no matters that have been pending for longer than 12 months.

47 Kim M Economides, Alfred A Haug, and Joe McIntyre, 'Toward Timeliness in Civil Justice' (2015) *Monash Law Review* 414, 415.

heard, dissuading future potential claimants, or pressuring a less-resourced opponent to settle on unfavourable terms.[48]

(b) Too Expensive

The high financial cost of litigation has long been recognised.[49] Abraham Lincoln, a career lawyer before political life, recognised the cost that litigants incur. In 'notes for a law lecture', Lincoln encourages lawyers to counsel clients to manage matters without recourse to court proceedings:

> Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.[50]

Since Lincoln's time, courts have dedicated significant efforts to improve the efficiency and accessibility of litigation. However, these efforts have been matched and exceeded by increases in the complexity of matters, progressive cuts in funding to the justice system, and with the advent of the information age, by an increase in the volume of documentary evidence. Sir Thomas Bingham described the expense of litigation as 'cancer eating at the heart of the administration of justice'.[51] Martin identifies (extra-curially) the barriers experienced by 'ordinary Australians' in accessing the legal system:[52]

> The hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians. They can and should take pride in the fact that Australia has a very good legal system provided by judges and magistrates who are independent of executive government and in which corruption is virtually unknown. In theory, access to that legal system is available to all. In practice, access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance.[53]

---

48 Ibid.

49 Mason (n 30) 6: 'The rigidities and complexity of court adjudication, the length of time it takes and the expense (both to government and the parties) has long been the subject of critical notice.'

50 Abraham Lincoln, 'Draft of a Lecture on Practicing Law' (1860) Abraham Lincoln Papers at the Library of Congress.

51 Lord Woolf, 'Access to Justice Report to the Lord Chancellor on the Civil Justice System of England and Wales' (1995) 8.

52 Wayne Martin AC, 'Creating a Just Future by Improving Access to Justice' (Speech, 24 October 2012, Community Legal Centres Association WA Annual Conference); see also Sir Gerard Brennan, 'Key Issues in Judicial Administration' (Speech, 20 September 1996, 15th Annual Conference of the Australian Institute of Judicial Administration) 3-4.

53 Ibid.

Speaking at the 1981 Legal Convention in Tasmania, Dr Wolfgang Zieter, President of the Federal Constitutional Court of Germany described the adversarial system of law as a 'Rolls Royce system'.[54] In contrast, Zieter likened the German system to a 'Volkswagen', a less luxurious and less expensive vehicle. He challenged an audience of Australian judges, lawyers and jurists thus: 'how many Australians could afford a Rolls Royce? And how many could afford a Volkswagen.'[55]

The cost of adversarial litigation has not abated since, as noted by Australian courts in several recent matters.[56] For example, in the family law matter *Riemann v Riemann,* the court cited 'substantial legal fees' comprising $2.70 million for the wife and $1.95 million for the husband. [57] In a 2019 divorce matter that has been compared by commentators to Dickens' 'Bleak House',[58] the parties are reported to have spent fourteen years, received 61 judgements and accrued over 40 million dollars in legal fees from initial filing to final appeal.[59] In relation to the commercial world, Spiegelman notes (extra-curially) that 'when senior partners of a law firm tell me, as they have, that for any significant commercial dispute the flag fall for discovery is often $2 million, the position is not sustainable.'[60]

While usually discussed in the monetary sense, the price of litigation may also be considered in terms of the emotional and personal effect of the process on the parties and on their families or friends. Judges, speaking extracurially have identified the significant non-pecuniary toll of litigation. Bathurst CJ noted, the 'cost of litigation is not only financial— it can also be emotional.' Hayne AC stated:

---

54 Wayne Martin CJ, 'Improving Access to Justice through the Procedures, Structures and Administration of the Courts' (Speech, 21 August 2009, Address to the Australian Lawyer's Alliance, Western Australian State Conference) cited in Boulle and Field (n 5); the 'Rolls Royce' metaphor for the adversarial system remains in popular use, see ibid, G. Davies and J Leiboff, 'Reforming the Civil Litigation System: Streamlining the adversarial framework' (1995) 25 *Queensland Law Society Journal* 111, 114; cf ALRC (n 34): argues that the Rolls Royce metaphor implies a false dichotomy of approaches to the justice system.

55 Michal Kirby J, 'Alternative Dispute Resolution, A Hard-Nosed View of its Strengths and Limitations' (Speech, 29 July 2009, The Institute of Arbitrators & Mediators Australia South Australian Chapter AGM).

56 *Riemann v Riemann (No 5)* [2017] FamCA 986; *Salway v Fegley* [2017] FamCA 410; *Simic v Norton* [2017] FamCA 1007.

57 *Riemann v Riemann (No 5)* [2017] FamCA 986 [4]: further costs to fully litigate the matter were estimated by counsel at $1, 169, 003 for the wife and $508, 150 for the husband.

58 Frank Chung, 'Australia's most expensive divorce wraps up after 14 years and $40 Million in Legal Fees (28 March 2019) *<news.com.au>;* See generally, David Hoffman, 'What the #@!* are they Fighting About?!?: Reflections on Fairness, Identity, Social Capital and Peacemaking in Family Conflicts' (2015) 53(4) *Family Court Review* 509: on 'why family warfare is so intense'. Leslie Katz, 'Bleak House in Australian Courts' (2009) 26 *NSW Bar Association News* 70: On the continuing relevance of Dicken's work.

59 *Strahan & Strahan* [2019] FamCAFC 31.

60 James Spiegelman J, 'Access to Justice and Access to Lawyers' (2007) 29 *Australian Bar Review* 136.

> Anyone who has had direct experience of litigation knows all too well the costs it exacts from the participants… The costs in time and money are real and obvious, but the emotional cost of litigation for those who participate in it is often equally pressing.[61]

Litigation has also been observed to exact a toll on the parties' relationships. In the family arena, adversarial processes have been identified as 'reinforcing antagonism between spouses, neglecting children, and providing no opportunities for spouses to learn effective co-parenting.'[62] In cases of elder abuse, litigation may be avoided due to stress, or its potential to cause antipathy within the family.[63] Even in the commercial world, theorists have identified a reluctance to engage in litigation with business partners due to its deleterious effect on their present and future dealings.[64]

If these intangible costs of litigation are too high, parties may avoid the courts even if they otherwise have a strong interest in managing their dispute. Bathurst CJ notes that 'ensuring access to justice in this context means providing flexible options to those who want to avoid confrontation.'[65]

(c) Too Adversarial

Some of the deepest critiques of litigation question whether the justice system is not only too expensive, or time-consuming, but is in fact too adversarial.[66] Here, the term 'adversarial' is not necessarily confined to its meaning as a legal term of art. Rather it includes the broader sense contained in its ordinary meaning, defined, for example, by Merriam Webster dictionary as: 'involving two people or sides who oppose one another…'[67]

---

61 Kenneth Hayne AC, 'Restricting Litigiousness' (Speech, 13 April 2003, 13th Commonwealth Law Conference); see also McClelland J 'Reasonableness— A Fundamental Aspect of a Lawyer's Duty to the Court and the Administration of Justice' (2018) Address to Australian Disputes Centre, 8 February 2017.

62 William H Schwab 'Collaborative Lawyering: A Closer Look at an Emerging Practice' (2004) 4(3) *Pepperdine Dispute Resolution Law Journal* 354.

63 Australian Law Reform Commission 'Elder Abuse— A National Legal Response' (2017) 207-9.

64 See, e.g., Stewart Macaulay 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55, 65-6, cf Catherine Mitchell 'Contracts and Contract Law: Challenging the Distinction Between the 'Real' and 'Paper' Deal' 29(4) *Oxford Journal of Legal Studies* 675, 678.

65 TF Bathurst CJ, 'Dispute Resolution in the Next 40 Years: Repertoire or Revolution' (Speech, 1 December 2011, New South Wales Law 40th Anniversary Conference) cited in Bathurst CJ, 'The Role of the Courts in the Changing Dispute Resolution Landscape' (2012) 35(3) *University of New South Wales Law Journal* 870, 871.

66 See, e.g., Finkelstein (n 27) 136.

67 'Adversarial', Merriam-Webster Dictionary (2020): 13 January 2020. These two meanings of 'adversarial' are interrelated because the exemplar provided by the Courts influences how legal disputes are perceived by professionals and the general public: Pound (n 6); see also Olivia Rundle, 'Unpacking

Adversarial interactions are part of the human experience,[68] but a process that expects parties to behave antagonistically accommodates only some of the plurality of ways in which people relate to one another when their interests or values are in conflict. American sociologist Robert Nisbet describes five general forms of social interaction: 'cooperation, conflict, social exchange, coercion and conformity.'[69] Adversarial litigation is premised on dispute and coercion between the parties. There are few, if any, opportunities for cooperation or social exchange in court or in positional negotiations. Interactions such as suggesting accommodations for the other party, making apologies, or even routine greetings, do not feature in the standard template for litigation advice. On the contrary, trial counsel may advise against these pro-social acts because they may place their client at a strategic or social disadvantage in negotiations.[70]

Lord Woolf considered that an excess of adversarial zeal was not only an issue in its own right but was also a primary cause of high costs and delays in England and Wales Civil Procedure. In a 1995 interim report, his Lordship noted:

> Without effective judicial control… the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply. In this environment, questions of expense, delay, compromise and fairness may have only low priority. The consequence is that expense is often excessive, disproportionate, and unpredictable; and delay is frequently unreasonable.[71]

Roscoe Pound delivered an influential early critique of the adversarial bar in his 1906 address to the Annual Convention of the American Bar Association. In a speech titled 'The Causes of Popular Dissatisfaction with the Administration of Justice', Pound described eighteen reasons for dissatisfaction across four categories.[72] Two of his reasons have particular significance as

---

the Adversarial Advocate' (2013) *Australian Dispute Resolution Research Network* <https://adrresearch.net/2013/12/04/unpacking-the-adversarial-advocate/>.

68 Robert A Nisbet, Robert Perrin, *The Social Bond* (Knopf, 2nd ed, 1977).

69 Ibid.

70 See, e.g., Pauline Tesler, 'Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts' (2008) *Journal of Dispute Resolution* 83; pro-social is defined by the American Psychological Association as: 'Denoting or exhibiting behaviour that benefits one or more other people, such as providing assistance to an older adult crossing the street': 'prosocial', *APA Dictionary of Psychology* (2020) <https://dictionary.apa.org/prosocial>.

71 Lord Woolf, 'Access to Justice Report to the Lord Chancellor on the Civil Justice System of England and Wales' (1995) 30.

72 Roscoe Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice' (1964) 10(4) *Crime & Delinquency* 355-71: initially presented in the Annual Convention of the American Bar Association, 29 August 1906, St. Paul, Minnesota [3]: '(1) causes for dissatisfaction with any legal system, (2) causes lying in the peculiarities of our Anglo-American legal system, (3) causes lying in

a turning point in the legal profession's understanding of litigation and its alternatives[73]: 'the manner in which the courts have emphasised the procedural form over the substance of human conflicts'[74], and the 'sporting theory of justice'.[75]

Dealing with the first complaint of procedural form overshadowing the substance of disputes, Pound was concerned that cases were too frequently decided on procedural points, rather than on substantive issues of justice. It is trite that the court's attention is directed to aspects of a case which relate to a relevant point of fact or law. The difficulty is that these aspects do not necessarily coincide with what the parties consider to be important to them or to their personal notions of justice. The omission of personal or emotional detail, in particular, can have a dehumanising effect. As Tesler notes, 'the client's complex human individuality fades as the traditional lawyer strips away all personal details…except those that support the client's claim to prevail…'[76]

Second is what Pound describes as the 'sporting theory of justice.'[77] Pound identifies the American justice system as being affected by 'exaggerated' contentiousness, where the trial is treated as a game between counsel, and the judge is limited to the role of the umpire. He argues that the sporting theory has a corrupting influence. Judges are led to feel that they are 'merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice.'[78]

> [lawyers] forget that they are officers of the court and deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport, working to get error into the record rather than to dispose of the controversy finally and upon its merits.[79]

Witnesses (especially expert witnesses) are reduced to 'partisans pure and simple'.[80]

---

our American judicial organization and procedure, and (4) causes lying in the environment of our judicial administration.'

73 Lara Traum and Brian Farkas, 'The History and Legacy of the Pound Conferences' (2017) 18 *Cardozo Journal of Dispute Resolution* 677-98.

74 Ibid 681.

75 Ibid.

76 Pauline H Tesler, 'Goodbye Homoeconomicus: Cognitive Dissonance, Brain Science, and Highly Effective Collaborative Practice' (2009) 38 *Hofstra Law Review* 635, 645.

77 Pound (n 72).

78 Ibid.

79 Ibid.

80 Ibid.

Gamesmanship in litigation is still noted across the common law world. In 'The Secret Barrister',[81] an anonymous English Junior Barrister describes their experiences in contemporary criminal practice in 2018, and makes use of language very similar to Pound's original lecture:

> The word 'game' hangs in the air. Because that is often what adversarialism amounts to. It does not seek to take a cool impartial look at all available evidence. The police… pass what they find to the CPS, which selects the evidence that points towards guilt. The defence try to exclude parts of that evidence, throw in some of their own, equally partial, while lobbing smoke bombs into the arena in the hope that some may damage the prosecution witnesses, or at the very least, distract the jury. Who, let us not forget, we cannot trust in possession of the full facts, lest they misapply them or otherwise disgrace themselves...[82]

The game metaphor is also found in the more candid guides to trial advocacy. In a popular guide written for barristers, English Queen's Counsel Ian Morley advises:

> Adversarial advocacy… is a well-mannered contest, in which there are rules, and it is possible to win, even in the face of seemingly overwhelming evidence if you play the rules better than your opponent and learn to be a more persuasive advocate than your opponent.[83]

Even the 'winner' in an adversarial contest may find that the prize is less than satisfactory. The outcomes that may be awarded by a court are limited and tightly prescribed. In many matters, the only award that may be available is the payment of damages or equitable compensation as the court is reluctant to order specific performance where it would be required to provide continuing supervision. In contrast, parties who rely on non-litigation dispute management processes, such as mediation or collaborative practice, may decide on any outcome that is lawful. They are limited only by their own creativity.[84]

6.5 The Civil System

In the civil law tradition, search for truth is emphasized over the procedural rights of the parties to a dispute. As Jolowicz notes, a keystone of French justice is article 10 of the *Code*

---

81 Anonymous, *The Secret Barrister: Stories of the Law and How It's Broken* (Macmillan, 2018): Author described therein as a junior barrister specialising in criminal law, columnist in *Solicitors Journal, New Statesman,* and *iNews,* also published in the *Sun*, the *Mirror*, and *Huffington Post*.

82 Ibid.

83 Iain Morely, *The Devil's Advocate: A Short Polemic on How to be Seriously Good in Court* (Sweet & Maxwell, 3rd ed., 2015).

84 See, e.g., Lisa Di Marco, 'Therapeutic Divorce: The Scope and Means of Implementing Collaborative Practice in Australia' (2010) 3 *Queensland Law Student Review* 25.

Civil: 'everyone is bound to co-operate with the administration of justice with a view to the revelation of the truth'.[85]

In the civil law tradition, the search for truth is performed primarily by non-partisan actors. A hierarchy of professional judges actively investigate matters and decides what evidence is necessary to determine the matter. Witnesses are encouraged to provide a narrative of relevant events with little interruption and are then questioned by the judiciary. In the civil tradition, the defense avocat in a criminal matter is not even permitted to question witnesses, and may only suggest a question to the judge.[86] Even in civil matters, where counsel has an opportunity to ask questions after the judiciary, examination by counsel is usually brief. Kötz notes that in a German trial, the judge will usually have covered most of the relevant ground and advocates are cautious not to convey the appearance that the 'court does not know its business'.[87]

In criminal trials, the active investigatory role of the civil system judiciary replaces many of the functions of the lawyer in common law systems. The differences between systems are more nuanced in civil matters.[88] The avocat takes an active role in determining and putting together the 'dossier', a compilation of material that is placed before the court to make its determination. This step at least is consistent with an adversarial process. There are, however, significant differences. In terms of procedure, civil-system trials proceed as a relatively informal series of conferences, with an orientation towards documentary rather than oral evidence. Most important for the present discussion is the difference in how lawyers or avocats understand their role. Counsel in both traditions must balance duties owed to their client, the court, and society. However, the balance between these duties is struck quite differently.

In the adversarial system, the lawyer's duty to pursue their clients' interests is comparatively emphasised, second only to their duty to act in a manner consistent with the

---

85 J A Jolowicz, 'Adversarial and Inquisitorial Models of Civil Procedure' (2003) 52 *International and Comparative Law Quarterly* 281, 291; Felicity Nagorcka, Michael Stanton and Michael Wilson 'Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice' (2005) 29 *Melbourne University Law Review* 448, 452.

86 Vivienne O'Connor 'Common and Civil Law Traditions' (International Network to Promote the Rule of Law, 2012) 20.

87 Hein Kötz, Civil Justice Systems in Europe and the United States (2003) 13 *Duke Journal of Comparative & International Law* 63: regarding civil procedure in Germany in particular.

88 Nagorcka, Stanton and Wilson (n 85); Gary Downes, 'The Movement Away from Oral Evidence: How Will This Affect Advocates' in Charles Sampford, Sophie Blencoe and Suzanne Condlin (eds) *Educating Lawyers for a Less Adversarial System* (Federation Press, 1999) 77.

law and the rules of the court.[89] Lawyers are absolved by a special role morality, where they are not considered culpable for the social impacts of advocacy within the rules of the profession.[90]

In contrast, civil legal traditions expect lawyers to exercise greater moral responsibility in their work, and to consider not only the interests of their client but also the social consequences of how they choose to pursue them.[91] There are similarities in this respect between the ethics of lawyers in civil law systems and the perspective of some collaborative lawyers. Some collaborative lawyers perceive their role as attending to more than just their client's interests. However, when collaborative lawyers adopt this broader perspective, it is usually about people in the client's immediate circle. Macfarlane found that collaborative lawyers look at the family, rather than the individual client, as the focus of their work.[92] A collaborative solicitor notes: 'I never saw myself as being his [the client's] advocate… I advocated people trying to attain their best behaviour in a very unusual and time-compressed situation.'[93] This solicitor perceived their role as holistic, being a guide for all in the process to manage their behaviour towards one another, including their client, the other client, and the lawyer for the other side.[94]

Attending to the needs of the family of the client is more defensible under a common law 'zealous advocacy' conception of ethics than considering the needs of society more broadly. This is because adopting an ethic of care[95] towards the people in the client's immediate family may benefit the client in the longer run.

6.6 The Influence of Adversarial Litigation on Legal Professional Culture

The courtroom provides the setting most associated with the 'sporting theory' of justice. However, its influence is not limited to litigation. Pound argued that, as a public process, the way litigation was conducted affected how the public viewed their relationship with the law more broadly.[96] That is, gamesmanship in the courtroom would encourage the perception of

89 See, e.g., Australian Solicitors' Conduct Rules 2015 s 3.1, s 4.

90 W Bradley Wendel, 'Civil Obedience' (2004) 104 *Columbia Law Review* 363, 363-7.

91 Nagorcka, Stanton and Wilson (n 85).

92 Julie Macfarlane 'Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project' (2004) 1(13) *Journal of Dispute Resolution* 179, 201-4.

93 Ibid 204.

94 Ibid.

95 See, e.g., Carol Gilligan, In A Different Voice: Psychological Theory and Women's Development (Harvard, 1982).

96 Pound (n 72).

the law not as a social contract to be followed in both word and spirit, but as amoral rules of a game to be tested, avoided, and put to purposes different to what its framers may have intended. Pound described this circumstance as 'the modern American race to beat the law'.[97] He strongly worded this:

> If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it. …. Thus, the courts, instituted to administer justice according to law, are made agents or abettors of lawlessness.[98]

Therefore, even though many lawyers do not regularly work in litigation, the perception of legal disputes as contests can affect other types of legal work, such as negotiation. Menkel-Meadow notes that older texts on negotiating legal disputes are written from a highly adversarial perspective. In her view, such texts conceptualise the lawyer as 'a consummate game player who maximises gain for clients by engaging in a series of ploys and countermoves designed to mislead the opponent into *conceding* as much as possible...'[99]

Scholars of the Critical Legal Studies discipline have argued that this competitive framework for legal practice is constructed (both consciously and unconsciously) to support the interests and follow the values of dominant cultural groups. Through most of history, adversarial legal systems have been shaped by a narrow segment of society, which was predominantly white, male, educated and wealthy. Mulcahy explains that feminist legal scholars perceive the adversarial system as following a 'masculine moral philosophy' where values such as 'performance, control, security of transaction, and standardization' are emphasised.[100]

The influence of litigation may even extend to the lawyer's conduct in non-litigation dispute management processes. Rundle found evidence of a lawyer-centred approach in court-connected mediation. Lawyers tend to see their role primarily as an advocate and prioritise control over information above 'self-determination and empowerment'.[101]

---

97 Ibid.

98 Ibid.

99 Carrie Menkel-Meadow, *Dispute Processing and Conflict Resolutions: Theory, Practice and Policy* (Ashgate, 2003).

100 Linda Mulcahy, Chapter 8 'Bargaining in the Shadow of the Flaws? The Feminisation of Dispute Resolution' in Linda Mulcahy, Sally Wheeler (eds), *Feminist Perspectives on Contract Law* (Glass House Press, 2005) 146.

101 Olivia Rundle, 'Barking Dogs: Lawyer Attitudes Towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases' (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 77, 91.

According to Tesler, collaborative and traditional practitioners work within different paradigms: the adversarial, which relates to the mainstream legal community, and the collaborative, which relates to the emerging collaborative practice movement.[102] Tesler does not define a 'paradigm' of law. However, as Shields notes, the concept resembles Kuhn's concept of a paradigm in the natural sciences:[103] 'the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community'.[104]
Tesler describes lawyers coming to the collaborative process as needing to undergo a paradigm shift by 'unlearning adversarial behaviors and learning collaborative behaviors'.[105] , However, this term can be misleading. Collaborative lawyers retain their adversarial skills and can deploy them when necessary. What it unlearnt is not the skills themselves but the trained response to deploy them without reflecting on other approaches.

Macfarlane has argued that 'convergence' is a better description of how the legal profession changes than paradigm shifting.[106] Settlement culture— which includes collaborative practice— is not replacing adversarial culture in the sense of a Kuhnian paradigm shift. Rather, the cultures of traditional and settlement law are influencing one another. The perspective of convergence better reflects the experience of individual lawyers who do not lose their traditional skills but rather complement them with a collaborative skillset, described by some as 'the new advocacy'.[107]

6.7 Alternatives to Litigation

The perceived disadvantages of litigation have motivated progressive efforts to develop less adversarial ways to manage legal disputes between parties. These are relevant to this research because they form part of the progression of theory and practice that has led to the collaborative process.

---

102 Pauline Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (American Bar Association, 3rd ed, 2017) 58.

103 Richard W Shields, 'On Becoming a Collaborative Professional: From Paradigm Shifting to Transformative Learning through Critical Reflection and Dialogue' (2008) 2 *Journal of Dispute Resolution* 427-63, 435-6; Sherri Goren Slovin, 'The Basics of Collaborative Family Law— A Divorce Paradigm Shift' (2008) 18(2) *American Journal of Family Law* 74.

104 Thomas S Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 2nd ed, 1970) 175: Kuhn uses the term paradigm in several ways in his research, including notably in the sense of an exemplar. This 'social' sense of the term has proven to be the most adaptable.

105 Ibid, cf Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (University of British Colombia Press, 2008) 20.

106 Ibid.

107 Ibid; Marilyn Scott 'Collaborative Law: Dispute Resolution Competencies for the "New Advocacy"' (2008) 11 *Queensland University of Technology Law Journal* 223.

Chip Rose compares the emergence of client-centred methods of dispute management to the stages of a Saturn rocket. In this analogy, mediation is the 'first stage lift-off'[108], and collaborative law is the 'second-stage booster.'[109] However, unlike the stages of rockets, which are progressively discarded, mediation and collaborative practice continue in parallel, influencing and improving one another.[110] Skills and techniques that are regarded as essential to the collaborative process were refined in mediation. Counsel notes, for example, that 'collaborative family law practice creates a new role for lawyers that include skills similar to those used in mediation.'[111]

The exploration conducted in this research is focused on the future of collaborative practice, but to achieve this, an analysis of its past and precedents is an important first step. Doing so lays the theoretical basis for sound analysis of the potential of the collaborative process outside of family law. As Boulle and Field explain:

> …the future and practice of dispute resolution in the legal profession can only be intentionally and dynamically designed if it is built on the solid foundation of an understanding of its history. Using this history, we can work out what is worth doing in the future by adapting and legacies, as well as innovating and creating new directions.[112]

So, looking at non-litigation dispute management as a whole is necessary to situate collaborative practice within the greater tradition of concepts and methods that challenge the primacy of the adversarial trial in concluding civil disputes.

There is no definitive starting point for the discussion of alternatives to litigation for dispute management. The use of systems of mediation is ancient, and indeed predates litigation itself. Alexander notes that forms of mediation may be identified in 'ancient Greece, the Bible, traditional communities in Asia and Africa, and to the fourteenth Century English Mediator of Questions.'[113] Developed forms of mediation were in use by Indigenous Australians long before English colonisation.[114] In comparison, the western movement to

---

108 Chip Rose in Sheila Gutterman, *Collaborative Law: A New Model for Dispute Resolution* (Bradford, 2004) 130.

109 Ibid.

110 Ibid.

111 Caroline Counsel, 'What is this Thing Called Collaborative Law' (2010) 85 *Family Matters* 77.

112 Ibid: see also Connie Healy, *Collaborative Practice: An International Perspective* (Taylor & Francis, 2017) 6.

113 Nadja Alexander 'What's Law Got to Do with it? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions' (2001) 13 *Bond Law Review* Art 5; see also Sourdin (n 9) 11.

114 See, e.g., Larissa Behrendt, Aboriginal Dispute Resolution: A Step Towards Self-Determination and Community Autonomy (Federation Press, 1st ed, 1995).

professionalise and broaden the appeal of methods such as mediation, arbitration, and the collaborative process is much more recent. Menkel-Meadow describes the field of 'alternative dispute resolution' as an intellectual field emerging in the late 1970s and early 1980s.[115]

Inspired by Roscoe Pound's original address, the 1976 Pound conference was an important focal point for broadening the scope of non-litigation dispute management. In addition to rallying voices for the reform of traditional litigated justice, the conference was instrumental in popularising concepts of dispute management theory.[116] For example, it was there that Frank Sander introduced the concept of the 'multi-door courthouse', a process that would, at an early stage, identify the most appropriate form of dispute management for a particular matter, and refer parties to the relevant process.[117] In the 1980s, a number of United States jurisdictions began to experiment with the concept, referring parties to a variety of different processes, including mediation, non-binding arbitration, early neutral evaluation, and summary jury trials. [118]

Influenced by these international developments, Australian civil justice has undergone several cycles of reform. The initial reception of 'alternative dispute resolution' was said to be 'enthusiastic and uncritical'.[119] Condliffe argues that non-litigation dispute management in Australia grew, as in the United States[120], with the formation of 'neighbourhood or community justice centres' in the 1970s and early 1980s.[121] It was soon after adopted by the

---

115 Carrie Menkel-Meadow, 'Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR' (1997) 44 *University of California Los Angeles Law Review* 1613.

116 Lara Traum, Brian Farkas, 'The History and Legacy of the Pound Conferences' (2017) 18 *Cardozo Journal of Conflict Resolution* 677.

117 Ibid 685-7.

118 Patricia Bergin J, 'The Global Trend in Mediation; Confidentiality; and Mediation in Complex Commercial Disputes: An Australian Perspective (Speech, 20 March 2014, Mediation Conference (Hong Kong)): Australia does not possess multi-door courthouses in the sense of Sander's vision, but is 'moving closer' through reforms such as court-annexed mediation; see also Frank Sander and Stephen Goldberg, Chapter 23 'Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure' in Carrie Menkel-Meadow (ed), *Mediation: Theory, Policy and Practice* (Routledge, 2nd ed, 2018) 92; Jill Howieson, 'The Professional Culture of Australian Family Lawyers: Pathways to Constructive Change' (2011) 25(1) *International Journal of Law, Policy and the Family* 71, 92: A multi-door courthouse could eliminate the 'social stratification' of dispute management processes.

119 Marie Delaney and Ted Wright, 'Plaintiffs' Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation' (Justice Research Centre, 1997).

120 Richard Salem, 'The Alternative Dispute Resolution Movement: An Overview' (1995) 49 *Arbitration Journal* 3-11: Sourdin (n 7) 22.

121 Peter Condliffe, *Conflict Management: A Practical Guide* (6th ed, 2019) 122, Katherine Douglas, 'The Teaching of Alternative Dispute Resolution in Selected Australian Law Schools: Towards Second Generation Practice and Pedagogy' (Phd Thesis, RMIT, 2012) 24; cf Sourdin (n 9) 23: Sourdin describes non-adversarial dispute management as fostered initially by Courts and Tribunals as part of case-management schemes.

courts, which integrated mediation with their case management processes.[122] Non-litigation dispute management was fostered with support and funding from Australian legislatures, often attracted to promise of gains in efficiency. Then Australian Attorney-General Daryl Williams stated: 'The Government firmly believes that mediation and alternative dispute resolution should be the norm rather than the exception.'[123]

The arrival of 'new' dispute management methods raised few objections from the judiciary. Mediation was perceived as a solution to common criticisms of litigation, including the problems of delay, cost, and adversarialism. Australia's 'initial euphoric phase'[124] was, however, tempered by growing debate about how to implement dispute management methods and what types of disputes might or might not be suitable. It was considered important to ensure that the adoption of consensual methods of dispute management did not diminish the rights and protections provided to litigants, especially those in a vulnerable or systematically disadvantaged population.[125]

In 1995, Australian Attorney-General Michael Lavarch referred the Australian Law Reform Commission to inquire into 'the advantages and disadvantages of the adversarial system of conducting civil, administrative review and family law proceedings before courts and tribunals exercising federal jurisdiction',[126] as well as whether current practices should be amended, and any related matters.[127] The commission maintained a conservative but optimistic position towards non-litigation dispute management. They noted 'its importance… as a tool in resolving cases quickly, less expensively and to the satisfaction of parties'[128], but they also warned against 'uncritical acceptance… as a panacea for all ills of litigation.[129]

That same year, the National Alternative Dispute Resolution Advisory Council (NADRAC) was commissioned as a non-statutory advisory body to provide policy and legislative advice to the Commonwealth Attorney-General in relation to 'alternative dispute resolution'.[130] NADRAC continued in this role until its decommission in 2013. Thereafter,

---

122 Ibid.

123 Daryl Williams, 'Press Release dated 6 April 1998' (1998) cited by Ulrich Magnus, 'Chapter 17: Mediation in Australia: Development and Problems', Klaus Hopt and Felix Steffek (eds) *Mediation: Principles and Regulation in Comparative Perspective* (Oxford, 2013) 872, ALRC (n 34) 424.

124 ALRC (n 34) 904.

125 Ibid 3, Field (n 33).

126 ALRC (n 34) 3.

127 Ibid.

128 Ibid 18.

129 Ibid.

130 Australian Government, Attorney General's Department, 'Alternative Dispute Resolution'<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx>.

several NADRAC members were instrumental in forming an independent advisory body with similar goals and values. Termed the Australian Dispute Resolution Advisory Council (ADRAC), this body conducts independent research, advises Australian Governments, and supports the use of non-litigation dispute management.[131]

Delaney and Wright undertook an early evaluation of the use of dispute management in New South Wales civil matters that were held between 1992 and 1995.[132] The researchers studied plaintiffs' satisfaction with the dispute management process, comparing litigation with pre-trial conferences, arbitration and mediation in two-hundred and fifty personal injury matters. They concluded that plaintiffs who had settled their matter without litigation were more likely to report that 'the procedure used to resolve their claim was fair'[133], were more likely to be satisfied with the outcome of their claim[134], and 'were satisfied with the way the legal system handled their claim.'[135] These findings were encouraging for the reform movement, demonstrating consensual processes such as pre-trial conferencing or mediation were perceived as satisfactory by those who had initiated legal action. However, the sample included only plaintiffs who had finalised their matter through the chosen process, and so may be open to the criticism of focussing only on 'successful' examples.

In 2009, NADRAC provided several recommendations intended to increase the visibility and accessibility of non-litigation dispute management within the Australian civil justice system. These recommendations included that parties be required to make genuine steps towards managing their matter before resorting to court or tribunal proceedings could be commenced. This reform was enacted by the Australian Parliament in the *Civil Dispute Resolution Act 2011.*[136] Attorney General Robert McClelland noted that the bill represented 'a further step to moving from the adversarial culture of litigation to one where resolution is actively sought.'[137]

---

131 Australian Dispute Resolution Advisory Council, 'ADRAC Charter' <adrac.org.au/charter>.

132 Delaney and Wright, (n 119) [26]: mediations were sampled in 1992-1994, arbitrations and trials in 1994, pretrial conferences 1994-1995.

133 Fairness: pre-trial conferencing plaintiffs (98%); mediation plaintiffs (76%); arbitration plaintiffs (72%), trial plaintiffs (62%); total population (75%).

134 Satisfaction with outcome: pre-trial conferencing plaintiffs (85%); mediation plaintiffs (65%); arbitration plaintiffs (54%), trial plaintiffs (50%); total population (60%).

135 Satisfaction with the legal system: pre-trial conferencing plaintiffs (81%); mediation plaintiffs (80%); arbitration plaintiffs (54%), trial plaintiffs (50%); total population (61%).

136 *Civil Dispute Resolution Act 2011* (Cth).

137 Robert McClelland, 'Minister's Second Reading Speech' (2010) *Hansard* 30 September 2010, 9.41 am.

The Act requires both applicants and respondents to file a 'genuine steps statement' at the time of filling.[138] The statements specify the 'steps that have been taken to try and resolve the issues despite between the applicant and the respondent in the proceedings' or 'the reasons why no such steps were taken'. In exercising its discretion, the Court considers the filing of this statement, and whether the parties have taken 'genuine steps' to resolve a dispute, which is defined as a '… genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute.[139] Most importantly, the Court may consider 'genuine steps' when allocating legal costs between clients.[140] A lawyer's failure to provide advice and assistance in filing a genuine steps statement may result in the award of costs against them personally,[141] a discretion conferred by the *Federal Court Act.*[142] Where costs are ordered against the solicitor for this reason, solicitors are expressly prohibited from recovering costs from their client.[143]

Examples of the 'genuine steps' that a party may take to attempt resolution include 'considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process'.[144] The Australian Attorney-General McClelland opined that genuine participation in the collaborative process is likely to suffice: 'Given the objective of collaborative law is to resolve a matter, I would anticipate that genuine participation in such a process would likely be accepted as satisfying the requirement.'[145]

---

138 Ibid.

139 Ibid s 12.

140 See, e.g., Kathy Douglas and Becky Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40(3) *Monash University Law Review* 758, 761.

141 *Civil Dispute Resolution Act 2011* (Cth) s 9.

142 *Federal Court Act 1976* (Cth) s 43(3)(f); similar provision is made in the *Family Court Rules 2004* (Cth) r 19.10.

143 *Civil Dispute Resolution Act 2011* (Cth) s 12.

144 The Australian Law Reform Commission recently recommended amendments to the *Family Law Act 1974* (Cth), that would introduce similar requirements for family law financial and property settlements. Parties would be required to 'take genuine steps to resolve their property and financial matters prior to filing an application for a court order', similar to the *Civil Dispute Resolution Act 2011* (Cth), failure to make genuine steps would have cost consequences: Australian Law Reform Commission, 'Family Law for the Future— An Inquiry into the Family Law System: Final Report' (2019) *ALRC Report #135*, 46.

145 Robert McClelland, *Australian Financial Review* (22 July 2011) 41: cited in Sourdin (n 7) 154.

6.8 Is Collaborative Practice Non-Litigation Dispute Management?

The initial push for new forms of dispute management did not encompass collaborative practice so much as mediation. The collaborative process was initially developed separately from methods such as mediation and arbitration, and more substantially later. A question arises as to whether it is properly categorised as a non-litigation dispute management process. Riekert identified three different understandings of 'ADR'. It may be used to firstly describe any process other than litigation; secondly, any process that resolves the matter by consensual agreement between the parties; or thirdly, any process, other than litigation, where the parties manage their matter with the assistance of an outside party.[146]

The first of these definitions even includes unaided negotiation between parties, the second includes facilitative or advisory processes but excludes determinative processes such as arbitration. Riekert's third definition includes all processes (whether facilitative, advisory, or determinative) so long as the parties are assisted by an outside party.

NADRAC[147] provided a description consistent with this third usage, but further required that the outside party be 'impartial':[148]

> ADR is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them...[149]

As a consensual process not connected with courts, collaborative practice fits cleanly into any of three usages identified by Riekert. However, the collaborative process rests uneasily with descriptions that require an 'impartial' facilitator, such as the definition proposed by NADRAC. Lawyers in a collaborative process are aligned with a party's interests, regarding themselves as advocates, or at least as a 'process guide' for their clients.[150] Consequently, a lawyer-only model of collaborative practice does not include anyone who could make a claim to impartiality in the same sense as a mediator or arbitrator. NADRAC has noted that a conflict may arise between the collaborative process and the 'impartiality' requirement. Nevertheless, it characterises the collaborative process as a form of 'alternative' dispute

---

146 Justin Riekert, 'Alternative Dispute Resolution in Australian Commercial Disputes: Quo Vadis?' (1990) 11 *Australian Construction Law Newsletter* 17, 17.

147 National Alternative Dispute Resolution Advisory Council 'Legislating for Alternative Dispute Resolution: A Guide Alternative Dispute Resolution: A Guide for Government Policy-Makers Government Policy-makers and Legal Drafters' (Australian Government, 2006) 99.

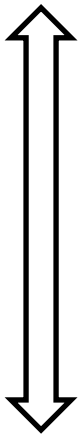
148 Ibid.

149 Ibid.

150 Macfarlane (n 4).

management.[151] Sourdin describes collaborative practice as an exception to the requirement for an impartial third party.[152] In terms of dispute management theory, the collaborative process is often described as an advisory process.[153] Brown and Marriot include the collaborative process at the consensual end of the dispute management spectrum, as shown in Figure 2 below.[154]

[Adjudicatory: 3rd party responsibility]



Litigation
Private Judging
Administrative or Statutory tribunals
Arbitration
Expert Determination
Adjudication
Dispute Board
Court-annexed arbitration
Ombudsman
Arb-med; Med-arb
Evaluation (early neutral Evaluation
Neutral fact-finding expert
Mini-trial (executive tribunal)
Negotiation (through representatives)
Collaboration and Collaborative Practice
Mediation (involving evaluative treatment)
Mediation (purely facilitative)
Negotiation (by parties personally)

[Consensual: parties' own responsibility]

Figure 2: The Dispute Management Spectrum[155]

This means that, like mediation and negotiation, parties maintain a strong degree of control within the collaborative process.

6.9 Chapter Summary

In conclusion, collaborative practice has developed mainly as a response to the shortcomings identified in both litigation and adversarial negotiations. It is considered a 'second-generation non-litigation dispute resolution process', building upon the foundation of facilitative mediation. The attributes that characterise 'second generation' processes are likely only to be fully identified in retrospect. But if the collaborative process is indicative of a trend, it is towards holistic processes that integrate and blur the boundaries of traditional professional

151 NADRAC (n 147) National Alternative Dispute Resolution Advisory Council (2009) 3-4: s ADR; see also Family Law Council and Family Law Section of the Law Council of Australia, 'Best Practice Guidelines for Lawyers Doing Family Law Work' (4th ed, 2017) 10 <www.familylawsection.org.au>.

152 Sourdin (n 7).

153 Ibid.

154 Henry Brown and Arthur Marriot, *ADR Principles and Practice* (Sweet & Maxwell, 3rd ed., 2011).

155 Ibid 21.

roles. Collaborative practice involves not just a new process, but for its practitioners also a significant difference in how they perceive their professional role.

The difference between the adversarial, civil law traditions and collaborative practice can be summarised in terms of their approach to truth. The civil law tradition sees truth as an imperative unto itself and values objective inquiry as the primary means of attaining it. The adversarial tradition also places value on truth but is more pragmatic in its approach. The truth that matters is the one that emerges from a rigorous and procedurally fair hearing. Collaborative practice, in contrast, sees truth in postmodern terms.[156] The parties each have their own truth, and the process does not set out to prioritize one above the other. Each party's truth is relevant as a tool for reaching a consensual solution to the problem. Thus, this exploration of the literature confirms that the collaborative process provides parties not only with a new process, but also with professional services that conceive their work in a new way, which is more aligned with their own experience.

[156] See, e.g., Carrie Menkel-Meadow, 'The Trouble with the Adversary System in a Postmodern, Multicultural World (1995) 38 *William and Mary Law Review* 5.

Chapter 7. Empirical Data

This chapter provides the results of the survey and interview research. The results of the online survey are presented initially, followed by the results of the interviews. These results will subsequently be discussed and integrated with the literature in the final chapter 8. Many of the themes discussed by practitioners support positions which have been presented in the literature. Where this is the case, the data provide significant empirical support for the theoretical foundations of collaborative practice. Where the data parallels perspectives from other jurisdictions, the independent construction of these themes is important in confirming that the experiences of Australian practitioners generally fit with the experience in other jurisdictions.

The 'wide' sampling strategy used in this research involved sampling participants from a variety of professional backgrounds. These are presented in three groups: traditional solicitors, comprising admitted solicitors who have not been trained in, or used the collaborative process; collaborative solicitors, comprising admitted solicitors who are either trained in and/or use the collaborative process; and other professionals, comprising members of professions other than the law, which are associated with interdisciplinary collaborative practice. These professions included accounting, financial planning, mediation, and collaborative coaching.

Participants are reported as follows. The participant's profession is recorded based on categories established in the survey: 'solicitor', 'accountant', 'financial planner', 'mediator/coach', 'psychologist' and 'other'. These categories are adopted from the terminology used by the International Academy of Collaborative Professionals (IACP) standards to follow terminology that was anticipated to be readily understood.[1]

Solicitors and other professionals are sometimes further described as 'collaborative' (c) or 'traditional' (t). Here, the adjective 'collaborative' is used as a shorthand for any lawyer or other professional who has completed collaborative process training, or who has participated in at least one matter under a participation agreement. Other participants are termed 'traditional'. This approach was adopted rather than categorising professionals by their primary practice approach because many in the collaborative practice movement still

[1] IACP 'Standards and Rules' (2018) 6: 'Collaborative Practice Groups around the world use a variety of names to describe the professionals who perform these functions.'

resolve the majority of their matters through ordinary negotiations without the use of a collaborative practice agreement.[2]

The naming conventions used in this research should not be taken to imply that these lawyers never 'collaborate' in the ordinary meaning of the term.[3] Many of the 'traditional' lawyers involved in this research demonstrated knowledge and appreciation of interest-based negotiations, and made use of other less adversarial approaches such as mediation.

Index numbers are included to support the discussion, with survey and interview data indexed using their own numbering. Indexing is omitted in questions that relate to the demographic characteristics of participants, or to their training or location. Omitting this information reduces the risk that an anonymous participant may be identifiable by the cross-referencing of responses. In quotes, commentary or clarification is provided in square brackets. Unambiguous typographical errors in the responses to the written survey have been omitted without notation.

Research Participants

S:	Solicitors
M:	Mediators or coaches
F:	Financial advisors or accountants
Or:	All respondents from professions other than law.
(c):	Collaborative: research participants trained in, or working in, the collaborative process (including those who also work in a traditional adversarial context).
(t)	Traditional: research participants neither trained in, nor working in, the collaborative process.

e.g., S(c): 'Collaborative Solicitor',

Likert Scale Responses

[hs]: highly suitable [s]: suitable, [ss]: somewhat suitable, [ns]: not at all suitable.

[hi]: highly important [i]: important, [si]: somewhat important, [ni]: not at all suitable

2 See Chapter 7.1(d).

3 See, e.g., 'Collaborative' in *Macquarie Dictionary* (2020): 'produced by united or cooperative effort.' So outside of its meaning as a dispute management term of art, a 'collaborative' approach to law may entail working in a manner which is attentive to the interests of other parties to a negotiation.

7.1 Survey Results

This section presents the results of the online survey. Results are presented section by section, generally following the order in which questions were presented. Thirty-two professionals participated in the survey. This sample allowed for meaningful qualitative exploration of the issues.

(a) Participant Demographics

Of the twenty solicitors who elected to complete the optional demographics section, twelve self-identified as female and eight as male. Five members of other professions self-identified as female and two as male.[4] The largest category of contributors to the survey were solicitors. The Australian legal profession comprises an approximately even proportion of women (52%) and men (48%).[5] However, the composition of the profession varies greatly based on the age of professions and area of law. Men are more strongly represented among older demographics and in private practice.[6] Women are more strongly represented in the corporate and public sectors, and among younger practitioners.[7] Both the collaborative process and family law are associated with a higher proportion of female practitioners, so it was not surprising that a majority of solicitors who participated (n=12/20,60%) were female.[8]

The age range of participants suggested that the survey sample achieved a sound degree of representation across generations. In the United States, Schwab's survey research suggested that collaborative practitioners are generally older and more experienced, averaging sixty years old and with twenty years of experience.[9] The survey was not statistically powered to draw conclusions on the demographics of collaborative professionals, so the demographic spread suggests only that the sample included a range of perspectives.

---

4 The form allowed participants to indicate that they identified with a non-binary conforming gender. However, no participant did so, perhaps a consequence of the limited sample size.

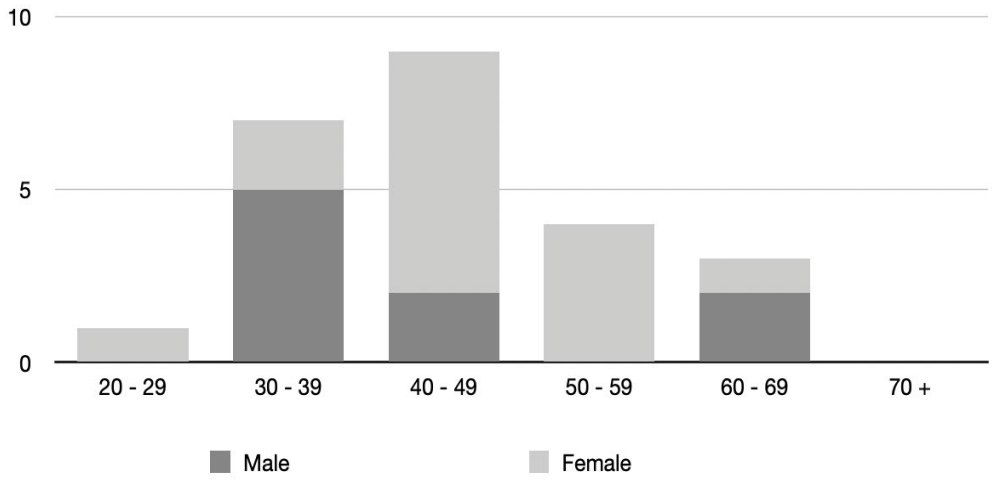
5 Urbis, 'National Profile of Solicitors 2018' (2019): report commissioned by the Law Society of New South Wales on behalf of the Conference of Law Societies.

6 Ibid: for example, seventy percent of lawyers aged under twenty-four years are female, in contrast to twenty-eight percent aged between sixty and sixty-four.

7 Ibid.

8 See, William H Schwab, 'Collaborative Lawyering: A Closer Look at an Emerging Practice' (2004) 4(3) *Pepperdine Dispute Resolution Law Journal* 354, 372; Brett Raymond Degoldi, 'Lawyers Experiences of Collaborative Family Law' (LLM thesis, University of British Colombia 2007) 30; Rory McMorrow 'Collaborative Practice: A Resolution Model for Irish Employment Disputes' (Master of Business Studies Thesis, Letterkenny Institute of Technology, 2012) 103.

9 Ibid.



* Nine participants elected not to provide data on age range.

Figure 3: Survey Participant Age Range and Reported Gender

(b) Professional Characteristics

This cluster of questions asked participants about their professional work. The first question asked the participant about their main profession. A multiple-choice format was used. Participants could choose from a series of options or select 'other' to provide details in a short text field. Participants were not permitted to select more than one main profession. Anecdotal evidence suggests that lawyers who are interested in less adversarial forms of practice have frequently trained in mediation. It was hoped that limiting participants to one primary profession would help to focus data on the professional context that was the most important to their responses.[10]

Solicitors were strongly represented, which is reflective of the membership of collaborative practice associations.[11] Some members of those professions that are associated with interdisciplinary collaborative practice also provided their perspective. The survey participants comprised nineteen solicitors, a financial planner, two mediators/coaches, and two who indicated other. One participant did not specify their profession.

Participants were not asked directly to describe themselves as 'collaborative' or 'traditional' because these terms may be understood in different ways. Instead, professionals were asked about their experience with the collaborative process, including whether they had

[10] One participant avoided this limitation by entering two main professions, lawyer and 'ADR practitioner', in the 'other' free text response window.

[11] As explored in chapter 5, see Table 3 [5.4].

received specific training, and how many matters they had worked on under a participation agreement.

Based on this terminology, seventeen professionals had a 'collaborative' background within the definition used in this research. These comprised eleven solicitors, two mediators or collaborative coaches, a financial planner and one participant who did not disclose their profession.

Table 5: Survey Participant Primary Profession

What is your current main profession?			
	Traditional participants	Collaborative participants	Total
Solicitor	9	18	27
Accountant	-	1	1
Financial Planner	-	1	1
Mediator / Coach	1	1	2
Other / not specified	3*	-	2
	10	15	33
* Both a lawyer and ADR (FDRP, mediator and arbitrator) practitioner' (1), details of profession not provided (2).			

A follow up to the question on primary professions asked participants about the types of legal disputes that were relevant to their work. The language in this question was varied slightly depending on what the participant listed as their main profession. Solicitors and barristers were asked in which fields of law they had practised. Other professionals were asked which areas of law they considered to be most relevant to their clients. The typology of areas of law used throughout this study was adapted from a form used by the Law Council of Australia and Law Institute of Victoria in previous survey research.[12] Using a standard typology in this way ensures that results are presented in a way that is readily understood, and facilitates comparisons between different studies and meta-analysis.

Consistent with the literature, family law was strongly represented among collaborative practitioners. All lawyers trained or with a background of working in collaborative practice indicated that they had, or were, practising in family law (n=18, 100.0%). A sizeable minority of collaborative lawyers also reported experience in at least one other field (n=7, 38.9%). Among other fields, wills and estates law was the most frequently represented (n=6, 33.3%). Traditional lawyers who responded to the survey helped to fill out

[12] Law Council of Australia, Law Institute of Victoria, 'Report into the Rural, Regional and Remote Areas Lawyers Survey' (2009) <http://lawcouncil.asn.au>.

the cross-section of the professionals surveyed. All fields were represented to some degree, except for the highly specialised areas of tax and intellectual property. This range supported the research goals because it enabled consideration of the potential of the collaborative process in a variety of circumstances.

Table 6: Survey Participant Practice Areas

a. In which areas of law have you practised? [lawyers] b. Which areas of law would you consider to be most relevant to your clients? [Neutrals]				
	S(t) %	S(c) %	Or %	Total %
Family law	37.5	100.0	100.0	72.2
Wills and estates	50.0	33.3	40.0	33.3
Commercial and business law	25.0	16.7	40.0	19.4
Conveyancing	25.0	22.2	-	16.7
Personal injury (excl-med)	50.0	11.1	-	16.7
Property law	25.0	16.7	20.0	16.7
Criminal law	12.5	22.2	-	13.9
Employment law	37.5	5.6	10.0	13.9
Medical negligence	25.0	5.6	-	8.3
Elder law	12.5	5.6	-	5.6
Construction	12.5	-	-	2.8
Tax law	-	-	20.0	2.8
Intellectual property law	-	-	-	-
Other	'commercial litigation' (1)	-	-	

Participants were also asked how long they had worked in their main profession. Survey participants were generally experienced in their role. Seventy-six per cent of responses (n=25) to this question indicated seven or more years in their current profession.

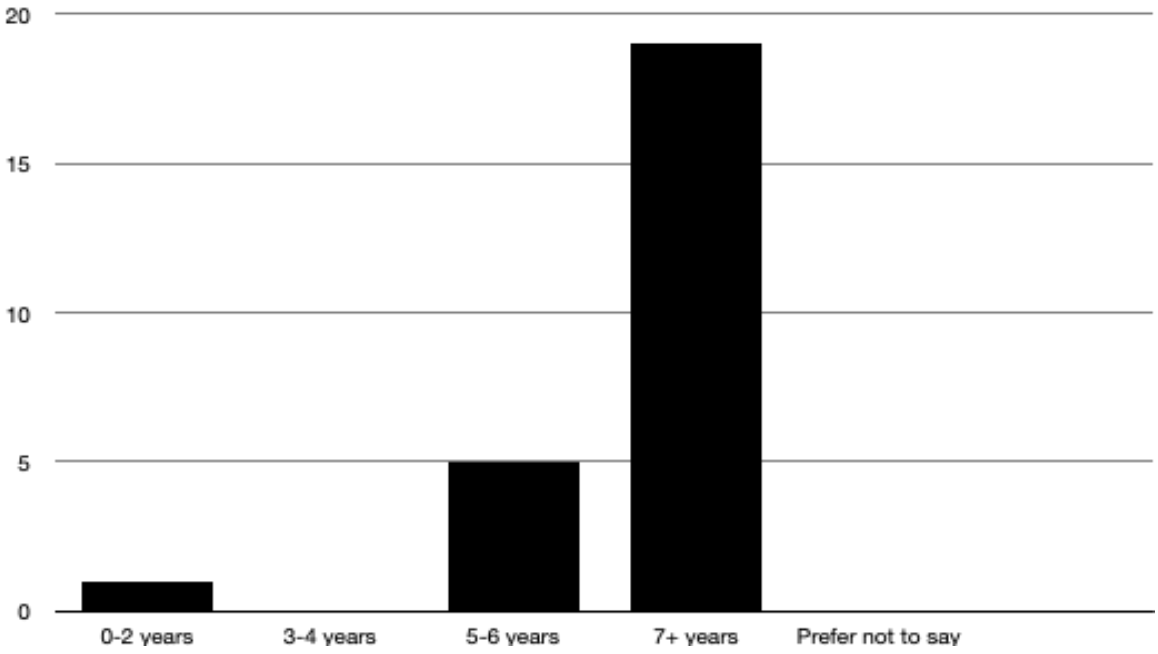


Figure 4: Survey Participant Post-Qualification Experience

Among participants who provided location data, New South Wales (n=10, 47.6%) and Queensland (n=9, 42.9%) had the most substantial representation. Responses were also received from Victoria (n=1, 4.8%) and the Northern Territory (n=1, 4.8%).

(c) Defining Collaborative Practice

It was important that survey participants' answers related to the concept of 'collaborative practice', rather than the idea of collaboration in the legal profession more generally. For this reason, all participants were provided with the International Academy of Collaborative Professionals (IACP) definition of collaborative practice.[13] Participants were further provided the opportunity to comment on how the IACP definition compares with their understanding of the process. A substantial minority (39.1%) of participants indicated general support for the definition as written. Others indicated possible areas for refinement or process aspects that should receive greater emphasis. Among these, several responses (13.0%) focused in particular on the importance of a coach or mental health professional in the collaborative process. The IACP definition recognises that mental health professionals may be engaged, but it is neutral in tone and does not describe the benefits associated with including interdisciplinary professionals in the process. The IACP definition includes coaches only

[13] International Academy of Collaborative Professionals, 'Standards and Ethics' (2018): this definition is excerpted in chapter 2, 2.7.

indirectly as part of the broad definition of 'mental health professional'.[14] One participant noted that coaches are compulsory within some models [M(c) 1]. 'Team' models[15] such as this are not expressly described in the IACP definition, so a person not acquainted with the collaborative process could read the fifth element as implying that interdisciplinary professionals are optional or auxiliary in all models. Further, it was noted that the classification of coaches as 'mental health professionals'[16], does not describe Australian practice as some coaches may not have a mental health background.

One participant, who sometimes serves as a financial planner in the collaborative process, highlighted that the collaborative process is 'goals driven' or 'outcomes-driven' and that clients (rather than the court) are responsible for setting their own goals and outcomes [F(c) 1]. Some practitioners indicated that they use the term 'collaborative' in a less formal sense, to include matters which follow the conventions and goals of the collaborative process but do not make use of a binding participation agreement. One collaborative solicitor noted that in rural settings, solicitors may collaborate without the 'formality' of the collaborative process, as defined by the IACP [S(c) 7]. Another collaborative solicitor noted: 'I'll embrace a collaborative process (be it under contract or not) for any matter where there are complicated commercial considerations in the context of a property settlement' [S(c) 12].

While the question was phrased to permit responses from all participants, traditional solicitors did not generally provide a perspective in relation to the IACP definition. One traditional solicitor noted: 'I was not aware that lawyers could not continue acting in court proceedings, but it seems to make sense now that you mention it' [S(t) 2]. Another traditional solicitor indicated that it would be 'difficult to get insurance respondents to agree to all aspects of a true collaborative process' [S(t) 4]. Some traditional solicitors also discussed types of collaboration that were less formal than collaborative practice (as defined by the IACP). One participant noted, for example, that they would agree to 'a collaborative approach' to negotiations without the use of a participation agreement [S(t) 5]. Others simply noted that they were not familiar with the process or had no comment.

---

14 Ibid.

15 Interdisciplinary team models are discussed further in Chapter 4, 4.3(b).

16 IACP (n 13).

Table 7: Comments on the IACP Definition of 'Collaborative Practice'

Do you have any initial reactions or comments about how this definition relates to your experience or understanding of collaborative practice?	
Participant	*Response*
S(c) 1	'I adopt this model as a standard of practice.'
S(c) 2	'It accords with my understanding.'
S(c) 3	'It's spot on.'
S(c) 4	'This definition succinctly sums up collaborative practice, in my experience. It is my practice, however, to always include a mental health professional as part of the professional team and it is unusual for a mental health professional not to be included.'
S(c) 5	'This reflects accurately my experience and understanding of collaborative practice.'
S(c) 6	'The lawyers need to be collaboratively trained and it is beneficial for all professionals who form part of the collaborative team helping the parties to also be collaboratively trained. The participation agreement also sets out the role/function/responsibilities of the various professionals and circumstances when the collaboration can be ended by professionals or parties.'
S(c) 7	'There is a difference between "Collaborative Practice" as defined above and the type of collaboration that may occur by practitioners in regional or rural settings. Whilst the above definition works for most matters, there is also the type of collaboration where two practitioners who work well together can resolve matters without the need of the formality of the process defined above. Not all practitioners are collaboratively trained, and those who are not should not attempt Collaborative Practice as defined, as they must have a working knowledge of the process. Some practitioners try to dabble but ultimately if they are not properly trained, they can easily derail the process.'
S(c) 8	'Above is accurate.'
S(c) 13	'On point.'
S(c) 18	'The definition is consistent with the collaborative practice training I completed in 2015 – Item 1, however, is somewhat different to the understanding of collaborative practice we have in the family law profession in Sydney. This is probably because the nature and scope of family law collaborative practice is already apparent to the participants.'
F(c) 1	'I have participated in several collaborative family law matters (as a financial neutral), and this is in line with that model however I would state that the process is outcomes driven or goals driven, these goals or outcomes are dictated by the clients rather than a court.'
F(c) 2	'Yes, I have done the training course. I am yet to see a full-blown collaborative matter in Cairns, although we do use the training.'
M(c) 1	'I think a critical element omitted is the role of the coach in a 5-way model. The reference to mental health professionals does not refer to coaches as some are not mental health professionals. Coaches in a 5-way model are a crucial element of the collaborative team and not optional.'
M(c) 2	'That captures my understanding of Collaborative pretty well. Except that a coach is in my view important to the success of the process.'

O(t) 1	'I think this would be beneficial where a relationship of some type needs to be maintained – family situations (wills & estates, family law matters with children) or commercial settings where the parties will have some dealings in the future.'
S(t) 1	'Your definition is very formal. There is not much in there about how it is different from other forms of practice.'
S(t) 2	'I was not aware that lawyers could not continue acting in court proceedings, but it seems to make sense now that you mention it.'
S(t) 3	'I was unaware of collaborative practice until undertaking this survey.'
S(t) 4	'It is difficult to get insurance respondents to agree to all the aspects of a true collaborative process.'
S(t) 5	'I have never signed a collaborative participation agreement despite agreeing to a collaborative approach in unlitigated claims.'
S(c) 10, S(c) 11, S(t) 6	'none', 'no' or similar.

(d) Professional's Experience with Collaborative Practice

An important aspect of the research was to learn from the experiences of collaborative and traditional practitioners. It was necessary to construct a general picture of the understanding and use of the collaborative process. The professional experience cluster set out to explore how well the collaborative process was integrated with the legal profession, and with the professions most strongly associated with interdisciplinary collaborative practice.

Question C1

Participants were asked about their prior awareness of the collaborative process. Collaborative professionals were, as might be expected, generally confident in their understanding of the collaborative process. All indicated, at a minimum, that they would be able to explain the process to a client. In contrast, the majority of professionals from a traditional background either had not heard of collaborative practice prior to participating in the research, or had heard of the process but did not understand the process well enough to be able to explain the process to a client, which is shown in Figure 5 below.

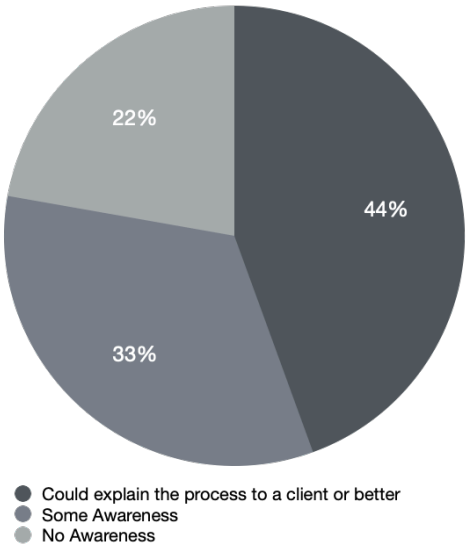


Figure 5: Awareness of Collaborative Practice among Traditional Solicitors

Table 8: Participant Awareness of Collaborative Practice

What was your awareness of collaborative practice prior to participating in this research?				
Single Selection Statement (select one)	S(t)%	S(c)%	Or %	Total %
I had not heard of collaborative practice.	22.2	-	16.7	9.1
I had heard of collaborative practice but would not be able to explain the process to a client.	33.3	-	-	9.1
I would be able to explain the collaborative practice process to a client.	11.1	11.1	16.7	12.1
I have a detailed knowledge of collaborative practice.	33.3	50.0	50.0	45.5
I have expert knowledge of collaborative practice.	-	38.9	16.7	24.2

Question C2

Participants were asked to record their level of experience with the collaborative process. These experiences comprised discussing the process with a client, completing collaborative practice training, and participating in a collaborative matter under a participation agreement. Participants were only asked this question if they indicated, at a minimum, that they were sufficiently familiar with the collaborative process to explain it to a client. The classification of participants as 'collaborative' or 'traditional' for the purpose of the analysis was based on their response here. As previously noted, participants who had completed training and/or indicated that they had participated in a collaborative matter are described as 'collaborative' for the purpose of reporting results. Most lawyers who had worked within the collaborative process had completed dedicated collaborative training (71.4%). However, there were lawyers who had participated in collaborative practice without training in the process

(28.6%), and there were lawyers who had completed collaborative practice training but had not yet participated in a collaborative matter (28.6%).

Question C3

Participants who had been collaboratively trained were asked to briefly describe their training in a free text response window. Collaborative Professionals used a variety of terminology to describe the model in which they were trained. Some referred to their trainer, others to a particular jurisdiction or model of the process. The training descriptions given by participants cover a variety of different training experiences including a mixture of United States, Canadian and Australian trainers. However, responses often suggested that practitioners were not aware of the differences between the model that they were trained in and other models. Distinctions drawn from the literature referred to United States regional styles of practice (e.g., Colorado style) but these did not appear to be readily understood by survey participants [S(c) 3, S(c) 5, S(c) 18, M(c) 2]. With the benefit of this data, it is likely that, rather than asking about models, it would have been preferable to focus on specific details such as how the roles of interdisciplinary professionals were framed, and the rationale presented for disqualification. Future research into the training of collaborative professionals might benefit from this type of more specific inquiry into the content of training.

Question C4

Collaborative professionals were asked about the outcomes of collaborative matters in which they had participated. For the purpose of this question, outcomes were defined as follows:

(i) 'Settled': Matters that resulted in a comprehensive settlement agreement.
(ii) 'Terminated (participation agreement)': Matters terminated under a term of the participation agreement.
(iii) 'Terminated (otherwise)': matters terminated other than under a term of the participation agreement. (For example, by the reconciliation of a relationship).
(iv) 'Ongoing Matters': Matters ongoing at the time of submitting the survey.

As shown in Table 9, participants ranged in the number of matters they had participated in from zero matters to twenty-five. As Figure 6 indicates, most collaborative lawyers had participated only in a small number of matters. The average number of matters was 4.8, and the median only 2.0. There were, however, some lawyers who were much more established in the collaborative process. The top four lawyer averaged 15.25 matters, and accounted for 67.0% of the matters reported.

Of collaborative processes that were no longer ongoing, the majority resulted in a comprehensive settlement agreement. Four matters were terminated under a term of the participation agreement. This may indicate that the matter was terminated due to litigation, absence of good faith, or refusal to disclose relevant material. Three matters were terminated other than under the participation agreement. This may indicate that the parties entered into a different non-litigation process such as mediation. In a divorce or separation context (the context of most collaborative matters), this may also indicate that the parties have reconciled their marriage or partnership. Of completed matters reported, 89.9% resulted in a comprehensive settlement agreement.

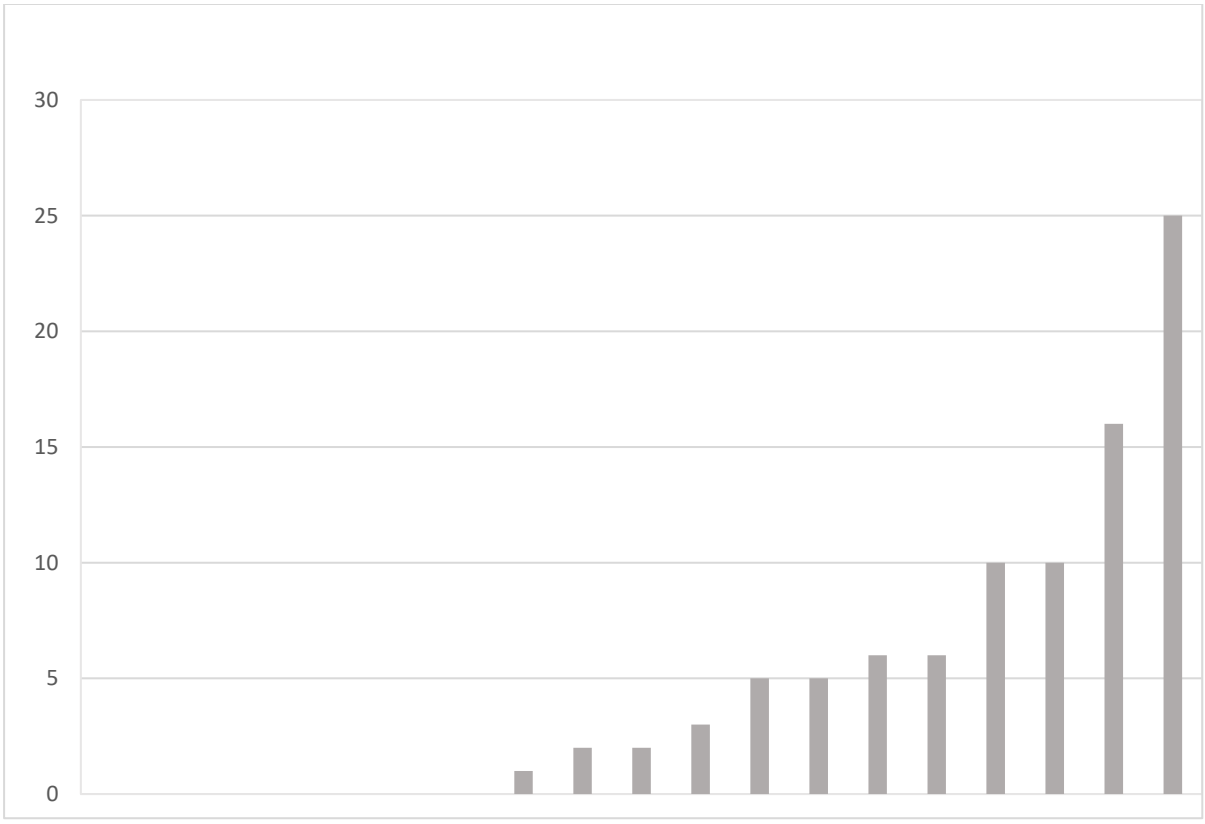


Figure 6: Total Matters Reported by Collaborative Solicitors

Table 9: Participation in Collaborative Practice Matters

Approximately how many matters under a collaborative practice agreement have you participated in?					
# *Participant role*	*Settled*	*Terminated (participation agreement)*	*Terminated (otherwise)*	*Ongoing*	*Total*
S(c) 1	-	-	-	-	
S(c) 2	-	-	-	-	-
S(c) 3	5	-	-	1	6
S(c) 4	5	-	-	5	10
S(c) 5	2	-	1	-	3
S(c) 6	20	3	-	2	25
S(c) 7	2	1	-	2	5
S(c) 8	10	1	-	5	16
S(c) 9	-	-	-	1	1
S(c) 10	1	-	1	-	2
S(c) 11	8	-	-	2	10
S(c) 12	5	-	-	-	5
S(c) 13	2	-	-	-	2
S(c) 14	2	-	-	4	6
S(c) 15	-	-	-	-	-
S(c) 16	-	-	-	-	-
S(c) 17	-	-	-	-	-
S(c) 18	-	-	-	-	-
O(c) 1	-	-	-	-	-
F(c) 1	2	-	-	1	3
F(c) 2	-	-	-	-	-
M(c) 1	2	-	-	1	3
M(c) 2	5	-	1	2	8
Σ Total	71	5	3	26	105
Settlement rate (completed matters)	71/79 89.9%				

Question C5

Participants were asked whether they had discussed using the collaborative process with a client outside of a family law context. The majority of lawyers had not done so. However, the clarifying follow-up question 'C6' prompted several responses that mentioned family matters. Since such matters should have been excluded by the phrasing of the question, these responses may suggest a misreading of the question text by a minority of participants. Alternatively, those participants may have considered that family matters often involve a plurality of areas of law.

Table 10: C5. Discussion of Collaborative Practice Outside of a Family Law Context

Have you discussed collaborative practice with a client as a means of resolving a matter in an area other than family law?		
Group	Yes %	No %
Solicitor (c)	38.9	61.1
Solicitor (t)	28.6	71.4
Other	33.3	66.7

Question C6

Participants who indicated that they had discussed using collaborative law with a client outside of a family law context were asked to describe 'the general nature of the most recent such matter'. One participant noted that they had discussed the use of collaborative practice with a client in relation to an 'elder law' matter, and a financial neutral in relation to 'business partnership disputes'. Interestingly, several participants provided responses related to family law. Two traditional solicitors noted that they had discussed collaborative practice to manage disputes in relation to historic sexual abuses. One stated that they had used the process in 'personal injury law as it relates to institutional historical sexual abuse', and the other in a 'historical sexual abuse claim (personal injury)'. These responses may relate to claims under the 'National Redress Scheme for people who have experienced institutional child sexual abuse'[17] (the 'National Redress Scheme'). This scheme would not be considered collaborative practice within the meaning used by collaborative practice associations because redress offers are formulated by an 'independent decision-maker',[18] rather than by negotiations between the aggrieved and the institution. These responses are consistent with the use of the term

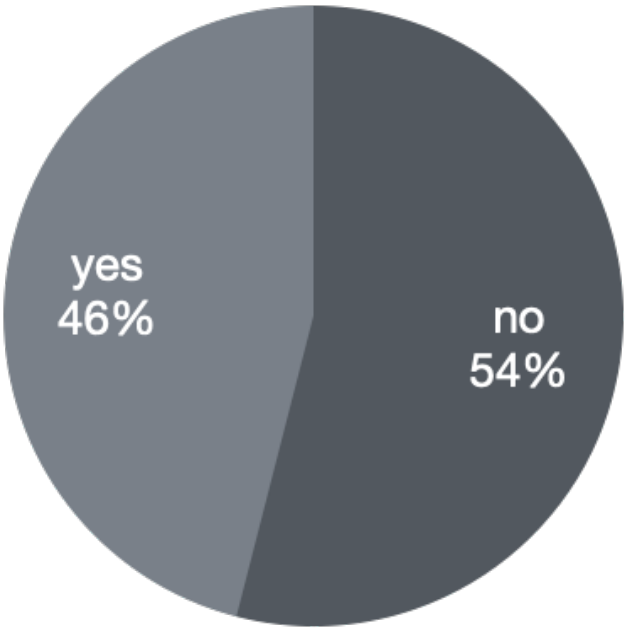
17 *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth).

18 Ibid s 185: A role specific to the National Redress Scheme.

collaborative to refer more generally to less adversarial, non-litigation methods of dispute management.

Question C7

This question was presented to all participants who indicated that they had participated in a collaborative process. It asked whether they had participated in a collaborative process that included consideration of legal issues in areas other than family law. This question was intended to explore whether collaborative family law matters might include work in other areas of law such as, for example, restructuring a family business as part of a divorce settlement. Given that there are few examples of use outside of family matters, these types of cross-field cases could form a basis for understanding how collaborative practice could be used in non-family areas. A sizeable minority (46 %) of collaborative solicitors indicated that they had done so.



'Have you participated in a matter under a collaborative practice agreement that included consideration of legal issues in areas other than family law (e.g., a non-family law matter, or a matter than included both family-law and commercial law considerations)?'[19]

Figure 7: Participation in Matters Involving Issues Outside of Family Law

[19] This question was only provided to those who had professionally participated in a collaborative process.

Question C8

This question was presented to participants who indicated in response to Question C7 that they had participated in a collaborative matter that involved issues outside of family law. Participants were asked to provide detail on their most recent such matter. The most common area addressed was wills and estates planning. This may reflect a perception that even when collaborative practice is not used for divorce, it is still especially well adapted to other areas where family relationships are important. Alternatively, it may be the case that social ties within the law profession are more likely to connect lawyers from a family law and wills and estates backgrounds, and that these social ties have led to the sharing of knowledge about collaborative practice.

Other responses addressed business and commercial issues. One participant noted that they would 'embrace a collaborative process '(be it under contract or not) for any matter where there are complicated commercial considerations in the context of property settlement'. The parenthetic text here suggests a broader reading of collaborative practice, including matters where no formal contract has been signed. This may include matters which would be considered 'cooperative' within the terminology followed in this research.

Table 11: General Nature of Collaborative Practice Matters that Included Non-family Law Issues

If possible, what was the general nature of the most recent such matter? (in which you discussed collaborative practice as described above) [referring to C7]
Collaborative Solicitors
'Family law matters have included issues such as commercial law, trusts, wills, and estate planning.'
'Estate matters and real property.'
'Estate Planning, Superannuation splitting, and matters relating to businesses including shareholders and unit holders agreements.'
'Family law.'
'Several business entities'
'I'll embrace a collaborative process (be it under contract or not) for any matter where there are complicated commercial considerations in the context of a property settlement.'

Question C9

Participants were asked how many collaborative practice matters they had participated in that related primarily to an area of law other than family. Only one survey participant indicated that they had done so. This participant, a collaborative solicitor, indicated that they had completed two matters that related primarily to tax law and two that related primarily to commercial and business law.

(e) Extension of Collaborative Practice into New Areas of Law

Section D gathered participants' perspectives on the suitability of the collaborative process for managing disputes in a broad range of areas of law. This section was intended to identify areas which presented a significant opportunity for focused and more detailed analysis. All questions in this section were presented to all participants.

Question D1

This question asked participants to rate the suitability of the collaborative process on a four-point Likert scale, from not at all suitable to highly suitable. As might be expected, all collaboratively trained participants who responded to this section indicated that collaborative practice was either suitable or highly suitable for resolving disputes in family law. Elder law and wills and estates were also included. No participant considered conveyancing, criminal law, or tax law to be suitable areas of law for collaborative practice. Conveyancing is transactional and does not generally involve litigation, and it therefore avoids the mischief that the collaborative process is intended to remedy. Criminal and tax matters may involve litigation, but these are public law fields that address matters between the state and the individual. Very particular forms of dispute management have been developed in these areas. Table 12 below shows the areas that were most frequently identified as suitable or highly suitable by collaborative solicitors. Responses from other participant groups should be treated with caution due to lower representation from these groups.

Table 12: Most Suitable Areas for Collaborative Practice Ranked in the Perception of Collaborative Professionals

	Proportion rating areas a suitable or highly suitable		
Areas of law	Solicitors (c)	Solicitors (t)	Other
1. family law	100%	60%	100%
2. wills & estates	80%	67%	100%
3. elder law	80%	67%	80%
4. employment	79%	75%	80%
5. commercial and business	75%	25%	66%
6. construction	69%	25%	60%

Traditional practitioners appeared to be less optimistic in terms of the number of areas where collaborative practice could be applied. As shown in

Table 13 below, traditional practitioners on average identified fewer applications where the process was suitable or highly suitable [3.5] than either collaborative solicitors [6.0] or professionals from other disciplines [5.7].

Table 13: Average Number of Areas Identified as Suitable or Highly Suitable[20]

Response	*Average number of areas identified*		
	Solicitors (c)	Solicitors (t)	Other
suitable	3.7	2.0	2.7
highly suitable	2.3	1.5	3.0
suitable or highly suitable	6.0	3.5	5.7

Question D2

This question asked participants for the main reason for their identification of areas as suitable for collaborative practice. Participants' reasons for identifying these areas as suitable included some common themes. Several participants mentioned the need to preserve some form of relationship [S(c) 5, S(c) 9, S(c) 11, S(c)12, S(c) 14, Or(1) S(t) 4]. Two other participants noted more generally that ongoing interests or future benefits were important. That the issues were more complex than blackletter law, especially those that involve emotion, was also considered as a reason to adopt the collaborative process.

[20] Average of all participants who provided a response to question D1.

Table 14: Reasons for Perceiving Areas of Law as Suited to Collaborative Practice

Thinking about the areas of law you identified as 'suitable' or 'highly suitable', what was the main reason for your response?		
#	Areas identified	Response
S(c) 1	family law [s]	'Because negotiating between parties is preferable to adversarial positions.'
S(c) 3	commercial & business [s] construction [s] elder law [s] employment law [hs] family law [hs] intellectual-property [hs] personal injury [s] wills and estates [hs]	'Clients who have the capacity to collaborate and the legal issues and future benefits that might be gained through the process.'
S(c) 4	commercial & business [hs] construction [hs] elder law [hs] employment law [hs] family law [hs] property law [s] wills and estates [hs]	'The areas where collaborative practice is suitable are areas which are not 'black and white', where discussion, negotiation and collaboration are possible.'
S(c) 5	commercial & business [hs] construction [s] conveyancing [s] elder law [hs] employment law [s] family law [hs] intellectual-property [s] personal injury [s] property law [s] wills and estates [hs]	'Essentially, the practice of law is about people. The legal issues are important but how they are dealt with has lasting effects on the people involved in the case. It [affects] their lives and their stories. Collaborative law participation empowers people and provides them with much more input into the negotiation and settlement process. It gives a much wider range of settlement options, it is quicker and often cheaper. I believe people who resolve their matters collaboratively come away with a far better understanding of the settlement reached and why it was reached. They also see negotiations and resolution of their dispute conducted in a respectful and calm manner. The lack of hostility between the solicitors provides a better model for the parties and they tend to retain better relationships with one another afterwards. The areas of law which I think are suitable are those where the relationships between the parties are more personal and accordingly would most benefit from being preserved as far as possible during the resolution of the dispute.'
S(c) 6	commercial & business [hs] construction [hs] conveyancing [s] property law [s] employment [s] family law [hs] wills and estates [hs] elder law [hs]	'Areas where options can be created to reflect the interests, needs, and concerns of all parties.'
S(c) 7	commercial & business [s] construction [s] elder law [s] employment law [s] family law [s] intellectual property [s] medical negligence [s] wills and estates [s]	'Ability to resolve issues.'
S(c) 8	employment law [s] family law [hs]	'Experience.'
S(c) 9	commercial & business [s] construction [s]	'Matters where a dispute exists but there is a good reason or motivation to resolve amicably and with the benefit of

	elder law [s] employment law [hs] family law [hs] personal injury [hs] property law [s] wills and estates [s] intellectual-property [s]	preserving the relationship between the parties. Matters where there is a benefit to one party resolving the dispute without the trauma or expense of litigation.'
S(c) 10	commercial & business [s] construction [s] elder law [s] employment law [s] family law [hs] wills and estates [s] intellectual property [s]	'Areas that are traditionally focused on by collaborative practitioners'
S(c) 11	commercial & business [s] construction [s] elder law [hs] property law [s] family law [hs] personal injury [s] wills and estates [hs]	'Family and relationship based often.'
S(c) 12	employment law [s] family law [hs] wills and estates [s] elder law [s]	'The need to preserve ongoing relationships and reconcile interests.'
S(c) 13	wills and estates [hs]	'Similarities to family law disputes, in which the model is highly effective'
S(c) 14	elder law [hs] family law [hs]	'Both areas of law involve families and ongoing relationships, which would be adversely affected by other legal processes.'
S(c) 15	construction [s] elder law [s] employment law [s] family law [hs] medical negligence [s] wills and estates [s]	'I am aware of other practitioners using this method to resolve such disputes.'
S(c) 18	commercial & business [hs] construction [s] employment law [s] family law [s] wills and estates [hs] intellectual property [s]	'These are areas where a win-win (or perhaps mutually beneficial) outcome can be negotiated, and where there are often financial, commercial and emotional/personal benefits from adopting a less adversarial process – in other words, these are areas where the interests of the parties may be found to be aligned or at least to have some things in common. I should add that while I have completed collaborative practice training, I've never had a collaborative practice matter as my family law clients have always wanted the option of being able to instruct me to commence Court proceedings if settlement discussions break down (this is also partly due to the culture of the Sydney family law profession). That said, I have used my collaborative training to improve how I participate in mediations and settlement conferences.'
F(c) 1	commercial & business [s] elder law [s] employment law [s] family law [hs] medical negligence [s] wills and estates [s]	'I believe that the litigation process is stressful and antiquated. In today's busy times with everyone having access to vast amounts of data, resolution can often be met with a formal process, solid legal advice and a robust participation agreement – this is the collaborative process.'
F(c) 2	commercial & business [s] family law [s] wills and estates [s]	'The main thing is to get the parties away from a straight litigation approach.'

M(c) 1	elder law [hs] employment law [s] family law [hs] medical negligence [s] personal injury [s] wills and estates [hs]	‘All legal disputes involve people. Most therefore involve emotion. (Although I am less familiar with commercial and property disputes.) If confidential discussions can be supported by legal counsel and parties can acknowledge the other’s needs and interests.’
M(c) 2	construction [s] elder law [hs] employment law [s] family law [hs] medical negligence [s] personal injury [hs] wills and estates [s]	‘The relational aspect is highly important, and lawyers trained in these areas may tend to have a more collaborative mindset.’
O(t) 1	commercial & business [hs] construction [s] elder law [s] employment law [hs] family law [hs] intellectual-property [s] wills and estates [hs]	‘The main areas I can see collaborative practice being suitable for use is in areas where there is a need to maintain a personal or professional relationship with future dealing.’
O(t) 2	family law [hs] wills and estates [hs]	'I am familiar with that area of law.'
O(t) 3	commercial & business [hs] construction [hs] conveyancing[hs] elder law [s] family law [hs] intellectual-property [s] property law [hs] wills and estates [hs]	‘These areas I believe are the most suitable as I can imagine both parties in these areas could work collaboratively on the matter. I feel as if these types of matters could be easily resolved in this way of law.’
S(t) 3	employment law [hs] family law [hs] intellectual-property [s] medical negligence [s] personal injury [s]	'These areas of law are litigious and adversarial meaning that a higher level of cooperation between the parties may lead to outcomes more quickly.'
S(t) 4	commercial & business [s] construction [s] elder law [s] employment law [hs] family law [hs] medical negligence [s] personal injury [s] wills and estates [hs]	'Emotive areas of law where the disputes often have little to do with contract or logic and are more about relationships and emotions.'
S(t) 5	elder law [s] employment [s] family law [s] medical negligence [hs] wills and estates [s]	'Claims which are not clear cut and have the potential for compromise on both sides are best suited to collaborative approaches I think.'
S(t) 7	conveyancing [hs]	'Requirement for disclosure in collaborative practice appears to be at odds with disclosure requirements in any court proceedings (?)'

Question D3

This question partially mirrored the structure used in D2, asking participants to describe their reasons for identifying areas of law which they considered to be not at all suitable for collaborative practice. The middle 'somewhat suitable' response option was not explored here, because it was considered that a response focussed on the least suitable areas would reveal more about the reasoning process applied to the question of what makes a process suitable.

Some responses further supported the themes established in responses to D2. Whether areas of law involved 'black and white' questions was important to the rationale of several participants. A collaborative solicitor noted that 'black and white areas which are not really subject to discussion are not suitable for collaborative practice' [S(c) 4]. Others noted that relationships or ongoing interests were not as important in these areas of law.

Table 15: Reasons for Perceiving Areas of Law as not Suited to Collaborative Practice

Thinking about the areas of law you identified as 'Not at all suitable', what was the main reason for your response?		
#	**Areas identified**	**Response**
S(c) 1	medical negligence [ns]	'The fault factor in preventable negligence.'
S(c) 3	criminal law [ns] medical negligence [ns]	'Medical negligence is a zero-sum game, and the victim would want findings of fault and then compensation, not to collaborate with the person who harmed them or their family member. Lawyers can use old fashioned negotiation if they want to sort out this kind of claim. Criminal law – I doubt the capacity of alleged criminals to participate in the process. They have counsellors and parole boards and report writers to help them and put their perspective forward.'
S(c) 4	conveyancing [ns] criminal law [ns] tax law [ns]	'Black and white' areas which are not really subject to discussion are not suitable for collaborative practice – e.g., criminal law/tax law/ conveyancing.'
S(c) 5	criminal law [ns] tax law [ns]	'Criminal law in particular doesn't seem to lend itself to collaborative practice as persons are either found guilty or not. I think there is some scope with young offenders particularly to deal with charges in a collaborative manner which would prioritise education and working with young people to reduce re-offending, but this would require a massive shift in the whole system. Same with tax law, I expect that the ATO would not be interested in finding creative solutions for people who they deem to be in breach of the tax laws.'
S(c) 6	criminal law [ns]	'Limited options to deal with matters.'
S(c) 7	conveyancing [ns] criminal law [ns] property law [ns]	'Matters where there are 'time of the essence' provisions are too difficult.'
S(c) 9	conveyancing [ns]	'Transaction type matter – no need for a process that doesn't involve litigation.'
S(c) 10	conveyancing [ns] criminal law [ns] property law [ns] medical negligence [ns]	'Matters that are transaction-based or require expert opinions that will not readily lend themselves to collaborative practice.'
S(c) 11	-	'Nature of the law involved.'
S(c) 12	conveyancing [ns] tax law [ns]	'The law is relatively black and white— very little reason to preserve relationships going forward.'
S(c) 14	commercial [ns] construction [ns] conveyancing [ns] criminal law [ns] intellectual-property [ns] medical negligence [ns] property law [ns] tax law [ns]	'These areas are more black and white, where there is less of a need for any relationship to be retained.'
S(c) 15	commercial law [ns] conveyancing [ns] criminal law [ns] tax law [ns]	'Non-personal interests, therefore no investment in the process, Other than money, to resolve collaboratively. Crime is different as 'dispute' is with the state. Rights and power more relevant here than interests or relationships. But it could be explored.'
S(c) 18		'Criminal law is a contest between the Crown/State and the individual and the nature of criminal liability is that it is something that the Crown must establish. Possibly collaborative practice could be useful as a sentencing option AFTER guilt has been established

		or as a diversionary program for offenders such as young people and persons with impaired capacity or special needs.'
F(c) 1	conveyancing [ns] construction [ns] criminal law [ns] elder law [ns] property law [ns] tax law [ns]	'To be honest, I am unfamiliar with the proceedings in these areas so I cannot recommend them for Collaborative.'
F(c) 2	-	'These are not areas I work in.'
M(c) 1	criminal law [ns]	'Non personal interests, therefore no investment in process, Other than money, to resolve collaboratively. Crime is different as 'dispute' is with the state. Rights and power more relevant here than interests or relationships. But could be explored.'
M(c) 2	-	'In my opinion, these identified areas are ones where I feel there is no need for ongoing relationships'
O(t) 1	property law	
O(t) 2	family law [hs] wills and estates [hs]	'Not aware of any practitioners using this method in these areas.'
O(t) 3	criminal law [ns]	'Less relational, more traditional or corporate and lawyers may have more of a reputation to be adversarial.'
S(t) 3	employment law [hs] family law [hs] intellectual property [s] medical negligence [s] personal injury [s]	'These areas of law are litigious and adversarial meaning that a higher level of cooperation between the parties may lead to outcomes more quickly.'
S(t) 4	commercial & business [s] construction [s] elder law [s] employment law [hs] family law [hs] medical negligence [s] personal injury [s] wills and estates [hs]	'Emotive areas of law where the disputes often have little to do with contract or logic and are more about relationships and emotions.'
S(t) 5	elder law [s] employment [s] family law [s] medical negligence [hs] wills and estates [s]	'Conveyancing is too rigid, and there are other principles at work in criminal law which militate against a collaborative approach.'
S(t) 7	conveyancing [hs]	'Requirement for disclosure in collaborative practice appears to be at odds with disclosure requirements in any court proceedings (?)'

Question D4

This question was presented to all participants as a follow-up to D3. This question invited participants to note an area of law which was not included within the list. This was included as a fail-safe— the list was intended to cover the field with respect to the main areas of legal practice. Suggestions included ‘anti-discrimination law’ [S(c) 18], ‘commercial litigation’ [S(t) 3], and ‘child care and proceedings, where mediation is used in some cases; appropriate matters could use collaborative with a highly trained team' [S(c) 6]. One participant noted the importance of relationships: ‘Family. Wills. Any dispute where relationships are important’ [M(c) 1].

Question D5

This question asked all participants about which aspects of the collaborative process would be most important with respect to its use in commercial disputes. It was common for participants to regard most or all the listed aspects of the process as important or very important. Open disclosure of all relevant information, good-faith interest-based negotiations, and a mutual commitment to settle were usually regarded as very important and were at a minimum important by all participants.

Mandatory disqualification of counsel was more polarising among participants. A substantial number of participants regarded it at the extremes of very important, or not at all important. The table below shows the proportion of each participant category who rated the aspects of collaborative practice.

Table 16: Importance of Aspects of Collaborative Practice for Commercial Disputes

Thinking about the use of collaborative practice for commercial disputes, how important is it that the process includes each of the aspects listed below?												
Process aspect	Not at all important %			Somewhat important %			Important %			Very important %		
	S(c)	S(t)	Or	S(c)	S(t)	Or	S(c)	S(t)	Or	S(c)	S(t)	Or
1. Lawyer disqualification if the matter proceeds to litigation.	14	25	17	07	50	17	14	-	17	64	25	50
2. Open disclosure	-	-	-	-	-	-	-	25	-	100	75	100
3. Good faith, interest-based negotiation	-	-	-	-	-	-	21	75	-	79	25	100
4. A mutual commitment to settle	-	-	-	-	-	-	14	50	-	86	50	100
5. Inclusion of a neutral third party as mediator or coach	-	-	-	29	-	-	36	75	67	36	25	33
6. Inclusion of professionals with subject matter expertise from disciplines other than law.	-	-	50	29	25	08	50	75	25	21	-	17
7. Mutual trust between lawyers /other professionals	-	-	-	-	-	-	14	59	33	86	50	67
8. That all professionals are collaboratively trained	-	-	-	-	75	-	21	25	33	70	-	67
S(c): collaborative solicitors, S(t): traditional solicitors, Or: other participants												

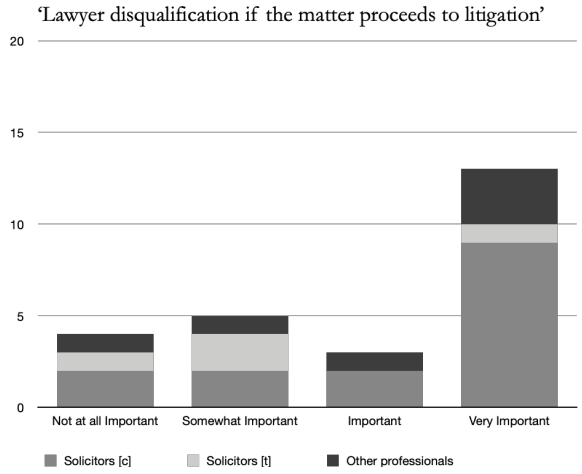


Figure 8: Lawyer Disqualification

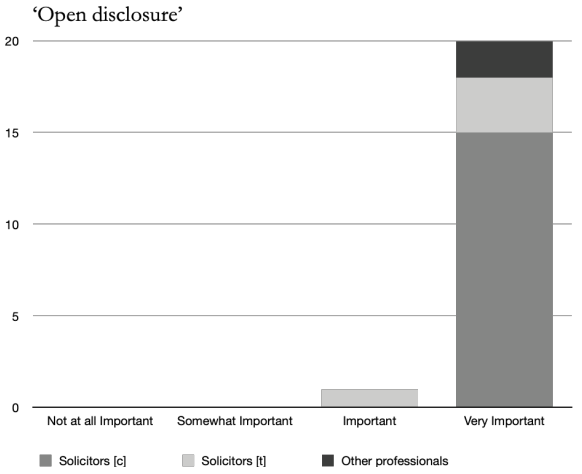


Figure 9: Open Disclosure

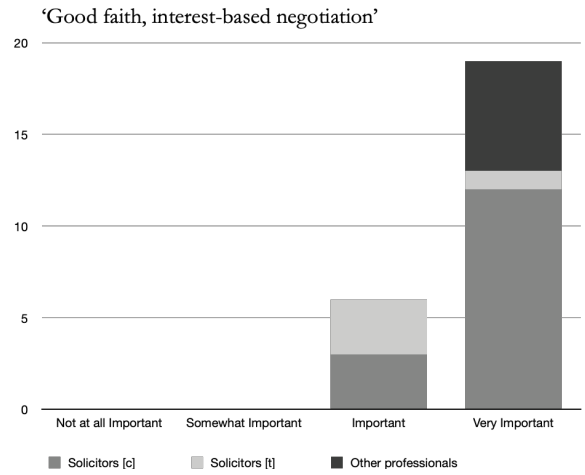


Figure 10: Good Faith Interest Based Negotiation

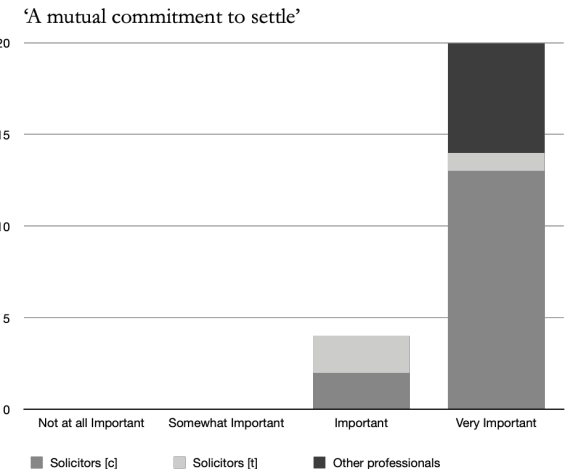


Figure 11: Mutual Commitment to Settle

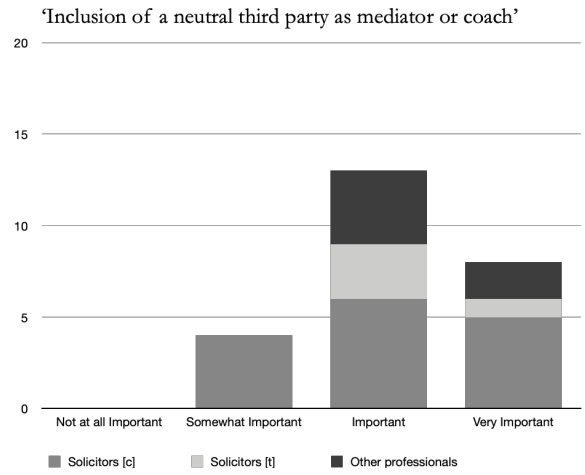


Figure 12: Facilitative neutrals

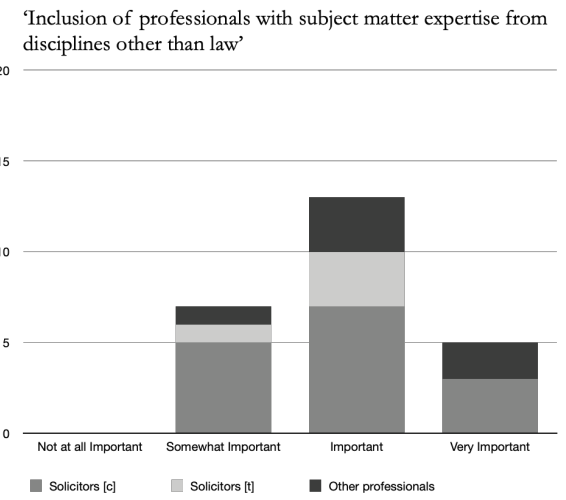


Figure 13: Neutral Experts

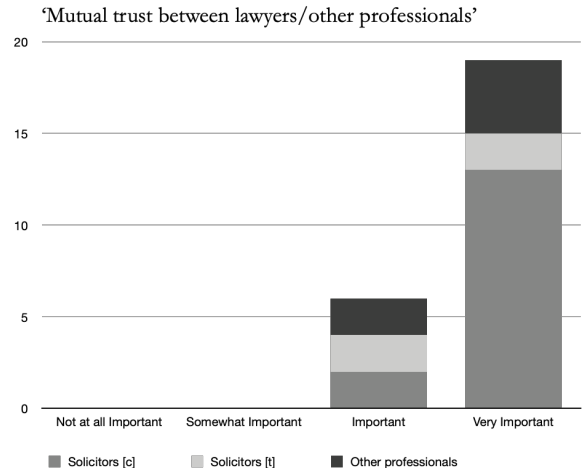


Figure 14: Trust Between Professionals

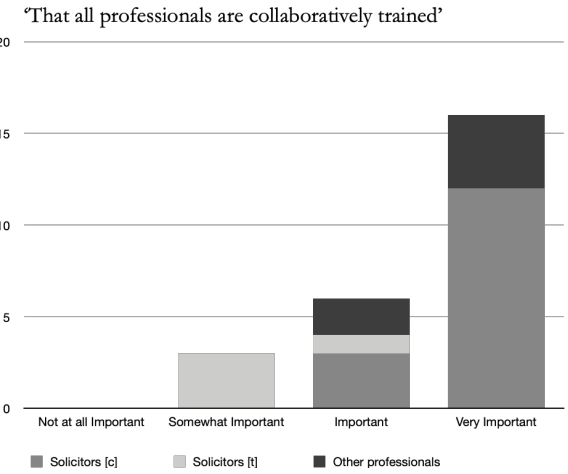


Figure 15: Specialised Training

Question D6

This question was presented to all participants as a follow up to D5. This question asked participants to explain why they identified aspects of the collaborative process as important or very important in relation to its use in commercial matters. To provide context for responses, the areas that they identified as important or very important have been included, with ‘very important’ selections underlined.

Participants tended to regard most of the aspects listed as important in the use of collaborative practice in the commercial world. Every response identified at least five areas as important or very important, and 36.8% of responses identified all eight areas as important or very important.

Table 17: Reasons Aspects were Identified as (very) Important in Commercial Collaborative Practice

Thinking about those aspects that you identified as important, or very important, what was the main reason for your response?		
#	Areas identified	Response
S(c) 1	2 3 4 5 6 7 8	'To enhance outcomes.'
S(c) 3	1 2 3 4 6 7 8	'There has to be an open mind set on all sides; otherwise it is just a waste of time and an information-gathering duplicitous exercise. Training is a must - otherwise the lawyers can just round table negotiate or mediate. The only way to keep the professionals honest and work toward settlement is if they can't act if collaboration fails.'
S(c) 4	1 2 3 4 5 6 7 8	'Without a mutual commitment to settle and the other items listed as important or very important, a collaboration will not work. Collaboration depends on a mutual commitment to settle, building up trust within the team, open and honest discussions. The lawyer disqualification is very important, as usually clients don't want to lose their lawyers and commit to another expensive process, therefore there is another reason to settle.'
S(c) 5	1 2 3 4 5 6 7 8	'The whole process works if there is maximum information available and trust between all parties. If someone undermines the process by not disclosing or the trust is broken, then the entire basis for the negotiations breaks down and people take protective positions which become adversarial. Assistance from financial professionals and coaches can help with the parties' understanding of their own, the other person's and the children's needs which helps to reduce the fear (which is often what leads to the most conflict).'
S(c) 6	1 2 3 4 5 7 8	'My experience in collaborative matters - how teams work effectively and not so effectively.'
S(c) 7	1 2 3 4 6 7 8	'You cannot do a collaborative matter if you do not trust the other practitioner. There are a number of collaboratively trained practitioners whom I will not work with as they cannot be trusted. If you don't follow the process correctly, you might as well not do it.'
S(c) 9	2 3 4 7 8	'Foundations of the process are trust between professionals, motivations of the parties is critical, disclosure and availability of all relevant information is essential.'
S(c) 10	1 2 3 4 5 6 7 8	'Untrained practitioners can easily derail matters.'
S(c) 11	1 2 3 4 5 6 7 8	'From experience in matters.'
S(c) 13	1 2 3 4 5 6 7 8	'The model works when all participants are focussed on achieving settlement by working through the dispute from a client-centric and interests-based position rather than from an adversarial entitlement-based position. The listed aspects are vital to the efficacy of the model working.'
S(c) 14	2 3 4 5 6 7 8	'These aspects are central tenets of the process which allows for the open good faith negotiations to occur. Needs to be mutual trust between all of the professionals as because collaborative matters are less formal, and the participants rely on each other to act in good faith.'

S(c) 18	2 3 4 5 7 8	'From my experience as a family lawyer all of these are needed for the process to work - if the parties or one of them do not act in good faith or do not want to settle then they are less likely to compromise or see things.'
F(c) 1	2 3 4 5 6 7 8	'Collaborative law is a trusted process, you must have trust and respect of the professional participants to ensure the matter will be handled with integrity. When it comes to the coach role, I personally see this as the pinnacle role in the process. I have worked with an amazingly talented coach whom I believe has truly been the reason the process has been successful. The coach is a leader, guide, anticipator, communicator and one to lead the team to victory.'
F(c) 2	2 3 4 5 6 7 8	'If the matter is not taken on by all Parties with the intention of seeking a resolution in good faith, it will not work.'
M(c) 1	1 2 3 4 5 7 8	'My expertise is family law. Less easy to be sure, but all Elements are critical to successful CP.'
M(c) 2	1,2,3,4 5 6 7 8	'Without these, the process is less likely to succeed. Good faith, interests base and lawyer disqualification are fundamental tenets of the collaborative process.'
S(t) 3	2 3 4 5 6 7 8	'An independent, neutral third-party mediator is always very important when attempting to reach a negotiated outcome to a dispute.'
S(t) 4	2 3 4 5 6 7	'It is impossible to collaborate with a practitioner or party that you do not trust. Full disclosure of relevant information and a mutual desire to settle are also imperative.'
S(t) 5	2 3 4 5 6 7	'The respondent needs to have faith that all relevant information has been provided by the claimant.'

1. Lawyer disqualification if the matter proceeds to litigation.
2. Open disclosure
3. Good faith, interest-based negotiation
4. A mutual commitment to settle
5. Inclusion of a neutral third party as mediator or coach
6. Inclusion of professionals with subject matter expertise from disciplines other than law.
7. Mutual trust between lawyers /other professionals
8. That all professionals are collaboratively trained

Question D7

This question was a further follow up question that referred to answers given in question D5. Participants were asked to explain why they identified particular aspects of the collaborative process as not at all important to the use of the collaborative process in commercial areas. As noted, the disqualification provision was strongly polarising, which led to it being the area most frequently identified as not at all important. Participants who rated disqualification of counsel in this manner provided several reasons. Some participants noted the effect that disqualification would have on clients. One solicitor noted that:

> I don't know why it's useful to make the solicitors step down… it seems impractical and it would necessitate an extra cost to the client, for another practitioner to get across the matter to progress it. [F(c) 1]

A financial neutral considered that disqualification could cause the client to lose access to a trusted advisor:

> I do not believe the legal team needs to be completely disqualified if a matter falls over. The legal professionals often build a very trusted position with their client, it may be the other parties fault a matter was not resolved and then that trusted legal rep is not allowed to represent their client. Silly. [F(c) 1]

A traditional solicitor perceived the disqualification provision as a penalty against the solicitors for not achieving a settlement. They note: 'lawyers should not be penalised for failing to settle a matter and it proceeding to litigation' [S(t) 3].

Table 18: Reasons Aspects Were Identified as not at all Important in Commercial Collaborative Practice

#	Areas identified	Response
S(c) 1	1	'Practice and experience can be acquired.'
S(c) 5	-	'There aren't any aspects listed above that I consider not to be important.'
S(c) 9	-	'Depending on the matter, will determine the importance of the aspects I considered somewhat important. I don't believe that every matter, in every area of law will be appropriate or necessarily inappropriate for collaborative law and that the most important consideration, is each matter being assessed on a case by case basis.'
S(c) 11	-	'From experience in matters.'
S(c) 14	1	'Acts as an incentive for the process to work and for the participants to make it work.'
F(c) 1	1	'I do not believe the legal team needs to be completely disqualified if a matter falls over. The legal professionals often build a very trusted position with their client, it may be the other parties fault a matter was not resolved and then that trusted legal rep is not allowed to represent their client. Silly.'
M(c) 1	4	'Less likely to need this, but maybe wrong. Maybe financials and subject area experts v influential.'
S(t) 3	1 8	'Lawyers should not be penalised for failing to settle a matter and it proceeding to litigation.'
S(t) 4	1 8	'I don't know why it is useful to make the solicitors to step down. It seems impractical and would necessitate, at extra cost to the client, for another practitioner to get across the matter to progress it.'

1. Lawyer disqualification if the matter proceeds to litigation.
2. open disclosure
3. Good faith, interest-based negotiation
4. A mutual commitment to settle
5. Inclusion of a neutral third party as mediator or coach
6. Inclusion of professionals with subject matter expertise from disciplines other than law.
7. Mutual trust between lawyers /other professionals
8. That all professionals are collaboratively trained

(f) Culture and Attitudes

All questions in section E were presented to all survey participants. Participants were presented with an array of statements accompanied by the question: 'Do you agree or disagree with the statement below?' Questions were randomly ordered, and some areas were addressed by more than one question to confirm internal validity. Responses were recorded on a five-point Likert scale. Even with the limited sample size, many of the questions produced a substantial consensus among participants.

The ethics of the incentive created by the disqualification provision have been questioned by critics who consider it to amount to coercion. Most participants did not consider the disqualification to be coercive.[21] However, this view was not unanimous, with one participant agreeing and another strongly agreeing that the provision is coercive.

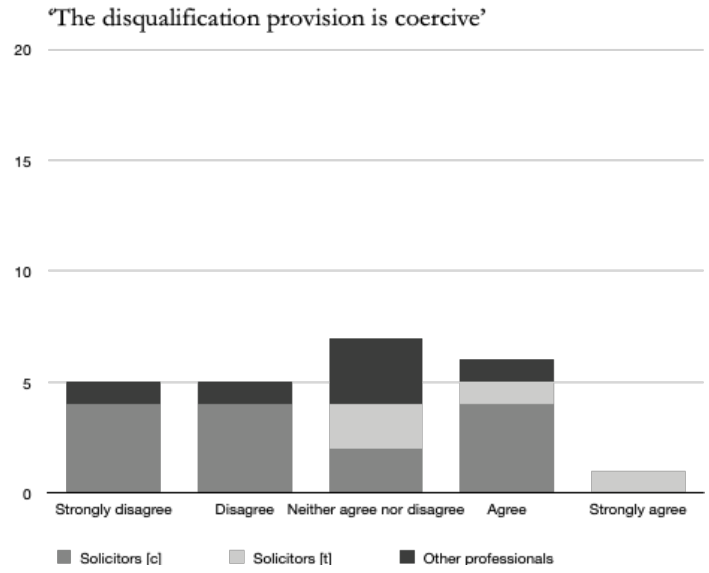


Figure 16: Perceptions of Coercion in the Collaborative Process

Participants did not perceive solicitors as open to working under a participation agreement. Only two participants indicated that they agreed or strongly agreed that 'most' commercial solicitors would be open to working within the collaborative process.

21 See, e.g., Nancy Zalusky Berg, 'Drinking the Kool-Aid' (2009) in Linda Wray and Nancy Zalusky Berg 'Point Counter-Point: Collaborative & Cooperative Law', 17 November 2010 Minnesota Bar Association.

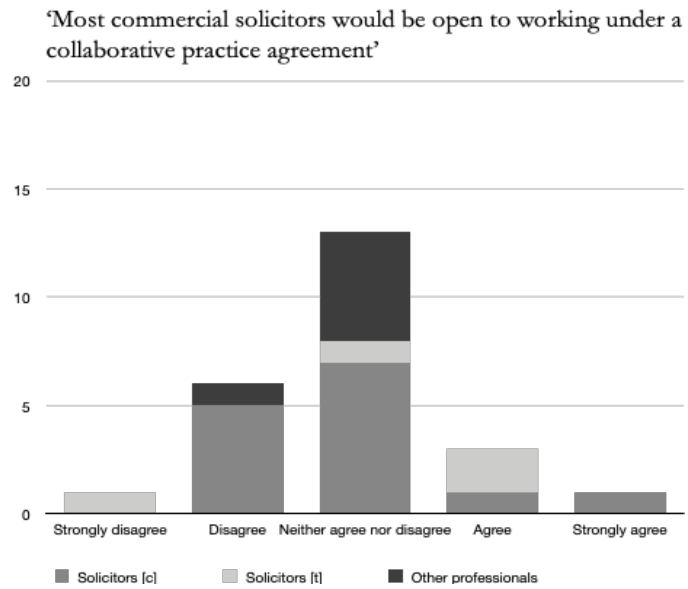


Figure 17: Openness of Commercial Solicitors to the Participation Agreement

Most participants were optimistic about the capacity of the collaborative process to assist clients outside of family matters. The majority (9) agreed or strongly agreed that collaborative practice could benefit their non-family clients.

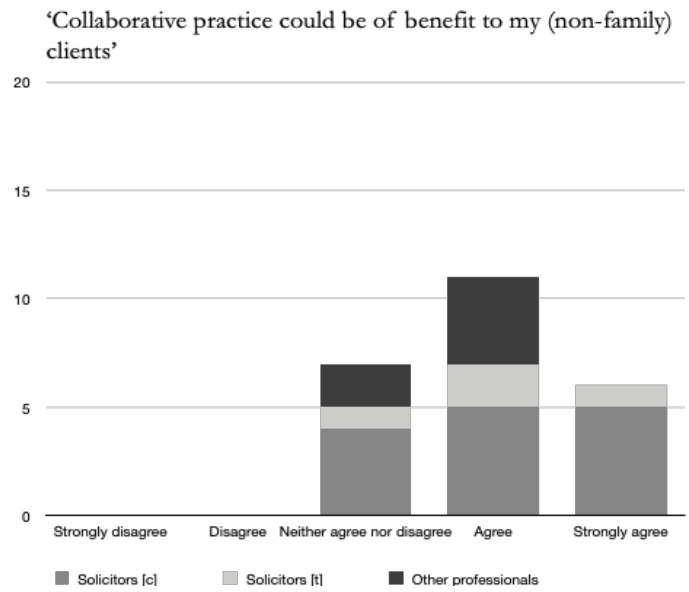


Figure 18: Perceived Benefit of Collaborative Practice for Non-family Clients

Participants from both traditional and collaborative backgrounds were open to the use of the process outside of family law. A clear majority disagreed or strongly disagreed with the idea that collaborative practice is 'really only suited to family law matters'.

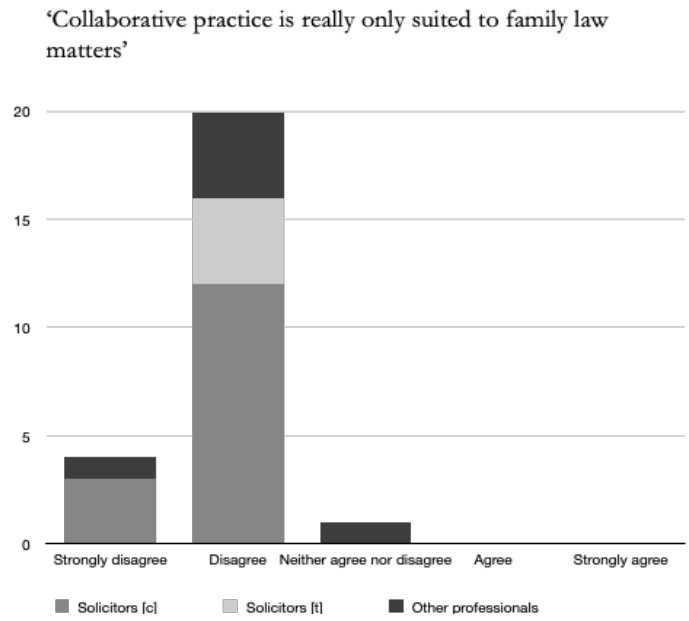


Figure 19: Suitability of Collaborative Practice Outside of Family Law

Litigation, as discussed in chapter two, has cultural relevance and attending court can have meanings for parties which extend beyond the practical aspects of the process. The idea of 'having your day in court' is literal in the sense of attending court for litigation, but further contains an idiomatic connotation described by the Cambridge dictionary as: 'to get an opportunity to give your opinion on something or to explain your actions after they have been criticised.'[22] Most participants (69.2%) did not consider 'having their day on court' to be important to their clients.

[22] 'Have your Day in Court' *Cambridge Dictionary* <dictionary.cambridge.ord/dictionary/English/have-your-day-in-court>.

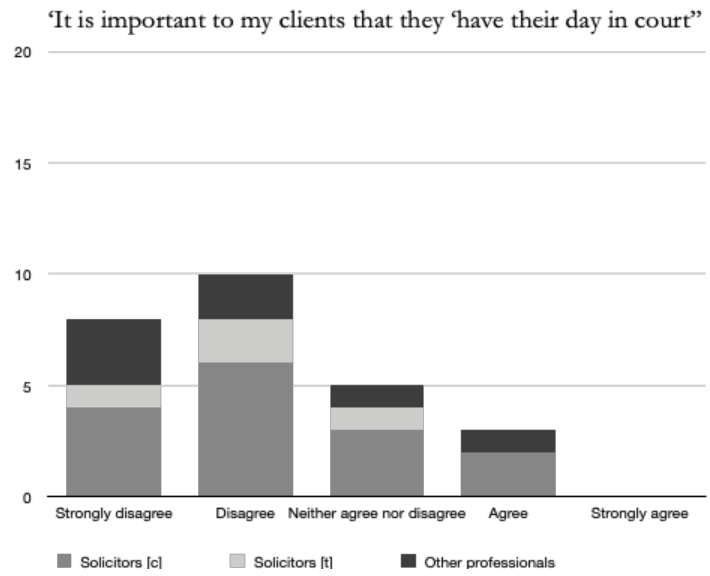


Figure 20: Importance to Clients of 'Having their Day in Court.'

Litigation has a reputation for requiring strong technical skills and knowledge. Some lawyers may consider effectiveness in this arena an important demonstration of professional skill. Few participants (12.5%) perceive litigation to be the ultimate test of a lawyer.

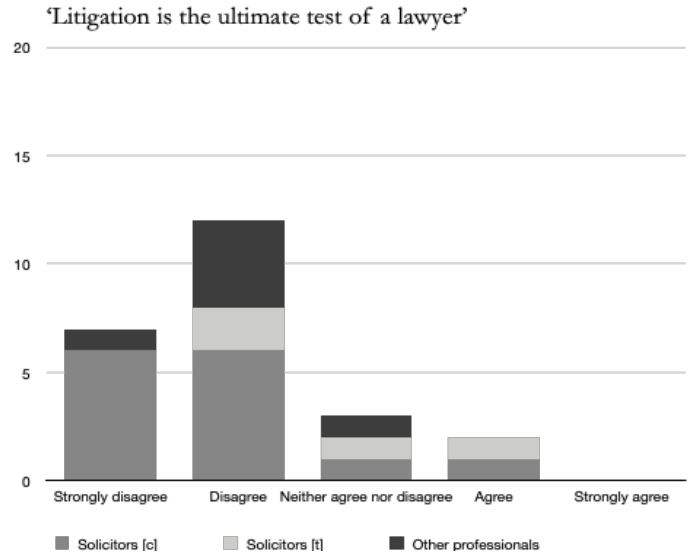


Figure 21: Litigation as the 'Ultimate Test of a Lawyer.'

Most participants (76.9%) considered that the issue of (a lack of) professional education and awareness was a barrier to the growth of collaborative practice.

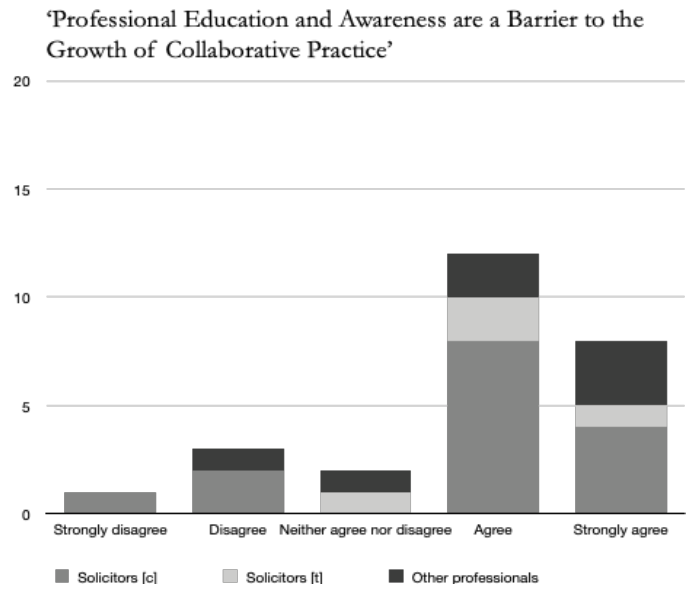


Figure 22: (Lack of) Professional Education and Awareness as a Barrier to Growth

Similarly, most participants (73.1%) considered that limited client education and awareness was a barrier to the growth of collaborative practice.

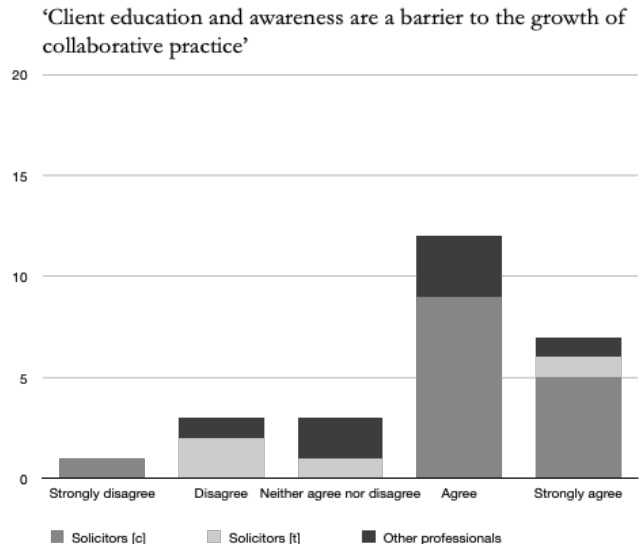


Figure 23: (Lack of) Client Education and Awareness as a Barrier

Two questions tested perceptions of attitudes in the profession towards lawyers who are collaborative. Most lawyers did not consider lawyers using the collaborative process to be less respected than lawyers working within traditional adversarial practice. However, when asked about competition and collaboration as abstract concepts, participants tended to perceive the legal profession to place a greater value on competition than collaboration.

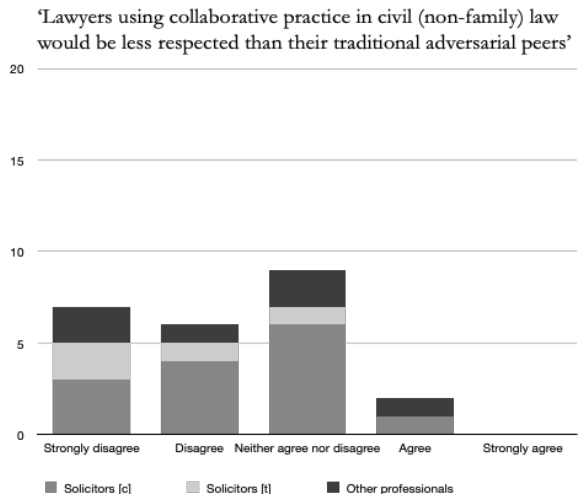


Figure 24: Professional Peer Respect

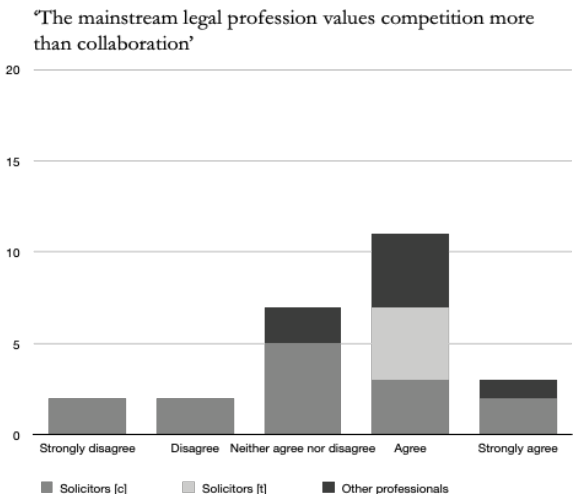


Figure 25: Mainstream Professional Values

Participants were asked whether the use of collaborative practice in commercial settings raises 'practical or ethical concerns'. Several participants noted that there might be ethical or practical issues which arise in the period that follows disqualification in an unsuccessful collaborative process. These issues included the potential (mis)use of information which is revealed or produced throughout the collaborative process, and the additional delay which may be experienced if parties begin working collaboratively rather than through litigation. Another participant noted a possible conflict between clients' interests and lawyers' pragmatic interests in managing their time. Several participants opined that the use of collaborative practice in a commercial matter could not give rise to ethical issues beyond those applicable to lawyers in all matters.

Table 19: Practical or Ethical Concerns in Relation to Collaborative Practice in Commercial Settings

In Your View, Does the Use of Collaborative Practice in Commercial Settings Raise any Practical or Ethical Concerns?
Responses
Collaborative Solicitors ‘advantages to all parties’ ‘Ethically, it would be what you could use through collaboration in court if it fails.’ ‘There are always issues— like financial planning, lawyers will be bound by acting in the ‘best interests’ of their client. Not their busy diaries. I don’t have enough legal knowledge to comment further on what these issues may be.’ ‘I think the main practical issue in a commercial setting is the delay in perhaps running a collaborative case, then finding it hasn't worked and then having to commence litigation. There is far more likely to be time pressing issues in commercial matters which need to either be resolved quickly or interlocutory orders made.’ ‘The same ethical and practical considerations apply in commercial and non-commercial matters. Lawyers are bound by their role as 'officers of the court' and work within an ethical framework as set out by determined cases and professional conduct rules.’ ‘No, if you are properly trained you will know what is appropriate in terms of practical or ethical considerations.’ ‘Not my experience.’ *Traditional Solicitors* ‘Collaborative practice appears less suited to the commercial context where solicitors must strongly advocate on behalf of their clients. They have ethical obligations to achieve the best outcomes for their clients and not to disclose commercially sensitive information to the opposing party should that not be in their client's best interest.’ ‘Sorry, I don't work in commercial law and don't really know what the implications or applications would be.’ *Other professionals* ‘There are always issues- like financial planning lawyers will be bound by acting in the "best interests" of their clients; not their busy diaries. I don’t have enough legal knowledge to comment further on what these issues may be.’ ‘I tend to use it as a form of mediation. We get both Parties in our Boardroom and actually explain the basis of valuations to them then go through the valuation results. I am open to changing numbers if both Parties agree or just to show the impact on the final valuation.’ ‘No expertise here.’ ‘The discovery aspect could be misused. Employees could be criticised later on for using this method rather than electing to go to Court if the process fails.’ ‘No’

The final mandatory question asked, in open terms, whether there was anything the participant wished to share with respect to the survey or the research area. [23] Two participants commented on education in law schools. These participants noted that interdisciplinary and less adversarial approaches are not within the core curriculum and that training in these should start at the undergraduate level.

[23] No question was truly mandatory in that the survey was programmed to allow respondents to skip any question, however the demographics section was expressly described as optional.

7.2 Interview Data

This section presents the results of semi-structured interviews conducted with collaborative and traditional lawyers and interdisciplinary collaborative professionals. Table 20 below shows the interview participants, an approximation of their experience after admission to legal practise or other relevant qualification, and the mode of interview. As in the survey, the views of both traditional and collaborative professionals were gathered to allow for a nuanced exploration of established and emerging forms of legal practice. All collaborative solicitors interviewed had previously worked within traditional practice and could thus make comparisons between their work before and after training in the collaborative process.

The collaborative participants' approach in interviews was characterised by reflecting on their cases, considering when they worked well, and when they encountered challenges, and relating these to more general abstract concepts. The commercial and other traditional lawyers interviewed did not have the same grounding of experience with the process, and so in contrast, tended to begin by considering the definitional characteristics of collaborative practice—as set out by the IACP, and then considered how the process might play out in their area of practice. These participants often referred to their experience with other non-litigation dispute management methods, such as mediation or alliancing, to inform on the potential of the collaborative process in their field. Each of these perspectives was important in building a rounded picture of the potential of collaborative practice outside of the established ground on family law.

Table 20: Professional Characteristics of Interviewees

Professional background	Location	PAE*	Mode
Solicitor (t)	Brisbane	20+ years	In-person
Solicitor, mediator (t)	Melbourne	20+ years	Phone
Solicitor, in house counsel (t)	Adelaide	10-15 years	Zoom
Solicitor, in house counsel (t)	Sydney	20+ years	Zoom
Solicitor (c)	Sydney	20+ years	Zoom
Mediator (t)	Brisbane	3-5 years	Zoom
Mediator, coach (c)	Sydney	5-10 years	Zoom
Solicitor (c)	Sydney	10-15 years	Zoom
Solicitor, mediator (c)	Sydney	20+ years	Zoom
Solicitor, mediator (c)	Sydney	20+ years	Zoom
Solicitor, in house counsel (t)	Sydney	20+ years	Zoom
Solicitor (c)	Gold Coast	20+ years	Zoom
Solicitor (c)	Brisbane	20+ years	Zoom
*Post-admission experience (lawyers), post qualification experience (other professions).			

The same semi-structured guide was used for each of the interviews.[24] However, the flow of interviews was organic, with participants often moving through the topics intended to be covered with minimal guidance. This was considered to support the goals of the research because it helped to limit the interviewer's intrinsic influence over data collection.

Interviews took between thirty to ninety minutes to complete, depending on the complexity of interviewees' responses. The length of the interviews is such that it would not be practical to provide them in full. The transcripts themselves would exceed the length of this thesis. Instead, the results are presented thematically, centred around themes which were recurrent or for other reasons appeared salient to the research area. As with the survey results, the interview data is laid out in brief here, then compared with other data and the literature in the following discussion chapter. Interview data are provided thematically. Themes discussed were reached through inductive methods and may therefore be considered grounded in the perspectives of interview participants.

(a) Perspectives on Traditional Legal Practice

Several participants commented on the culture and norms associated with traditional legal practice.

(i) Litigation

While few matters were perceived to be managed through litigation, the process was identified as retaining a focal position, both in the culture of legal practice and as a significant

[24] See Appendix 2 'Semi-structured Interview Guide'.

part of the business of traditional legal practices. It was common ground among participants that litigation was an ‘expensive’ [M(t) 6; S(c) 8, S(t) 3, S(c) 10, S(c) 9] and ‘time consuming’ [S(t) 3] process for clients. Several interviewees stressed that it was important to consider not only the direct costs associated with courts and representation but also the indirect and opportunity costs that the process imposed upon the parties. In family and other personal matters, these additional costs were the impact of the adversarial process on the parties' post-separation relationships. This included their relationships with one another, with mutual associates, and crucially, with their children. A collaborative solicitor noted: ‘you’re dealing with family members who have an interest in preserving family relationships, who don’t necessarily want to litigate because of the fact that the result of the litigation could be fracturing the family’[S(c) 9]. Another participant noted:

> We see a client at the end of a litigated matter— they are shattered, they’re absolutely and completely shattered. They’ve gone into the witness box they’ve been cross-examined up hill and down dale. They hate each other at the end; they absolutely hate each other! Because they said really nasty things in each other’s affidavits, all this private stuff has gone into the public arena. And then they have to go and parent their children; you know how does that work? [S(c) 8]

In commercial matters, the most discussed additional costs comprised the loss of executive time, as key staff come to focus on the dispute rather than the core concern of the business. Interviewees noted: ‘if it’s a business engaging in a dispute it takes key people away from the core business, what the organisation is driving’ [S(t) 3]; ‘it takes a life of its own…the loss of executive time, that’s never factored in’ [S(t) 11]. At its most harmful, litigation was said to cause executives to prioritise beating the other side beyond the goals of the organisation. As a traditional solicitor noted:

> The role of senior executives is to run their organisations for the benefit of the shareholders, and all the interested parties, including the public and the environment and all those sorts of things. And if they’re locked into a court case, well all that goes largely by the wayside because the court case dominates their lives. And you know it can’t be anything else because you know there is one winner there’s one loser… I’ve seen it so many times, where clients who are senior managers become obsessed with the nuts and bolts of the litigation, and they take their eye off the ball in commercial terms, and often to the great detriment of their organisation, and their employees, and customers. [S(t) 11]

One traditional solicitor discussed that the litigation process could expose errors that had been made by particular employees, and due to the adversarial nature of the process, show them in the worst possible light. They noted: ‘people don’t like the possibility that their mistakes are going to become aired and known’ [S(t) 4].

Acknowledging the many forms of costs associated with litigation, interviewees overwhelmingly perceived a duty to keep their clients out of court wherever possible. This was the case for both collaborative solicitors, and those from a traditional background. One traditional solicitor noted: 'any commercial lawyer worth his or her salt will tell you the last thing that a client should do is litigate' [S(t) 11]. Another traditional solicitor noted: 'we just try and resolve the issue and tend not to go off to adjudication or litigation unless it’s a difficult process or you’re not getting a proper hearing from the other side...’[S(t) 1]. There were only very limited exceptions to lawyers’ preferences to counsel against litigation. Participants noted that situations where litigation was more often warranted included 'test cases' [S(t) 5]; and in matters that involve ‘very high quantum' [S (t) 3, S(t) 1]. A solicitor observed that ‘if they have a sixty million dollar building and they have an overrun by ten million dollars, well that’s something that they’ll be a lot more adversarial about’ [S(t) 1]. Litigation was also considered necessary where the other party is absolutely unwilling to negotiate [S(t) 1].

However, the 'duty' to keep clients out of court appears to be experienced at the level of individual solicitors. This does not necessarily transfer to the priorities of firms as business entities. Even though participants often counselled against litigation, it was still identified as an important component of revenue for firms. Interviewees noted the significant billable hours needed to prepare for and participate in proceedings. Litigation was said to be 'extraordinarily expensive due to the amount of time that lawyers are obliged to spend on it' [S(c) 9].

Some participants highlighted a potential conflict of interest, where firms may be influenced by the importance of litigation as a source of revenue. Litigation was thought to be subtly encouraged within the dynamics of some firms. One solicitor noted: 'I didn't get a pat on the back when I settled matters, which I did regularly because then they were gone' [S(c) 10]. They felt this pressure even as the firm's approach was held out as less adversarial to clients: 'there was a lot of pressure to litigate… obviously the billing is far greater, and you've got a continuing matter on foot’ [S(c) 10].

Following this line of logic, some collaborative participants suggested that the collaborative process might be perceived as a threat by traditional firms. A collaborative

solicitor noted: 'You've probably come up against a lot of opposition, you know particularly from people whose livelihoods are dependent on litigation' [S(c) 10]; another that 'serious litigators see it [collaborative practice] as a threat' [S(c) 9].

In addition to its role in firms' revenue structure, litigation holds a significant role as a touchstone of professional identity. For some practitioners, working in court is a source of professional pride. These lawyers may be attracted to the court as much due to romantic notions of the ritual of the trial, as for any pragmatic reason to preferring litigation. One traditional solicitor stated:

> The courtroom is theatre, and there are lots of lawyers who become waylaid by the theatre… you know it's what they're trained [to do], it's what they're good at, and they enjoy it, enjoy it enormously… sitting around the conference table trying to hammer out a deal doesn't for many lawyers… have the same attraction. [S(t) 11]

Another solicitor described being attracted to the history and social significance of the law, and thus enamoured with the court as a newly admitted practitioner:[25]

> I love the intellectual side of the law... It's very interesting, the whole history and philosophy of particular Western society…about how we organise ourselves and each other. And so, from that point of view, it was exciting to be in court, it was exciting to have those arguments, and that's what I saw as being relevant. [S(c) 5]

However, as their career progressed, this solicitor identified the need to develop a non-adversarial skillset to better serve the needs of their clients.

> I wanted to be the best advocate or advisor to the person. And what I've learned since is that it's about not stopping with that adversarial skill. I can turn it on to this day. I find it quite straightforward and easy to do. But I just don't find it satisfactory for clients; it just isn't. And it's not their space; it's not where they want to spend their time and energy and resources. [S(c) 5]

(ii) Settlement 'in the Shadow of Litigation.'

Outside of the courtroom, legal practice was still perceived as maintaining an adversarial and competitive element. For example, a participant noted the importance of fighting back in legal practice. In response to a question on what was valued in traditional law firms, they

---

[25] See generally, Carrie Menkel-Meadow, 'Whose Dispute is it Anyway?: A Philosophical and Democratic Defence of Settlement (In Some Cases)' (1995) 83 *Georgetown Law Journal* 2663, 2669: on 'litigation romanticism.'

said: 'your ability to write a sort of pithy cutting letter, and you know. Give as good as you got [was highly valued]' [S(c) 10].

Interviewees acknowledged that adversarial negotiations often result in settlement. Many cited non-specific research, which has found high settlement rates in Australian legal disputes. However, even though matters often settled, interviewees from a collaborative background found negotiations within an adversarial framework an unsatisfactory or incomplete solution. Collaborative professionals discussed the harm that the litigation process did to their clients, and the limitations on settlement outcomes agreed through traditional negotiations. One collaborative solicitor described their experience in traditional practice:

> I would write that first settlement letter and a year later at the door of the court, the person would accept the offer that I had been able to work out on the first day, but I had been unable to protect my client from the experience and the expense. [S(c) 13]

Comments like this demonstrate that collaborative solicitors set an especially high bar for success in their work. In addition to achieving a settlement, they are attentive to the impact of the process on the parties in deciding whether they have provided a satisfactory legal service.

A traditional solicitor gave an example of how settling a dispute for nuisance value can work against the interests of *both* parties. In the short term, the party who settles for an unreasonable amount is deprived of a 'fairer distribution of fault' [S(c) 4]. The other receives a windfall—though their perception may vary. In the longer term, however, each party is harmed by a lost potential for future transactions between the parties [S(c) 4]. This solicitor noted:

> I was unhappy with the fact that the bill was paid in whole… I think we could have worked that all out in a such a way that we preserved the reputations of the people involved and still saved the organisation some money…. they may have actually picked up other work afterwards but they really just get a black cross against their name and may never get work again. [S(c) 4]

This matter illustrates that even the apparent winners in a traditional positional settlement may be worse off because the settlement windfall is offset by a breakdown in the mutually beneficial economic relationship between the parties.

(iii) 'Bully Lawyers'

Over and above the ordinary adversarial expected in traditional practice, participants discussed a narrow subset of lawyers who embodied the extremes of competitive and positional negotiation. Participants often drew upon metaphors to describe highly adversarial lawyers. Examples included 'fire and brimstone lawyers' [S(t) 1], 'bull terriers' [S(c) 8],

'ogres' [S(t) 4], and the 'funnel-web' spider [S(t) 10]. A collaborative practitioner described encounters with 'older male bullying' [S(c) 8], a style of practice which used yelling, dismissive language, and aggressive displays to influence negotiations. A collaborative solicitor described one established barrister as: 'just fierce when you came up against him… he certainly wasn't collaborative in the slightest' [S(c) 10].

While a degree of firmness was thought to be respected, neither collaborative nor traditional solicitors were accepting of colleagues who were exceptionally adversarial. Participants noted that highly adversarial lawyers tended to obstruct what might otherwise be reasonable and achievable settlements. One solicitor noted:

> …if you have adversarial lawyers then it can be quite difficult because rather than be commercial about things, they'll just stick to what they see should be the best outcome for the client rather trying to reach a commercial compromise. [S(t) 1]

Practitioners described that learning how to manage and diffuse interactions with aggressive lawyers was an important skill which they developed over time. Two interviewees described similar experiences of being vulnerable to, or intimidated by, highly aggressive practitioners early in their career [S(c) 5, S(c) 8]. However, when these interviewees encountered similar tactics later in their career, they were able to identify and bring attention to the tactics used, or to 'cajole'[S(c) 8] the practitioner into adopting a more collegiate negotiating style. One solicitor noted:

> There was this old guy here for years twenty odd years ago; I remember having conversations with and I was literally shaking when I get on the phone with them because I was the young lawyer… and he would yell, and he would yell, and he would yell, and it was an unpleasant experience. But six months ago [another highly adversarial solicitor] decides to tell me how it is, basically picks up the phone and start doing his yelling…. Twenty years later, I'm not a baby anymore; I don't need that. I knew what to expect, and I just cajoled him into being pleasant to me. [S(c) 8]

Another noted:

> I recently had an employment matter involving another lawyer who just behaved in- his whole approach to the matter was just very typical commercial litigator, his whole, very aggressive, very adversarial. I'm like, well buddy that's not going to work, you need to like, I'm going to hose you down and settle down, and we'll actually talk about it; we did in the end, it involved me using my skills to sort him out. He had to get the message. And this helps when you've got enough experience behind you. [S(c) 5]

(iv) Change in the Legal Profession

Solicitors described the legal profession as gradually adopting more cooperative approaches to disputes. Practitioners with decades of experience contrasted their current experience with the 'old days' [S(c) 5], when there was 'a lot more willingness to litigate' [S(c) 5]. Experienced practitioners noted that early in their career, the culture of practice was dominated by the expectation that practitioners would be highly competitive, aggressive negotiators. These norms were said to be gradually diminishing, displaced by a renewed civility in the legal profession. Both collaborative and traditional solicitors, and those from family law and commercial practice, perceived this trend towards a less adversarial legal practice culture across a range of practice areas. One collaborative solicitor noted:

> I think the old days of the really unpleasant practitioner are well and truly going, gone. …. these days I think most lawyers tend to try and be a lot more collegiate than they used to be sometimes the correspondence is more respectful than it used to be and I think that that has changed over time. [S(c) 8]

Similarly, a traditional solicitor noted:

> When I started over twelve years ago, there was less interest in more collaborative means of practice... But I think lately more and more lawyers acknowledging the fact that clients are turning away from traditional litigation just because of the cost and the delay. [S(t) 4]

One collaborative solicitor noted these changes in the legal profession as just part of a broader trend towards rebalancing values in the professions and in society more generally. Older models of success were seen as affected by toxic masculinity, a set of traditionally honoured male norms and traits, which have an adverse effect on people who portray them, or on others in society.

> I don't think the strong arm… 'lose your temper' kind of model of what makes a strong man is as attractive in our society… So, some of what might be called masculine toxicity as part of the model, you know the successful, sort of semi-bullying lawyer had a lot of the traits of masculine toxicity. And if the world's rejecting that, then it's going to reject that model, isn't it… that type of model of success. [S(c) 13]

This comment suggests a connection between legal professional culture, and attitudes towards gender and masculinity in Australia. A generational change was also considered to be an important driver of changing attitudes in the legal profession. As a collaborative solicitor noted:

> (t)here is a better way for the younger practitioners. I think they are a lot more collegiate than the older practitioners. And are really trying to make friends with everybody in the world. I think this is quite a positive thing. [S(c) 8]

A mediator, who previously worked as a solicitor, noted that the incoming generation has different priorities, valuing work-life balance over the competition for partnership positions, which had previously been considered to structure much of the profession.[26]

> The younger generation just thought 'stuff it' it's not me, I'm not going to work my balls off just because maybe one day when I'm old I'll get a real good return. Because my life is just finished by then. It's just by then I'm just, you know I've missed out on my kids, and I've missed out on that and missed out on this—there's no way. So they just gave up, life-balance, lifestyle, all of those things. [M(t) 2]

(v) Emerging 'Collaborative' Values in Traditional Legal Practice

If the highly competitive adversarial advocate is becoming diminished as an archetype of the legal profession, then what is emerging to replace it in traditional legal practice? Interviewees' perceptions of emerging cooperation in the legal profession suggested that there was a renewed sense of civility and pragmatism in practice, gradually supplanting the adversarial 'blackletter' practitioners of past generations.

A capacity for 'being commercial' [S(t) 1] was discussed as an increasingly important quality for lawyers to possess. Participants discussed success as being shaped primarily by reference to client outcomes, rather than whether they had 'won' their fight against the other party. To be commercial requires an awareness of aspects of the dispute well beyond blackletter law. This includes understanding the underlying needs of the client and being attentive not only to the legal outcomes of a course of action, but also the costs and other extra-legal outcomes. One collaborative solicitor noted: 'I don't think there's much room for a theoretical purist. We have to be pragmatic and commercial' [S(c) 13]. Similarly, a traditional solicitor noted: 'clients value lawyers who understand their business' [S(t) 11]. A traditional solicitor further noted: 'clients don't think about authorities, they don't think about precedents, they don't think about legislation; it's about their objectives and what they would like is the help in reaching those objectives.' [S(t) 11] In short, the interviewees suggest

---

[26] See, e.g., Marc Galanter and Thomas Palay, *Tournament of Lawyers: the Transformation of the Big Law Firm* (University of Chicago Press, 1991); Marc S Galanter, William D Henderson, 'The Elastic Tournament: The Second Transformation of the Big Law Firm (2008) 60 *Stanford Law Review* 1867.

'being commercial' means working towards an outcome with an awareness of costs and business implications rather than 'winning' or 'losing' the technical legal argument.

Solicitors from both adversarial and collaborative backgrounds discussed the importance of using more personal channels of communication. Phone calls and meetings in person were preferred to email because they were seen to encourage a more cooperative and constructive dialogue in negotiations. As a traditional solicitor noted:

> The main qualities you want to see a colleague would be trustworthiness, a good sense of, expertise, and respect for your fellow practitioners. I think that'd be the highest one that I put up there. I like to be able to pick up the phone and have a conversation with a colleague who, with whom I'm in litigation. I don't see a need to turn into a battle between the lawyers. [S(c) 8]

A collaborative solicitor noted: 'we don't write nasty letters and you know that's one of the best parts of it because you can actually really get some vicarious trauma just from other lawyer's letters' [S(c) 10]. A traditional solicitor, who worked as in-house counsel for a large Australian company, described their approach:

> I think the approach that I tend to take in negotiations- which is enquiring and curious, and trying to understand people's concerns so that we can reach a compromise on the drafting, um I think that kind of approach is really useful in these kinds of arrangements particularly where they're worth a lot of money- you need to maintain a high level of cooperation between the parties so you can continue to work together for some times many many years afterwards. So, I think that this is really helpful for setting the relationship off on a good foot. [S(t) 8]

This solicitor described the alignment of their own values with that of their clients as important to them in their work.

> One of my key personal values is fairness. And it sort of aligns quite nicely with one of our key values about doing the right thing. I think, for me... if I were working for an organisation which was more, I guess 'win at all costs', because I'm not a highly competitive person…I would find that… I could do that for a short period of time, and then I would find that I would be working outside of my own personal values too much. [S(t) 4]

(b) Perspectives on Collaborative Legal Practice

An important purpose of the interviews was to develop a deeper understanding of the function of the collaborative process, which might then provide the basis for exploring its potential in other areas. Participants from a collaborative background were typically well-established as

collaborative practitioners, with a wealth of experience to draw upon. Collaborative practitioners were enthusiastic about their work with collaborative practice. A collaborative solicitor noted: ‘Oh, I love it. It’s an extremely satisfying way of practising’ [S(c) 8]. A collaborative coach described their experience as ‘very positive thus far’ [M(c) 7]. Practitioners’ excitement for their work in collaborative practice related to two themes. First, they perceived the process as being more centred on the needs of clients, providing them with better outcomes and avoiding aftershock of adversarial litigation. Second, collaborative professionals preferred the team approach inherent in collaborative practice. Collaborative solicitors appreciated working with, rather than against, their peers. In interdisciplinary collaborative practice, professionals appreciated having all of the relevant people in the room.

(i) A Client-Centered Process

The most frequent reasons collaborative practitioners discussed for using the collaborative process were the benefits received by the clients. Collaborative practitioners noted that the process served to ‘empower clients’ [S(c) 9] and provided 'a much more gentle process that allowed parties to maintain relationships' [S(c) 8].

Negotiations within a collaborative framework were said to place the clients in control of the process. As noted in chapter two, the control parties have over the presentation of their case is limited by the rules of evidence and the matters that the court is willing to consider. Several interviewees described that the aspects of a case that the legal system considers relevant differ from what the client considers to be important. A traditional solicitor observed:

> [In litigation] arguments become incredibly technical and so the lay client has great difficulty in understanding exactly what’s going on. And often just wonders why they’re running down these burrows when they don’t seem to be addressing the substantive issues. [S(c) 9]

For one collaborative solicitor, the inscrutability of the trial process to lay people was their reason to stop litigating and focus on other forms of dispute management:

> I stopped litigating because I got tired of walking out of court high-fiving with the barrister, and the client’s sitting there thinking ‘what happened, nothing that I thought was important was even mentioned… every time I tried to raise something with the barrister… I was hosed down and told it was inadmissible… I still end up with a great big bill at the end of it, and I’m being told that I won.’ [S(c) 9]

Contrastingly, in the collaborative process 'the full story is able to be told' [S(c) 9]. A further advantage of the collaborative process was perceived to be its capacity to support an ongoing

relationship between the parties. Interviewees noted that adversarial litigation inherently pits parties against one another. One solicitor said: 'you have to win, so if you're trying to win, you have to say things that are relationship destroying' [S(c) 13]. The attitudes and behaviours people adopt to 'win' the adversarial process can have a long tail effect. A mediator noted: 'you might get an agreement, but you may not actually speak to one another again. It's a terrible outcome…' [M(c) 6].

Perhaps most importantly, the collaborative process creates a safe environment for parties to identify and disclose their interests as they relate to the dispute. In response to a question about what traits were important for today's solicitors, one collaborative solicitor noted that in the family law area: 'a critical capacity is to make the person feel safe' [S(c) 13]. Making people feel safe could be achieved in different ways: 'a clever barrister makes you feel safe, but in an entirely different way… you're under the shadow of [their] power' [S(c) 13]. In comparison, 'a good solicitor should make you feel safe for an entirely different raft of reasons' [S(c) 13]. They act as 'a trusted advisor'[S(c) 13] and help to connect clients with the resources that they need to resolve their dispute such as 'financial counselling' [S(c) 13]. They may even 'give the job away if it isn't actually a legal problem' [S(c) 13].

(ii) Working Together in the Collaborative Process

Collaborative professionals often discussed the teamwork aspect of collaborative practice. They found working with others was both productive and rewarding. For example, one collaborative solicitor noted:

> From a practitioner's perspective, it is fantastic working with the team; it's much less stressful you don't have the aggro that comes with the other types of work that we do, particularly, litigation. And there's a great satisfaction when we get a good outcome. [S(c) 8]

In addition to being 'rewarding' [S(c) 5, M(c) 7], working with professionals from different disciplines also facilitated interdisciplinary learning as part of ongoing professional development. A collaborative practice coach noted:

> As a coach, my role is quite different from the lawyers working in collaborative practice but what I have found is that kind of collegial mentality again, and the teamwork aspect of it has been really rewarding for me. Because in private practice I'm usually working on my own so having… that sort of team-based approach I found from both a professional and just a personal point of view, it's been very good to assist clients, and for my own sort of professional development. [M(c) 7]

Interview data confirmed that some collaborative practitioners considered their work to blur the traditional role boundaries of legal practice. They noted that while they were aligned with, and held a duty to, a client, often both lawyers were 'trying to work on behalf of both clients' [M(c) 7]. This meant that solicitors could credibly provide support for one another's perspective or provide an alternative explanation of the legal position for a client's benefit. One collaborative solicitor explained:

> …It's not black and white, it's not mathematical from a court perspective, there are a range of views, and we are kind of showing you that [a settlement] will be between X and Y. So, it's great though to have that backup if you like, when you have a difficult client because as soon as you alert your fellow collaborator that you are having a problem, that they can sometimes bring a different spin on it in the room… they know where you're coming from, and sometimes if I'm quiet they know… I'm having an issue with my client about it so that all come in and try and do something with it. So it's that teamwork to reach an outcome that they can live with. [S(c) 8]

Such blending is difficult to imagine in a traditional environment because clients would, with justification, be unwilling to trust the perspective of the other party's advocate, even where it parallels their own counsel's advice. A further way in which role boundaries were blurred was that collaborative solicitors were more willing to provide practical life advice, which did not necessarily connect with hard legal concepts such as rights and entitlements. One solicitor described adopting a pseudo maternal role with their clients:

> My staff here say that what I do is I mum them. So that I give them a disinterested overview of what I think might be a good idea in their life. And it's not always legal advice. You know like, you've got a tricky kid, oh 'what's causing trouble in your relationship?' Oh, our [teenage daughter] is only interested in fantasy and drawing. And we're worried about her, and we fight about it. And I go, well, 'have you ever thought of art lessons?' And they go 'Oooh, we could do that.' You know, but whereas I'm thinking… I'd be wanting them out of their bedroom. So I immediately go to getting them out into the public. How are you going to get that kid out? You're going to get them out with an offer of art lessons. But they hadn't thought of that. Now that might actually mean the fight between the husband and the wife decreases… it's that sort of stuff. [S(c) 13]

The holistic or 'rights-plus' nature of the process was further enhanced by the inclusion of professionals from different disciplines. One interviewee noted:

> …you're working alongside lawyers as part of a professional team and bringing in other

> specialists such as child consultants or financial neutrals. And what means is I think you're providing the client, when it's appropriate, with a more well-rounded service. [M(c) 7]

(iii) Comparisons with Other Forms of Dispute Management

Interviewees often had professional experience with mediation. The sample included professional mediators and solicitors who had participated in lawyer-assisted mediation. Interviewees noted that mediation and the collaborative process were purposed towards similar applications. One collaborative solicitor, who also worked as a mediator, noted: 'anything that I mediate I would think it could be done just as effectively collaboratively' [S(c) 9]. However, participants identified several differences between the processes. One important difference was that while many mediations are a 'one-off' [S(c) 8], the collaborative process is held 'over a series of meetings' [S(c) 8]. Providing additional time meant that the 'the client's interests and concerns are really looked at in a lot of detail' [S(c) 8]. One participant noted that mediations were 'settlement-focussed' [S(c) 10], while the collaborative process was more 'holistic' [S(c) 9]. In the context of a separation, this meant the process was better adapted to 'looking at the whole family, how they're going to go forth after everything's finished' [S(c) 10].

It was also noted that, compared to a facilitative mediation without lawyers, the parties to a collaborative matter are advantaged by receiving contemporaneous advice on how the law relates to a matter. In facilitative mediations, [27] the mediator 'does not advise on… or evaluate disputes'.[28] Depending on the mediation arrangements parties may not have access to legal advice within the mediation sessions. A collaborative solicitor noted:

> Well, mediation can have the disadvantage of handicapping the mediator by not allowing the mediator to provide advice in relation to likely outcomes… as a mediator you… reality test possible solutions to the parties to make sure they will work in the short term and in the long-term. Whereas with collaborative, the lawyers are there to advise in relation to specific things that the parties might decide to do. [S(t) 9]

Even in lawyer-assisted mediation, it was noted that the role of the lawyer is different from that in a collaborative process. A distinctive difference is the collaborative process encourages solicitors to be attentive to the needs of both parties, rather than focus on advocacy for their client. A collaborative solicitor stated:

---

27 Mediator Standards Board, 'National Mediation Accreditation System' (2015).

28 Mediator Standards Board, 'Role of Mediator' <https://msb.org.au/about-mediation>.

> The lawyers in a legally assisted process are very much just advocating directly on behalf of each client, and so the clients themselves tend to see the other lawyer as an adversary. Whereas it becomes quite clear from the first couple of meetings that often the lawyers really are trying to work on behalf of both clients to achieve an outcome that they are both are happy with. And that just alters the whole atmosphere of the joint meetings. Because the clients are not feeling so defensive. [M(c) 7]

(iv) Reactions of Traditional Solicitors to Collaborative Practice

Most traditional solicitors who participated in interviews had little or no experience with the collaborative process prior to this research. These interviewees provided valuable data of a different kind. Rather than building an understanding of the process itself, they provided an opportunity to understand the reaction of the profession to the process. These solicitors provided thoughtful consideration of how collaboration might work in the types of disputes they work with. This included an assessment of how they, their clients, and their professional peers might react to the idea of a collaborative process.

The traditional solicitors who participated in this research were cautiously optimistic in their assessment of the collaborative process. For example, commercial solicitors noted: 'It has a lot of merit at first blush, yeah I think it has a lot of merit' [S(t) 11]; 'I could see value in it for my clients' [S(t) 3]; and 'what you're proposing is good in theory. It's a question of finding the right vehicle or motor to present the parties and then the right circumstances.' [S(t) 1] The process was especially attractive to professionals who were already deeply engaged in alternative dispute management [M(c) 7]. A former traditional solicitor, who had since built a second career in mediation, said: 'I'd love that, I think it works. Yeah that's really good' [M(t) 2]. One solicitor noted that the collaborative process could be suited to more cooperative management styles. They noted that matters were sometimes settled because the relevant decision-makers were 'not people who were willing to take on conflict' [S(t) 4].

7.3 Chapter Summary

This chapter reported the findings of the survey, including statistical analysis in excel, and an exploration of the rich qualitative data submitted to free text response questions. The major themes established in interviews were then presented, based upon the thematic coding of transcripts in Nvivo. Participants informed on their experience in both collaborative and traditional practice, and on their perceptions of professional culture. Together the interview and survey data provide a rich snapshot of the perspectives of Australian professionals on the present use of collaborative practice, and of its potential for new applications outside of the

family law arena. The next chapter integrates these findings with the literature and desk exploration to provide answers to the research questions.

Chapter 8. Discussion and Conclusion: Expanding Collaborative Practice

The fundamental types of dispute that are prevalent in society are unlikely to change. [1] It is therefore important to consider the possibilities for lawyers to adapt in how they manage disputes, including the possibilities that the collaborative process can offer to their business model, and the boundaries of their professional role. This chapter brings the empirical data and the extant literature together in addressing the research questions. The thesis set out, taking an exploratory approach, to answer three central questions:

1. What barriers limit the expansion of collaborative practice into civil non-family disputes in Australia?
2. What could result from use of collaborative practice for civil non-family disputes in Australia?
3. What would facilitate the greater use of collaborative practice for civil non-family disputes in Australia?

This chapter brings the concepts of paradigm shift and convergence in lawyering together drawing on the perspective of participants and the literature. The research finds opportunities in particular areas of law, including wills and estates, elder law, and employment as well as general commercial matters. The barriers, opportunities and measures that would facilitate an expansion of collaborative practice are presented along with some suggestions that could improve uptake of the collaborative process. The research began by exploring the present reach of collaborative practice in Australia, as evidenced by the literature and the empirical data. The findings of this aspect of the research are now discussed.

8.1 The Present State of Collaborative Practice in Australia

As the research exploration has shown, collaborative practice is used in most Australian states and territories for family law disputes. It is supported by Collaborative Practice Associations at the state or territory, national, and international levels, and by an active network of relatively informal local collaborative practice groups. Collaborative practice has received acceptance from Australian legal institutions as ethical and effective but has not

[1] For a typology of general factors that 'fuel or mitigate the development of conflict' see, e.g., Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (John Wiley & Sons, 4th ed, 2014) 111.

been integrated into the family law system at the legislative level.[2] Use of the collaborative process for wills and estates matters in probate, family provision and succession planning contexts is developing. A small number of pioneering practitioners have made use of the process in a business context.[3] Yet overall, the Australian experience reflects the international focus of the process on family law matters.[4]

Australian collaborative practitioners mostly use a binding participation agreement, which provides for good faith, interest-based negotiations, full, honest and open disclosure, and disqualification of lawyers from unilateral proceedings in court.[5] Australian practitioners differ in how frequently they use an interdisciplinary process.[6] A lawyer only model is normative in some regions; in others non-legal professionals are retained in response to the emerging needs of the matter, and one Australian process model uses a standard team approach.[7] A diversity of opinions on interdisciplinary collaborative practice was reflected in the survey when practitioners were asked what was important to support collaborative practice in commercial matters. There was a clear consensus that 'open disclosure' and 'good-faith interest-based negotiation'[8] are essential to the process, but this was not the case for questions about how important it is to include non-lawyers in the process.[9]

When an interdisciplinary model is used, Australian practitioners tend to draw from a similar pool of roles, which are described by somewhat different terms in different States or Territories.[10] These roles include a facilitator or coach, a financial specialist, and a child specialist. The exploration of collaborative practice materials revealed that Australian collaborative practitioners favour a single coach approach.

This research found that Australian collaborative practitioners are generally open to the expansion of the collaborative process into new areas of law. A 2008 review of Victoria's civil justice system described collaborative practice as a 'valuable addition to the range of

---

2 As for example, by the *Uniform Collaborative Law Rules and Uniform Collaborative Law Act 2010* (US Model Legislation).

3 Robert Lopich, 'Collaborative Law— an Australian Experience' (2008*) Alternative Resolutions* 14.

4 Linda Wray 'International Academy of Collaborative Professionals Practice Survey' (2010).

5 See, for example, 'Queensland Association of Collaborative Practitioners, 'Lawyers' Collaborative Law Participation Agreement'; Peter Condliffe, *Conflict Management: A Practical Guide* (6th ed, 2019) 188-90.

6 See Chapter 5, 5.2.

7 Ibid.

8 Survey, Question D5.

9 Ibid.

10 See Chapter 5, Table 2.

dispute resolution options available.'[11] The review noted the process was applicable to non-family civil disputes including 'wills and probate disputes, property and construction disputes and other types of disputes.'[12] Similarly, the Australian Draft Guidelines clearly support the use of the process for a broad range of matters:

> [c]ollaborative processes… can take place in all areas where decisions are made. For example, collaborative processes can be used in relation to family, commercial, community, workplace, environmental, construction, building, health and educational decision making.[13]

Some collaborative practice associations maintain a section of their website dedicated to commercial collaborative practice, indicating support and preparation for its expansion.[14] The empirical data collected in this research confirm that support for the expansion of the process is also supported by the perspectives of individual lawyers and non-law collaborative professionals. Survey participants rated the collaborative process as suitable or highly suitable for many types of disputes, including wills and estates, elder law, employment, commercial and business, and construction.[15]

In summary, the current development of collaborative practice in Australia provides a sound foundation for the expansion of the process into new areas of law. However, the base of knowledge and expertise on collaborative practice in Australia is still focused on family law, so care is needed in applying this knowledge to new types of dispute. It should not be assumed that similarity to family law is the best criterion for establishing where the process could work, nor should it be assumed that process models that have gained prominence in Australian family matters will be the most effective model in other disputes. Given this state of development, the research has sought to uncover the barriers that resist the uptake of collaborative practice in a wider range of disputes.

---

11 Victorian Law Reform Commission, 'Civil Justice Review' (Victorian Government, 2008) 247-8.

12 Ibid.

13 Law Council of Australia, 'Australian Collaborative Practice Guidelines for Lawyers' (2011) s 11.

14 Collaborative Professionals NSW <collaborativeprofessionalsnsw.org.au/commercial>; Australian Association of Collaborative Professionals <www.collaborativeaustralia.com.au>.

15 Survey, Question D1.

8.2 Barriers to the Greater use of Collaborative Practice in Australian Civil Non-Family Disputes

This research identified several challenges for collaborative practice.[16] A collaborative solicitor noted that 'collaborative processes are not easy to get up and running' [Interview, S(c) 12]. Another participant perceived a 'huge gap' [Interview, M(t) 6] between solicitors who 'buy into the ideals and desire to practice collaboratively,' and the availability of collaborative work [Interview, M(t) 6].

Participants discussed the challenges facing collaborative practice mainly from the perspective of family law. However, the circumstances identified are also reflected in other areas. Thus, these barriers are also important to consider in shaping the collaborative process for new applications. Barriers are grouped here based on the themes from the survey and interviews as: limited awareness and understanding; cultural resistance to expanding professional boundaries; process costs for low-income parties; process integrity challenges; and commercial viability in the corporate hemisphere.

(a) Limited Awareness and Understanding

The literature has often noted a lack of awareness and understanding as a challenge for the collaborative practice community.[17] Awareness and understanding is even an issue in regions where the process is established. In the United States Salava observes, '[m]any people, even some attorneys are unaware of collaborative divorce as an option.'[3] When asked about the challenges faced by the Australian collaborative practice community, some interviewees echoed these sentiments [Interview, S(c) 8; S(c) 5]. For example, a collaborative solicitor described education as the main 'roadblock' to the expansion of the collaborative process:

> I think the main roadblock would be the lack of education about it… everybody knows about negotiation, everybody knows about arbitration, everyone knows about mediation, it's just part and parcel, but not everybody knows about collaboration, and I think in [our collaborative practice association] that's what we are really trying to focus on now, is how we educate the public, and how we educate professionals so that they know it's out there. And what we want to do is make it as normal a tool of practice as any other tool that we use. [Interview, S(c) 8]

---

16 See also Henry Kha, 'Evaluating Collaborative Law in the Australian Context' (2015) 26 *Australasian Dispute Resolution Journal* 178, 181-3.

17 Luke Salava, 'Collaborative Divorce: The Unexpected Underwhelming Advance of a Promising Solution in Marriage Dissolution' (2014) 48(1) *Family Law Quarterly* 179, 191.

The survey data indicate that the participants perceive a need for education about the collaborative process among both professionals and clients. Eighty-one percent of participants agreed or strongly agreed that a lack of professional education and awareness was a significant barrier to the growth of collaborative practice. Seventy-seven percent agreed or strongly agreed that a lack of client education and awareness was a significant barrier.[18]

The research suggests awareness of collaborative practice exists on a spectrum. Some practitioners who participated in the research were unaware there was even a dispute management process called 'collaborative practice', or ‘collaborative law’. Yet, there were also lawyers who had heard of the method but were unclear on the rules and conventions that separate it from mediation or less adversarial forms of lawyer-assisted negotiation. Among such practitioners, collaborative practice was often conflated with 'friendly negotiations'— an informal agreement to negotiate in a collegial and less adversarial manner. Collaborative practitioners expressed frustration with traditional lawyers who felt that they were already using a collaborative process.[19] One collaborative solicitor described having had a discussion with colleagues in the commercial space:

> The lawyers that I spoke to about it take the view that 95 or 75— or whatever percentage it is— settle anyway without going to court, so they say they’re doing essentially what is being proposed in regard to collaborative, they’re doing it anyway, through their practices. because these are matters that would generally settle as a matter of course. [Interview, S(c) 9]

Another collaborative solicitor described ‘pockets’ of lawyers who claim:

> … ‘well I do that every day anyway,’ i.e. they negotiate, and they settle things. And they don’t understand the difference, and that whole paradigm shift and the emphasis on the interests and needs and concerns, not on legal entitlements— they don’t get that, and they think it’s a load of rubbish. [Interview, S(c) 8]

Procedurally, an important difference between the collaborative process and friendly negotiations is that lawyers may represent their clients in litigation if negotiations fail. Philosophically, collaborative processes differ in placing control of the matter firmly with the

---

18 See Chapter 7, Figure 22: (Lack of) Professional Education and Awareness as a Barrier to Growth; Figure 23: (Lack of) Client Education and Awareness as a Barrier.

19 For a professional reflection on this issue, see, Lorraine Lopich, 'Collaborative Practice— 'We Already Do That' (2007) 9(9) *ADR Bulletin* 1.

clients.[20] In friendly negotiations, the lawyers work together to find a solution, but in collaborative practice, it is the clients who decide what is relevant, what is important, and how to reach a workable solution. Their decision may resemble or differ entirely from the kind of outcome that would be afforded by a judicial determination.[21]

Outside of the family law community, limited awareness of collaborative practice appears to be the norm rather than the exception. In interviews, lawyers from backgrounds other than family law generally had little or no prior knowledge of the collaborative process before engaging with this research. As noted, the sample was more likely to be skewed towards traditional lawyers who are open to new ideas about dispute management.[22] Thus, the fact that prior knowledge about the process was so limited speaks to the challenge of building even rudimentary awareness of the process.

Part of the challenge in communicating the process may be that the phrase 'collaborative practice' is not used as a precise term of art with a single agreed process. The phrase is used in many fields to describe any approach that emphasises cooperation, especially where cooperation transcends discipline boundaries or hierarchies.[23] Interviewees sometimes used the term 'collaborative' to apply generally to other methods of dispute management or interest-based negotiations. For example, one traditional solicitor stated: 'we have a lot of experience in people trying to use collaborative approaches to avoid litigation… alliances and so forth' [Interview, S(t) 1].[24] Another traditional solicitor mentioned 'mediation, that is in and of itself a type of collaboration,' adding: '…I know it's not the type of collaborative practice we're talking about' [Interviews, S(t) 3]. Traditional lawyers who say they are 'collaborating' are likely correct in the ordinary sense of the word. As Webb observed, ordinary legal practice includes moments where the parties cooperate well and support a positive negotiating dynamic.[25] What makes collaborative practice different is not that prosocial interactions are possible, but that practitioners have a system in place to

---

20 Julie MacFarlane, 'The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases' (Department of Justice, Canada 2005) 45.

21 Ibid.

22 See discussion of sampling in Chapter 2, 2.9.

23 See, e.g., Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis, 6th ed, 2019) 169-174; In non-law fields: World Health Organisation, 'Framework for Action on Interprofessional Education & Collaborative Practice' (2010); Bernadette Youens, Lindsay Smethem, Stefanie Sullivan, 'Promoting Collaborative Practice and Reciprocity in Initial Teacher Education: Realising a 'Dialogic Space' through Video Capture Analysis' (2014) 40(2) *Journal for Education for Teaching* 101.

24 See also Tanya Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 5th ed, 2016) 150-3.

25 Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49 *Family Court Review* 213, 214.

achieve them.[26] Care is therefore needed in communicating the process to traditional practitioners who may use the term collaborative differently. This research argues that their experiences of cooperation in ordinary negotiations are a valid and valuable foundation for their understanding of the collaborative process.

A full awareness of the collaborative process includes knowledge of both the process requirements and the reasons for their inclusion within the design. This is the minimum that should be expected for working within the collaborative process, as misapprehensions can lead to variations that affect the process integrity. For example, in some instances in Canberra, the perception that the disqualification provision is intended to 'punish' lawyers for not settling a matter led to a fault-based disqualification where the party responsible for the process failure would be held accountable for the other's costs.[27] This perspective of disqualification as a punishment was also observed by a traditional solicitor in the survey: 'lawyers should not be penalised for failing to settle a matter and it proceeding to litigation' [Survey, S(t) 3].

In fields where the process is available, this awareness of both requirements and rationale is a precondition for lawyers to truly claim to have advised clients on all the options reasonably available for their dispute. Solicitors who have only a vague understanding of collaboration as 'friendly' or 'soft' lawyering cannot describe the process in sufficient detail for their clients to make an effective choice, as required by the *Australian Solicitors Conduct Rules*[28], or equivalent State provisions.

A related challenge exists in creating awareness among clients. Unlike litigation or mandatory meditation, a collaborative matter requires both parties to consent to the process. This means that an opportunity for collaboration might be lost if either of the parties is unwilling to participate. One collaborative solicitor noted:

> Sometimes we'll have one client come in— they're really enthusiastic about it, but their partner has already gone with a non-collaborative lawyer, and usually when a party has a lawyer they don't want to change to somebody else. [Interview, S(c) 8]

Solicitors are important sources of knowledge for parties in this regard, but knowledge among the profession is not a complete panacea. Some parties may not even discuss the matter with any solicitor because lawyers are perceived to operate only in an adversarial

---

26 Ibid.

27 Anne Ardagh, 'Evaluating collaborative law in Australia: A case study of family lawyers in the ACT' (2010) 21 *Australasian Dispute Resolution Journal* 204.

28 *Australian Solicitors' Conduct Rules 2016* r 7.2.

manner. Macaulay described a 'common business attitude'[29] that 'one doesn't run to lawyers if [one] wants to stay in business because one must behave decently.'[30] A mediator described similarly that family law clients typically 'equate being amicable with not using lawyers' [Interview, M(t) 6]. Where potential clients associate lawyers with conflict, there is a need to build awareness about the fundamental nature of what a lawyer can provide. Suggesting that clients use lawyers to support a collaborative approach will not succeed if they understand lawyers only as an adversarial champion.

(b) Cultural Resistance to Expanding Professional Boundaries

Collaborative practice is considered to be a holistic or 'rights-plus' process.[31] It aims to address not only legal controversies but also the practical and interpersonal aspects of the matter.[32] The lawyer, therefore, must adopt broader and more flexible role boundaries than those of traditional legal practice. Collaborative lawyers have been described as adopting an ethic of care and a willingness to engage with the dispute on their clients' terms.[33] Recasting the role of the lawyer in this way is sometimes resisted by traditional lawyers. Hoffman notes, that there is some truth to the 'caricature' that lawyers regard the trial as their 'ultimate test' and dismiss less adversarial approaches as 'touchy-feely'.[34]

Collaborative solicitors in this research described peers who were dismissive of the process for similar reasons. A solicitor observed: 'I'm sure [traditional solicitors] look down on some of us as softer lawyers...' [Interview, M(c) 7]. One participant described a conversation they had with a mediator: 'I had a matter the other day, and I said to him, are you collaboratively trained? … he said, "oh no, that's just hocus pocus– warm and fuzzy stuff that doesn't work…"' [Interview, S(c) 10]. Another solicitor noted a perception among traditional colleagues that collaborative practice was about 'sitting in a circle holding hands and singing kum-bah-yah' [Interview, S(c) 12]. Since such dismissals may be made with little investigation into the collaborative process [Interview, S(c) 5], they are unlikely to represent a cautious and clinical professional evaluation. Instead, sociology may provide an

---

29 Stewart Macaulay 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55, 65-6.

30 Ibid: quoting an interview participant.

31 Susan Daicoff, 'Law as a Healing Profession: The Comprehensive Law Movement' (2005) 6(1) *Pepperdine Dispute Resolution Journal* 1.

32 See, e.g., Rodney Nurse, Peggy Thompson, 'One Perspective: Coaching to the "End": Expanding the Goal' *Collaborative Review* (2010) 16.

33 Julie Macfarlane, 'The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases' (Department of Justice, Canada 2005).

34 David Hoffman, 'Collaborative Law in the World of Business' (2004) 6(3) *Collaborative Review* 1, 6.

understanding of such attitudes. Psychologist Daniel Goleman argues that all groups develop their own norms of behaviour that are implicitly expected to be followed:

> The tacit price of [group] membership is to agree not to notice one's own feelings of uneasiness and misgiving, and certainly not to question anything that challenges the group's way of doing things… dissent, even healthy dissent is stifled.[35]

If the legal profession is considered a group, then collaborative practice presents a significant challenge to its longstanding norms and values. Asking professionals to consider collaborative practice may invite uncomfortable questions. Cameron's research found that transitioning to collaborative practice requires practitioners to 'question the success of litigation, question our professional status quo, and question our traditional concepts of access to justice'.[36] Such thoughts can be a source of cognitive dissonance, as lawyers struggle to balance their self-perception as effective professionals against perspectives that ask them to revaluate their fundamental approach. An interviewee described an uncomfortable notion expressed by an experienced traditional solicitor upon commencing collaborative training: 'we've been doing it wrong from the get-go' [Interview, S(c) 12].

For solicitors who are already vexed by questions of professional identity, the collaborative process may represent an answer to the questions that keep them up at night.[37] But for the unreflective litigator, dismissing the process out of hand provides a straightforward defence against uncomfortable self-reflection.[38]

(c) Process Costs for Low-Income Clients

Past analysis has suggested that limited financial resources are a barrier to the use of the collaborative process.[39] The consensus among collaborative practitioners in this research was consistent with the perception that collaborative process is much less expensive than litigation.[40] Avoiding the cost and delays associated with a trial was considered a significant

---

35 Daniel Goleman, *Vital Lies, Simple Truths: The Psychology of Self-Deception* (Bloomsbury, 1998); see also Pauline Collins, 'Resistance to the Teaching of ADR in the Legal Academy' (2015) 26 *Australasian Dispute Resolution Journal* 64, 70-1: on the similar challenge to better integrate ADR within law school curricula.

36 Nancy Cameron et al, *Collaborative Practice: Deepening the Dialogue* (Continuing Legal Education Society of British Columbia, 2014) 118.

37 See Pauline Tesler, 'Goodbye Homoeconomicus: Cognitive Dissonance, Brain Science, and Highly Effective Collaborative Practice' (2009) 38 *Hofstra Law Review* 635, 649-53.

38 Ibid.

39 See, e.g.., Daye Gang, 'Collaborative Practice and Poverty: Contextualising the Process and Accommodating the Market' (2016) 27 *Australasian Dispute Resolution Journal* 158, 164.

40 See, e.g., VACP (n 13) 247.

factor in attracting clients to the process. However, there was variation in perspectives on how collaborative practice compares to other non-litigation dispute management processes, such as mediation or traditional lawyer-assisted negotiations.

A literature search did not uncover any empirical evaluation of the cost of collaborative practice in Australia; the need for such research has been observed since at least 2008 and is becoming more urgent. There is, however, some anecdotal evidence of concern about the costs associated with the process.[41] A collaborative solicitor in Ardagh's research is reported as stating:

> I think collaborative law is more expensive than a traditional negotiation process. Compared to litigation it is possibly cheaper, but I think the run of the mill kind who are going to be able to negotiate their way through with minimal involvement from lawyers, I think this would probably end up being a little bit more expensive process…[42]

The survey and interview data indicate that variation in how the cost of collaborative practice is perceived is still present in professional communities. A collaborative solicitor described that collaborative practice is 'pretty cost-effective' [Interview, S(c) 10]. In contrast, another collaborative solicitor stated that for clients with smaller asset pools 'cost is a barrier' [Interview, S(c) 8], and that 'whilst it is a lot cheaper than going to court, it's a lot more expensive the mediation' [Interview, S(c) 8]. A mediator stated the 'perception is that it's incredibly expensive' [Interview, M(t) 6].

As noted, the holistic nature of collaborative practice poses a challenge in constructing a suitable basis for comparison. Where mediation is most usually a single session, collaboration is by design a multiple-stage process, which replaces not only mediation sessions but also, to a significant extent, private consults for legal advice. In interdisciplinary matters, counselling and coaching must also be considered. These are included within the collaborative process but may be costed separately where another dispute management process is used. Thus, while comparisons with other methods may be relevant for screening and decision-making, they do not represent a like-for-like comparison.

---

41 Paula Baron, Lillian Corbin, and Judy Gutman, 'Throwing Babies Out with the Bathwater? – Adversarialism, ADR and the Way Forward' 40(2) *Monash University Law Review* 283, 296; Ardagh (n 27).

42 Ardagh (n 27).

(d) Process Integrity Challenges

Several research participants raised the challenge of maintaining the integrity of the collaborative process as it grows in scale and scope. It was important to collaborative practitioners that the process continues to be used in good faith and be guided by professionals who have the necessary 'skill and will' [Interview, S(c) 5] to guide it.

Participants stressed that collaborative practice is not easy [Interview, S(c) 13]. Even for solicitors who were trained and experienced in collaborative practice, it is important that they maintain vigilance to keep the matter on foot. A collaborative solicitor noted: 'It's a lot harder to be the lawyer in a collaborative matter than the lawyer at a mediation' [Interview, S(c) 13]. Other participants noted that because clients take cues from their lawyers, 'self-regulation [is]…a really important tool' [Interview, S(c) 5]. A participant explained:

> When you feel like jumping across the table and throttling either the other lawyer or the other party you have to just stop, manage yourself, every word you say must be purposeful and not destructive… It's a very disciplined process where you're looking for solutions, but you've also modelling good behaviour. [Interview, S(c) 13]

In addition to modelling behaviour for clients, maintaining process integrity involves ensuring that the clients, rather than their lawyers, are in control of the process. A participant observed that, as in (facilitative) mediation, solicitors must resist the urge to step in and solve their problems:

> The big problem both in mediation and collaborative is that the mediator or the collaborative lawyer is often inclined to take over and problem solve rather than allow the parties to work out their own solution, to empower the parties to find a way…[Interview, S(c) 9]

A significant threat to the expansion of collaborative practice was identified to be 'wolves in sheep's clothing' [Interview, S(c) 10]. This term has been used in the collaborative practice literature[43] and was noted by some interviewees to provide a strong fit for their experience of working with solicitors who are trained in the collaborative process, but who are not committed to the philosophy and values of the movement. Practitioners observed that as collaborative practice gained popularity, it became more attractive as a marketing tool. They were concerned that this could cause the process to be adopted by solicitors who were 'not…

[43] Lana Stern, 'Wolf in Sheep's Clothing: Why It's Difficult for Collaborative Professionals to Make That "Paradigm Shift" and What To Do If They Don't!' (2017) 16(1) *Collaborative Review* 19.

fully committed to the collaborative process as we see it' [Interview, M(c) 7]. One collaborative solicitor noted:

> I'm a bit cynical that it just seems to be as another way that they can jump in on the new thing. Some of the most uncollaborative lawyers I've ever been in a matter against are now becoming collaboratively trained, and they're appalling…anyone can do the training, but you can't force people to change that mindset and change their practice... it would be a pity if the wrong people jump on board…because you're really powerful in a collaborative matter. You've got people that really are trusting that the process is really going to work for them. And it's the skill of the practitioner makes that work [Interview, S(c) 10].

Another collaborative solicitor stated:

> There are unfortunately some people that have done the training, and they call themselves collaborative practitioners, but they're not. And it's pretty obvious, pretty quickly that they can't. They haven't done that shift. You know they talk about this paradigm shift. I never had to do it, but for a lawyer who's practiced for twenty or thirty years in one way, they really do have to [Interview, S(c) 10].

(e) Commercial Viability in the 'Corporate Hemisphere'

The 'stunted growth'[44] of collaborative practice in the commercial world is said to be partly caused by the importance of litigation in the revenue mix of large law firms. Fairman notes: 'the potential loss of attorneys' fees, from large fee awards or revenue streams, can cause concern for would be collaborative counsel.'[45] Some participants said that corporate lawyers may, for this reason, be reluctant to embrace a process that would preclude work in court [Interview, S(c) 9].

Another important consideration is the risk of losing long terms clients when a matter is referred to adversarial counsel.[46] This risk is magnified in commercial fields, because the revenue of commercial law firms is often dependent on large repeat clients. Heinz and Laumann famously suggested that the legal profession is organised by two hemispheres, the personal hemisphere, where clients are mainly individuals, and the corporate hemisphere, where clients are organisations such as corporations or government bodies.[47] For the

---

44 Christopher M Fairman 'Growing Pains : Changes in Collaborative Law and the Challenge of Legal Ethics' (2008) 30(2) *Campbell Law Review* 237, 242.

45 Ibid 248.

46 Ibid.

47 John Heinz and Edward O Laumann, *Chicago Lawyers: The Social Structure of the Bar* (Northwestern

collaborative practice movement, a key difference between the hemispheres is the composition of the client base. Personal hemisphere matters are characterised by many 'single shot' clients. These are people new to the type of dispute they are faced with, and unlikely to provide repeat business. In contrast, lawyers within the corporate hemisphere rely on a smaller overall number of clients who provide a reliable base of repeat business. The collaborative process may therefore be perceived as riskier for commercial law firms, which stand to lose not only a matter but also a repeat client.[48] Korn suggests that outside of family law matters '[i]t may be that the limited retainer agreement is proving too restrictive'.[49]

One participant used the term 'golden handcuffs' [Interview, S(c) 13] to describe firms that were deeply involved with a lucrative client, to the extent that the risk of losing that client affected their willingness to investigate new approaches such as collaborative practice. Interview participants described this as a stumbling block in their attempts to introduce commercial collaboration:

> We formed a group of commercial lawyers some years back who expressed an interest in doing it. And although they think that the process can work and that there are advantages, they are just very reluctant to take it on, to actually do it. And part of the problem is that with non-family, the sort of ongoing relationship between the lawyer and the client, they see that as a risk of losing the client. [Interview, S(c) 9]

Another matter for consideration is that decision-makers in the corporate hemisphere tend to have more experience with legal dispute management and have established adversarial norms regarding legal disputes. The culture of a client organisation may nurture an expectation for decision-makers to 'dig-in' rather than admit fault or weakness. Participants noted that a decision-maker who chose the 'road less travelled'[50] of collaborative practice would be more exposed to the criticism if the process was not successful than if they had chosen a more established process [Interview, S(t) 4, Survey, M(c) 2]. Thus, decision-makers may tend towards traditional legal negotiations, or if an alternative process is used more widely understood options such as mediation, conciliation or arbitration.

University Press, 2nd ed, 1994): based on structured telephone interviews with 777 solicitors, while their data was limited to the Chicago area, their findings have a sound qualitative fit for the legal profession more broadly.

48 Sourdin (n 24) 145 [4.90].

49 Marion Korn, 'Fitting the Fuss to the 'Form': The Ethical Controversy Over Collaborative Law Contracts' (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 279, 281.

50 Sherrie Abney, *Collaborative Law: The Road Less Travelled* (Trafford, 2011): with credit to Robert Frost, 'The Road not Taken' in *Mountain Interval* (1916).

Thus, there are economic challenges in implementing collaborative practice in commercial disputes. However, it is important that these perceptions are validated by reliable research and are contextualized alongside the economic opportunities presented by the process. Solicitors discussed an economic environment where many firms have lost their appetite for litigation [Interview, S(t) 3]. As one interviewee put it, 'no one likes litigation other than lawyers' [Interview, S(t) 1]. In such an environment, the perceived risk of losing clients in a rare disqualification circumstance may be less significant than the risk of clients moving their business to a less adversarial firm or reducing their reliance on external counsel altogether.

If collaborative practice is to grow and become a viable way of lawyering, it is necessary that the benefits it can offer are understood. The research found there were clear benefits, and the next section lays these out.

8.3 Benefits of Collaborative Practice for New Types of Disputes

It is considered important to 'fit the forum to the fuss'[51] when choosing which process, or processes are suited to the management of a particular dispute. This section explores the benefits provided by the collaborative process as indicated by an analysis of the experiences of survey and interview participants, including Australian collaborative solicitors, collaborative neutrals, and traditional solicitors. The perspective of the participants is compared to the extant literature in the field. The approach here is similar in intent to Hoffman's analysis in the United States. Hoffman posits that the key to understanding why collaborative practice has expanded only modestly in the commercial world is looking at why it has 'caught on so quickly in the world of family law'.[52] He proposes a 'nearly ideal fit'[53] between collaborative process and divorce, theorising eleven factors that make collaborative practice exceptionally suited to family law:

> common interests, limited resources, predictable results, tax effects, need for an ongoing relationship, privacy and intangible costs, and complex negotiations versus single-issue cases,

---

51 Frank Sander and Stephen Goldberg, 'Chapter 23: Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure' in Carrie Menkel-Meadow (ed), *Mediation: Theory, Policy and Practice* (Routledge, 2nd ed, 2018).

52 Hoffman (n 34) 2; see also Family Law Council (Australia), 'Collaborative Practice in Family Law' (2006) 4: 'the potential benefits of this practice model are not limited to family law, although they do seem especially suited to disputes in this area.'

53 Ibid 2.

tightly knit bar, few repeat players, changing lawyers, and fee arrangements.[54]

Like Hoffman's analysis, family collaborative practice provided a starting point for the exploration of its extension to new fields in this research. However, there is a key difference in the guiding philosophy. Rather than assuming family law is exceptional as regards collaborative practice,[55] the present research begins by asking what the experience of collaborative family lawyers can tell us about the benefits of the process in a general sense. It remains open to the intriguing possibility that collaborative practice in other fields may even have benefits that are not expressed in its use in family law. There is also a difference in data collection. Where Hoffman's analysis was grounded in his personal experience of working in United States legal practice; this research instead explores the use of collaborative practice in Australia through survey research and interviews with practitioners alongside desktop review and literature analysis. This data collection strategy has permitted exploration of different accounts to demonstrate, for example, that a perspective is prevalent within or characteristic of the sample, to capture minority perspectives, and to examine areas where collaborative practitioners have a different perspective to their traditional peers.

Thematic analysis of the full breadth of research data produced a picture of four benefits to using the collaborative process: maintaining ongoing relationships; creating value around mutual interests; addressing complex non-legal issues; and establishing a framework for mutual trust. Each of these is now detailed.

(a) Maintaining Relationships

Theorists have commented that the collaborative process seems to be well suited to matters that involve an ongoing relationship between the parties to a matter.[56] Pollard notes, for example, that the collaborative process 'can work in any legal dispute where the parties wish to preserve an ongoing relationship which might be destroyed by hard-fought litigation.'[57]

The survey and interviews provided further support for a link between the process and relationships. Interviewees experienced with the collaborative process considered relationships to be a core reason for recommending the process. For example, one

---

54 Ibid 2-6: as demonstrated in sections (a)-(e), several of Hoffman's themes these were confirmed in the experiences of collaborative practitioners.

55 Ibid 1-2.

56 See, e.g., Sherrie Abney, 'Moving Collaborative Law Beyond Family Disputes' 38(2) *Journal of the Legal Profession* 277, 277; Stu Webb and Ron Ousky, 'History and Development of Collaborative Law' 219; Hoffman (n 34) 3; Fairman (n 44) 244; Clarissa Rayward, *Splitsville: How to Separate. Stay out of Court and Stay Friends* (2014) 73; VLRC (n 11) 21, 245-7, 284.

57 John Pollard, 'Collaborative Law Gaining Momentum' (2007) *Law Society Journal* 68, 70.

collaborative solicitor noted that the 'collaborative hot-spot' is people who 'don't want to destroy the relationship' [Interview, S(c) 9]. Another identified the intersection at the end of relationships, and loss, as salient:

> I believe that any relationship where the end of the relationship has a financial consequence and some sort of form of loss status, either genuine or imagined is an environment where collaboration could work. [Interview, S(c) 5]

There are obvious connections between relationships and family law. In a separation matter, there is a marriage, and where there are children involved, there are also co-parent, parent-child, and sibling relationships among others. Any or all of these relationships may be involved in the circumstances that have led to the separation, and all will be affected by the decisions the parties make.[58] It is not surprising, therefore, that disputes that tend to involve familial or strong social connections were consistently rated as suitable or highly suitable by collaborative participants. These areas comprise family law (100%), wills and estates (84%), and elder law (74%).[59] The interview data is also supportive of this trend; there was consensus that collaborative practice was an effective choice for family law matters. In interviews, a clear majority (84%) of participants raised estate law as a field where the collaborative process might be explored. One collaborative solicitor interviewed was already successfully using the process in estate disputes. In response to a question on what makes an estate matter suitable for collaborative practice, they noted: 'the underpinning wish by all family members to make sure that an inheritance isn't what rips them apart*'* [Interview, S(c) 12].

Clearly, collaborative practice is perceived as effective where the parties are related to one another. But this should not be taken to imply that collaborative practice is perceived as just for family matters. Collaborative practitioners also considered areas such as employment (79%), commercial and business (75%), and construction (69%) to be fertile ground for the collaborative process.[60] The literature points out that there is no dividing line between the law involving families, and the law governing the commercial world.[61] The allocation of larger estates (whether marital or deceased) will often involve commercial issues. Bamber reports a

---

58 See, e.g., Nurse and Thompson (n 32) 16.

59 Participants from a tradition background were more varied in their response and did not all intuit a connection with family law. Only 60% rated family law matters as suitable or highly suitable for collaborative practice. The highest rated category among such participants was employment law 100%.

60 Percentages reflect collaborative participants rating areas of law as suitable or highly suitable in question D1.

61 See, e.g., Roger Bamber, 'Happier Endings' (29 May, 2006) *The Lawyer* 31, 31.

United Kingdom matter where a couple used the collaborative process to divide a small empire, comprising private and commercial assets valued at around 20 million pounds.[62]

Interviewees in the present research discussed that ongoing family relationships are relevant in areas of law that might be considered commercial. A collaborative solicitor gave a case example of restructuring a sizeable business that was the source of income for several family members [Interview, S(c) 9]. They indicated there were passionate differences in relation to how the business funds were being used, and the legal and interpersonal issues of the matter were inseparably intertwined. The collaborative process was able to resolve their dispute such that the parties were still able to come together for dinner during the December holidays [Interview, S(c) 9]. This is an example of how the process may function to protect a familial relationship between the parties to a commercial matter. Can parties in a commercial dispute, whose ties are merely professional, still benefit from the potential of the collaborative process to maintain relationships? There are different opinions on this point. Some survey responses were specific in suggesting the process was suited to relationships that were personal or familial. For example, the collaborative process was said to be suited to matters that '…involve families and ongoing relationships which would be negatively affected by other legal processes' [Survey, S(c) 14], or where the problems are 'family and relationship-based…' [Survey, S(c) 11]. A collaborative solicitor noted:

> Essentially the practice of law is about people. The legal issues are important but how they are dealt with has lasting effects on the people involved in the case. It is their lives and their stories… The areas of law which I think are suitable are those where the relationships between the parties are more personal and accordingly would most benefit from being preserved as far as possible during the resolution of the dispute. [Survey, question D2, S(c) 5]

One collaborative solicitor doubted that the corporate world would place enough value on relationships to make effective use of collaborative practice:[63]

> I don't think commercially it is applicable at all. But I might be wrong. … from what I can see and from what I've spoken to people about you get people that are really really positional. They're in two corners of the room, and they're not really that interested in a relationship going forward often. If they've got a reason that that relationship should, then yeah maybe... [Survey,

---

62 Ibid; see also Julie Macfarlane, 'The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases' (Department of Justice, Canada, 2005) 67: 'a complex settlement of…financial assets, including dissolution of their business'.

63 See also Hoffman (n 34) 3-4: 'in non-family cases there is often no ongoing relationship... or a very limited ongoing relationship.'

S(c) 10].

Notwithstanding the scepticism expressed in this perspective, the participant makes an important point about how relationships correlate to collaborative practice. The focus is on the necessity to maintain at least some aspects of this relationship in the future. According to Cameron, the key to understanding where the collaborative process could thrive is not whether a relationship is personal; it is whether it will be continued.[64] Cameron argues the collaborative process is suited not only to personal areas such as family law, and wills and estates, but also to employment, commercial and educational disputes.[65] In Australia, the New South Wales State collaborative practice body, 'Collaborative Professionals (NSW)', describes the process as 'ideally suited to civil and commercial disputes, especially where there is a need for continuing relationships between the parties.'[66] Similarly, Sourdin notes that the process has been used outside of family contexts 'where there is a continuing relationship between those who are in dispute.'[67]

Some survey participants described the relationship-maintaining potential of collaborative practice in terms that were not specific to family law. One practitioner wrote that collaborative practice is suited to matters 'where a dispute exists but there is a good reason or motivation to resolve amicably and with the benefit of preserving the relationship between the parties…' [Survey, S(c) 9]. Another noted that: 'I can see collaborative practice being suitable for use in areas where there is a need to maintain a personal *or professional* relationship with future dealing' [Survey, Or 1].

The interview data indicate that traditional commercial solicitors recognise ongoing relationships as significant to their clients' businesses. Traditional solicitors emphasised the commercial importance of long-term stable relations:

> if you try and engage in litigation, it can really just put on pause an ongoing project that you're doing together or an ongoing relationship. [Interview, S(t) 4]

> The Australian commercial environment is only very small… there's only so many construction companies and particularly with tier ones and tier twos... they want to get on and work with each other next time, they don't want to have a tough talk unless it's irreparably fallen apart—that's different, but by and large most of them just want to go to a practice in place so they can work out how much they owe or whether they owe each other or how they can resolve it and

64 Cameron et al (n 36) 177.

65 Ibid.

66 Collaborative Professionals NSW 'Commercial' <collaborativeprofessionalsnsw .org.au/commercial>.

67 Sourdin (n 24) 123.

then move on... that's what the main goal is. [Interview, S(t) 1]

Such comments support the relational contract theory position that the commercial environment is shaped by business reputation and custom more so than the nuances of contract law.[68] In a landmark study of United States executives, Macaulay notes that 'while detailed planning and legal sanctions play a significant role in some exchange between businesses, in many business exchanges, their role is small.'[69] Instead of contract terms, 'personal relationships across the boundaries of the two organisations exert pressure for conformity to expectations.'[70] This suggests a difference in perspective between lawyers and their clients. For example, a lawyer may consider a time-is-of-the-essence-clause as the mechanism most likely to ensure on-time delivery; in practice, however, it may be more significant that a salesperson has given their word and then works internally to make sure it happens irrespective of the legal position.[71] Similarly, the decision to cancel and refund a contracted order may be guided more by what seems fair on a moral basis, than by the terms of the agreement or the doctrine of frustration.[72]

Research participants in the present research noted a difference in perspective between lawyers and clients that supports the relational contracting perspective. For example, that long term relationship between companies can lead to representatives sometimes prioritising the needs and interests of the other over contractual entitlements. An inhouse counsel solicitor for a large Australian company noted:

> I've certainly seen instances with long-standing suppliers where team members have been working alongside them for several years and…It's not quite that they're conflicted, that they've got a true conflict of interest, but they start to understand the challenges of the supplier so much that they then find it difficult to hold the supplier to the contractual commitment that they've made. [Interview, S(t) 4]

---

68 Macaulay (n 29); see also Ian Macneil 'Relational Contract Theory: Challenges and Queries' (2000) 94 *Northwestern University Law Review* 877; Ian R Macneil 'Contracting Worlds and Essential Contract Theory' (2000) 9 *Social & Legal Studies* 431, 432; David Frydlinger, Oliver Hart and Kate Vitasek, 'A New Approach to Contracts' (2019) 97(5) *Harvard Business Review* 116, 116: discussed in Oliver Hart, Kate Vitasek, 'The Inherent Failures of Long-Term Contracts—and How to Fix Them' (2019) 698 *HBR Ideacast* (podcast).

69 Macaulay (n 29) 62; see also Hugh Beale and Tony Dugdale, 'Contracts Between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2(1) *British Journal of Law and Society* 45, 59.

70 Ibid 63.

71 Ibid.

72 Ibid.

Gray argues that the traditional freedom of contract doctrine 'does not now, if it ever did, capture the relationship between contracting parties, which is often based on mutual trust and confidence.'[73] While the legal perspective regards the contract as the definitive statement of the parties' intentions, the parties themselves may be driven more by their individual values, or by '(t)he need to keep or earn a good reputation' [Interview, S(t) 4].

If, as both the interviews and literature support, businesspeople are engaged in trade that is based primarily on relationships between representatives, then collaborative practice is a more natural process for dispute management. The client-centred nature of the collaborative process allows parties to manage their dispute based on what matters to them, including reputation, relationships and individual values. Based on the literature, together with the interview and survey data, it can be concluded that collaborative practice is ideal in many contexts where ongoing personal or professional relationships are present or indeed anticipated.

(b) Creating Value Around Mutual Interests

Collaborative practice focusses on interest-based negotiations to not only distribute value, but also create it through the negotiating process.[74] Some theorists argue that every real-world matter presents some opportunity for this type of value creation.[75] Even in 'single-issue'[76] negotiations, parties have at least a mutual interest in the management of their dispute.[77] There is, however, significant variation in the extent of value creation that is possible.[78] It is reasonable to infer that the areas where the collaborative process will be most effective are those where mutual or interdependent interests provide the greatest opportunity for interest-based negotiations.[79]

Consistent with this proposition, participants discussed that collaborative practice is suited to matters where the parties have mutual or interdependent interests, especially those

---

73 Anthony Gray, 'Good Faith and Termination for Convenience Clauses in Australia' (2012) 5(4) *International journal of Private Law* 352, 357.

74 See, e.g., Law Council of Australia (n 13) [3]; discussed further in Chapter 3, 3.4(b); Bobette Wolski, 'The "New" Limitations of Fisher and Ury's Model of Interest-Based Negotiation: Not Necessarily the Ethical Alternative' (2012) 16 *James Cook University Law Review* 127, 134-5; Condliffe, (n 23) 175-7, 219-20.

75 Wolski (n 74) 139.

76 Ibid.

77 Ibid, Ross P Buckley, 'The Applicability of Mediation Skills to the Creation of Contracts' (1992) 3 *Australian Dispute Resolution Journal* 227, 235.

78 Wolski (n 74) 139.

79 See, e.g., Hoffman (n 31) 2: focusing in particular in the mutual interest in protecting children and reducing transactional costs.

that will continue after the dispute. In many cases, the mutual interests of the parties and their relationship are interrelated.[80] Several participants discussed the mutual interest of separated parents in providing a stable and supportive home life for children. For example, a survey participant noted that the motivations of the parties in a recent collaborative family law matter were 'wanting a good outcome with the least impact on their daughter' [Survey, M(c) 3]. Here, participants' perspectives were supportive of a significant body of literature identifying the collaborative process as a means to protect children's needs and interests during separation.[81] Other examples of mutual interests in family matters include the need to share space within a small community, or how they will be perceived by mutual acquaintances. For example, they may have a shared interest in relation to a commercial enterprise [Interview, S(c) 9]. One interview participant discussed a case that involved a business, which was not desirable to sell or divide at the time of separation [Interview, S(c) 9]. The parties had to find a way to maintain their shared business as an ongoing concern throughout the challenging emotional process of divorce. This example again illustrates how collaborative cases can extend beyond what would be considered 'family law' in a limited sense.

The use of collaborative practice in such matters begs the question of what might be achieved in 'pure' employment or commercial matters where other types of mutual interests subsist. Some participants proposed that managing employment matters through collaborative practice could maintain the reputations and relations of the people involved. One interview participant noted: '… people don't want to lose face, and they might want to work together again. I think those are environments for collaboration' [Survey, M(c) 3]. One participant did not consider the collaborative process to be inappropriate where the parties would not work together in the future [Interview, S(c) 10]. However, another made the counterpoint that employees who have left a business may ask themselves: 'how do I protect my reputation in order to get my next job?' [Interview, S(c) 5]. Collaborative practice provides businesses with the capacity to manage matters in a private process, usually without public admission of

---

80 The first factor of 'ongoing relationships' is arguably a special case of a mutual interest, in that parties have an interest in maintaining their relationship. However, the factors of relationships were interests were each prevalent and often detailed separately in interviews.

81 See, e.g., Susan Gamache, 'Collaborative Practice: A New Opportunity to Address Children's Best Interest in Divorce' (2005) 65(4) *Louisiana Law Review* 1455; JA Robinson, 'The Adversarial System and the Best Interests of the Child in Divorce Litigation: Some Thoughts Regarding Collaborative Law as a Means to Resolve Parental Disputes' (2015) 18(5) *Potchefstrom Electronic Law Journal* 1528-44; Austin Chessell, 'Putting Children First: Consider Collaborative Law and Arbitration as Out-of-Court options this Family Dispute Resolution Week' (2015) 159 *Solicitors' Journal* 30.

fault.[82] Internally, employees within a company will prefer a narrative around the dispute that does not cast them, or their departments, in a poor light [Interview, S(t) 4] , a circumstance that is difficult to achieve in the fault-based dialogue of traditional legal negotiations.

Thus, value creation around mutual interests is indicated as a benefit to the collaborative process. Whilst mutual interests can be identified readily in family law disputes, they are not unique to this area, which indicates a potential for the process in other areas, including in the commercial world.

(c) Addressing Non-Legal Issues

The third factor identified was the presence of complex non-legal issues. Theorists have described a trend in the legal profession away from the role of the lawyer as advocate, and towards the role of a wise counsellor, providing practical suggestions for how they can address their problems. Participants noted that the presence of non-legal issues indicates that collaborative practice would be a better fit than other dispute management processes. For example, one interviewee said: ‘sometimes mediation all by itself is not the tool to use where you’ve got a lot of grey issues, rather than black-and-white to get through.'[83] These 'grey issues' were evident in both interpersonal and corporate matters. Participants described two ways in which the collaborative process acknowledged and responded in a manner that went beyond the legal aspects of a dispute. The first of these was a pragmatic approach that focussed on the parties’ needs rather than their legal entitlements. Collaborative solicitors described how they were able to help their clients with practical suggestions to help them manage their disputes. These were not directly linked to law, such as encouraging them to take up a sport to let off steam, or suggesting that the parties gift their daughter with art lessons to encourage her to engage with a community [Interview, S(c) 13]. Several practitioners discussed bringing in a financial planner in an interdisciplinary practice to provide practical financial advice. A collaborative solicitor opined that the planner ‘has been fantastic in fashioning an out of the box financial solution for parties’ [Interview, S(c) 8]. They noted that where a party is financially vulnerable, such as where their spouse has always handled the finances, the financial planner helps them to become financially literate, with the full support and cooperation of the other party. One interviewee noted that traditional lawyers typically infer their client's goals from their legal rights, rather than by

---

82 Of course, this advantage is shared with other dispute management processes such as arbitration and mediation.

83 Similar uses of the phrase 'black-and-white' were also included in 9.7% of survey responses.

direct inquiry: ‘most people are not asked what outcome they seek, and often it’s a very practical pragmatic solution’ [Interview, S(c) 5]. The willingness of collaborative practitioners to offer both legal advice and pragmatic guidance provides their clients with a better basis for the lasting management of disputes.

The second way collaborative practice addresses non-legal issues is attendance to the emotional aspect of disputes. One survey participant noted that collaborative practice is most suitable for 'emotive areas of law where the disputes often have little to do with contract or logic and are more about relationships and emotions' [Survey, S(t) 4]. Similarly, another interview participant noted:

> …three areas of practice, wills and estates, family law, and employment… I think they’re kind of natural matches because it’s not really just about the law. In fact— the law is probably very little to do with it; it’s much more about managing people and everything else associated with it. [Interview, S(c) 5]

Emotions were often given as a rationale for the extension of the process into wills and estates matters. In response to a question on areas that are suitable for collaborative practice, one interviewee noted that ‘wills stuff is as emotional as family law stuff and sometimes even more so, so I think that’s a great one’ [Interview, S(c) 8]. The perceived suitability of collaborative practice for emotional subject matter relates both to its basis in social science theory and, in interdisciplinary practice, the inclusion of specialised roles such as the coach, psychologist or child specialist. Participants described the process as ‘well-rounded’ [Interview, S(c) 7], and ‘holistic’ [Interview, S(c) 8, S(c) 10].

It was not suggested that areas such as business or construction law brought about the same intensity or complexity of emotion[84] as matters surrounding separations or succession. Yet, emotion was still considered an important and relevant driver of disputes outside of the family law sphere. One survey participant wrote: ‘all legal disputes involve people. Most therefore involve emotion...' [Survey, M(c) 1]. A collaborative solicitor noted: ‘[a] legal action… is brought because of one of two things or both. One is lack of information, and two is hurt feelings, or humiliation— some kind of emotional response’ [Interview, S(c) 5]. This participant later emphasised that even disputes involving corporate executives had a strong ‘personal’ element:

---

84 See for example, David Hoffman, ‘What the #@!* are they Fighting About?!?: Reflections on Fairness, Identity, Social Capital and Peacemaking in Family Conflicts’ (2015) 53(4) *Family Court Review* 509: on ‘why family warfare is so intense’.

> Most senior people, whether they are a business owner or whether they're the CEO, or the C class executive or manager… at the end of the day it's personal— and they see it as [that]. It might not be relevant to their personal existence in terms of their ability to pay their bills on the reputational that sort of thing. But it's relevant to just their ability to deal with the situation. [Interview, S(c) 5]

Thus, emotional and interpersonal aspects of the dispute are still part of commercial disputes.[85] Commercial lawyers may seek to distance themselves from the emotions to maintain a professional distance from the non-legal aspects of the dispute. However, to do so does their clients a disservice. A managed outcome reached on an analysis of the law alone may address only the 'presenting issue'[86] [Interview, S(c) 5], and not the full breadth of what the parties were really fighting about [Interview, S(c) 5]. Because their dispute is only partially managed, it is easily reignited should they work together again in the future. Thus, disputes where a client's needs relate not only to the legal aspects of a dispute, but also to interpersonal or emotional issues, are suitable candidates for the collaborative process. This research confirms that such issues are prevalent even in the commercial world.

(d) Establishing a Framework for Mutual Trust

Mutual trust is integral to the collaborative process. The research suggests that trust relates to both the belief the other party and their counsel will be truthful with respect to the negotiations, and that they are proficient in interest-based negotiation. A solicitor noted these aspects of trust as the 'skill and will' to work in collaborative practice [Interview, S(c) 5].

According to Lewicki and Bunker, trust between individuals develops in three progressive stages: calculus-based trust, knowledge-based trust, and identification-based trust.[87] Calculus-based trust is structured around incentives and disincentives. In calculus based trust, parties trust one another because they believe that risks or rewards will encourage the other to follow the desired course. Knowledge-based trust is said to be 'grounded… in predictability.'[88] It is achieved when people know one another well to predict how they will behave in a particular situation. Identification-based trust occurs where people understand

---

85 See, e.g., John Farrar, Laurence Boulle, 'Minority Shareholder Remedies—Shifting Dispute Resolution Paradigm' (2001) 13(2) *Bond Law Review* 1, 4.

86 Ibid.

87 See, e.g., Roy Lewicki, Barbara Bunker, 'Developing Trust in Work Relationships' in Roderick M Kramer and Tom R Tyler (eds), *Trust in Organizations: Frontiers of Theory* (Sage, 1996) 114, 119-23; see also Debra L Shapiro, Blair H Sheppard and Lisa Cheraskin 'Business on a Handshake' (1992) 8 *Negotiation Journal* 365.

88 Lewicki and Bunker (n 87) 121.

and value one another's interests, such that they are each inclined to act as an agent for the other.[89] It is the last stage of trust to develop, and consequently present in fewer relationships.[90]

These forms of trust can contribute to a positive negotiating environment in dispute management processes. For example, parties who know one another understand each other's character from prior dealings. This experience can be used to determine how the other is likely to behave, resulting in 'knowledge-based trust.'[91]

However, the collaborative process presents opportunities to create trust even if the parties do not trust one another on the basis of knowledge of their behaviour.[92] If the lawyers can be counted on to uphold the integrity of the collaborative process, then their continued involvement provides a calculus-based assurance that their counterpart is proceeding in good faith. Thus good collaborative lawyers can support calculus-based trust between clients and sets the tone for the process by providing clients with a model for their own interactions.[93]As the collaborative process continues, the parties' experiences with one another in face-to-face negotiations may well prompt knowledge-based trust or occasionally even identification based trust between them.

Since the initial foundation of calculus-based trust depends on the lawyers, it is necessary to consider why collaborative lawyers themselves should be trusted. In principle, it is possible to rely on calculus-based trust here also. Lawyers who collaborate in bad faith, face informal sanctions from collaborative practice groups, and potentially proceedings for ethical breaches. However, theorists have argued that trust rooted in the risk of sanctions may not be sufficient.[94] Rather, the literature suggests trust in collaborative lawyers is knowledge-based, resulting from assurance from the parties' own lawyer that the other lawyer is known to be capable of supporting the process.[95] Thus, related to connections between lawyers, either personally, or indirectly through reputation networks. For collaborative practice to

---

89 Ibid 122-4.

90 Ibid 124.

91 Ibid 121.

92 See, e.g., David Hoffman, and Dawn Ash, 'Building Bridges to Resolve Conflict and Overcome the "Prisoner's Dilemma": The Vital Role of Professional Relationships in the Collaborative Law Process' (2010) 2 *Journal of Dispute Resolution* 271.

93 Ibid.

94 Marilyn AK Scott, 'Collaborative Law: Dispute Resolution Competencies for the "New Advocacy"' (2008) *Queensland University of Technology Law and Justice Journal* 213, 216.

95 See Ronald Gilson and Robert H Mnookin, 'Disputing through Agents: Cooperation and Conflict Between Lawyers in Litigation' (1994) 94(2) *Colombia Law Review* 509, 525-7; Hoffman and Ash (n 92).

work, lawyers must know one another, or at least have a strong enough understanding of each other's reputation, in order to trust one another.[96]

Participants noted that the family law sector was amenable to knowledge-based trust because the specialty is small enough that lawyers will often know if their counterparts have behaved inappropriately in the past.[97] As a mediator noted: "[a]ll lawyers come with their own kind of reputation, so you know that's usually fairly self-evident' [Interview, M(c) 07]. A collaborative solicitor further stated that 'they get a reputation very quickly of being uncooperative, unpleasant' [Interview, S(c) 8]. The position that knowledge-based trust is the foundation of the relationship between collaborative lawyers also provides an explanation for why collaborative practice groups are integral to the success of the process.[98] By maintaining strong links in their professional community, solicitors know who can, and cannot be expected to uphold their end of a collaborative process. Collaborative practice groups also facilitate formal and informal sanctions against misuse of the collaborative process, which provides for calculus-based trust between practitioners.

As more types of dispute are handled through the collaborative process, it is important that collaborative lawyers form and maintain strong collegiate connections and reputation networks and have effective mechanisms for addressing misuse of the collaborative process. Thus, collaborative practice groups are an important ingredient of the extension of collaborative practice into new fields. The extension of the collaborative process into new fields may require practitioners to address new issues such as collaborating in specialties where there is a larger pool of practitioners or collaborating in areas of law where there is said to be cultural divide between plaintiff-oriented firms and defendant-oriented firms, such as in personal injury, or union law.[99]

In summary, collaborative practice provides the tools to produce a working degree of trust between participants. This working trust has both direct and indirect sources. Directly, trust may be inherent in the relationship between the parties due to knowledge-based trust. Alternatively, or additionally, calculus-based trust between clients may be established based on the solicitors capacity to trust one another.

---

96 Scott (n 94).

97 See also Hoffman (n 34) 3.

98 Pauline Collins, Marilyn Scott, 'The Essential Nature of a Collaborative Practice Group for Successful Collaborative Lawyers' (2017) 28 *Australasian Dispute Resolution Journal* 12.

99 Heinz and Laumann (n 47): Clients strongly influence firm culture, so when firms tend to represent a particular type of client, they will adapt towards their worldview.

Noting the collaborative process presents opportunities to maintain relationships, create value around mutual interests, address non-legal issues, and build trust, the logical next question is what types of matters are suited to take the greatest advantage of its potential? An exploration of this question follows.

8.4 Areas Most Suited to Advancing Collaborative Practice

McMorrow's survey of Irish collaborative solicitors found participants were most likely to consider family (100%) employment (85%), will/estates (52%) and business (56%) to be suited to the collaborative process.[100] Collaborative practitioners in the present research favoured similar areas. Family law (100%), wills and estates (80%), elder law (80%), Employment (79%) and Commercial and Business (75%) were frequently identified as suitable or highly suitable. The highest rated areas in the present research were those that were most likely to involve personal individual relationships. The areas of wills and estates, elder law, and employment matters all share this trait. These areas are discussed first, followed by the benefits of expansion into the general commercial world.

(a) Wills and Estates and Elder Law

Wills and estates law was identified as the next most suitable for collaborative practice after family law. This was evidenced by its frequent discussion in both interviews and survey responses. One collaborative solicitor said: '…we have a focus on trying to get the estates people on board because I think that's a really logical next step' [Interview, S(c) 8]. Discussing the similarities with family law, a mediator noted: '…wills and estates is actually the closest and most obvious step sideways … it's a similar problem but with more people… as in more parties [Interview, M(t) 6]. Tesler has described interdisciplinary collaborative estate planning as 'perhaps the most promising recent development in collaborative probate work."[101]

As an area of legal practice, wills and estates is similar to family law in many of the ways that are important for collaborative practice. Estate disputes generally involve family members, and therefore it is likely that parties will wish to maintain a relationship after the dispute. In Queensland, a small group of solicitors have already begun using collaborative

---

100 Rory McMorrow 'Collaborative Practice: A Resolution Model for Irish Employment Disputes' (Master of Business Studies Thesis, Letterkenny Institute of Technology, 2012) 106.

101 Pauline Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (American Bar Association, 3rd ed, 2017) 2.

practice in wills and estates matters. An interviewee from this group described using the collaborative process in two ways in this area: family provision claims and succession planning [Interview, S(c) 12].

A family provision claim is a form of claim that may be made against an estate under the *Succession Act 1981* (Qld),[102] or similar law in other States and Territories, for adequate provision for proper maintenance and support of a testator's dependant. In Queensland, a claim may be made by a spouse, child, or dependant.[103] In a family provision circumstance, one interviewee observed that the process is 'much more gentle on people in grief' [Interview, S(c) 12], because it provides people with time and space to manage the dispute.[104] The collaborative practice is, therefore, a natural fit for family provision claims because it allows beneficiaries to manage their dispute without positioning them against one another.

Succession planning is the second way that collaborative practice is already being used in wills and estates law. This involves making decisions about what should be included in a will. In a traditional approach, it usually involves only the testator and their solicitor. One interviewee noted that this means that discussions about wills are often neglected or presented in a unilateral 'this is what we're doing [way]' [Interview, S(c) 12]. This kind of planning is undesirable because it can lead to discontent and, eventually, claims against the estate since beneficiaries concerns have not been considered.

The collaborative approach to succession planning involves facilitating often difficult discussions between the testator and their family or other beneficiaries about how an estate will be distributed [Interview, S(c) 12]. This use of collaborative practice for succession planning is especially innovative because the process is used in a preventative role— the collaborative process takes place before the testator's passing, and thus prior to any possible cause of legal action. Because the collaborative process is more communicative than traditional estate planning, the parties have a fuller understanding of what to expect, including the underlying interests and rationales that motivated testacy decisions [Interview, S(c) 12].

The model of collaborative process emerging in Queensland wills and estates practice is interdisciplinary. It makes use of financial planning to support decision making, and of coaching to facilitate discussions in both a preventative and dispute management (family

---

102 *Succession Act 1981* (Qld) pt 4.

103 Each of these terms is subject to a special definition under the act; similar claims may be made in all Australian States and Territories, however there is substantial variation between jurisdictions.

104 Ibid.

provision) role. One and two coach models are under consideration as one collaborative wills and estates participant described:

> … the coach is really key… where you've got multiple families, and you need to facilitate actions between families, and particularly blended families. Where you've got that, you may even need to have two coaches in the process. [Interview, S(c) 12]

In addition to facilitating conversations between parties, coaches serve as a check and balance on the process. It was stated that they make sure that 'the lawyers stay true collaboratives' [Interview, S(c) 12]. Coaches were also described as helping to smooth over differences in experience among solicitors, especially where a solicitor was new to the collaborative process [Interview, S(c) 12], In this way, the use of collaborative practice in wills and estates is consistent with the rights-plus ideals that are expressed in family law collaborative practice models.[105] In addition to addressing questions of legal entitlements, the process is described as facilitating discussion around topics that are important to families, but difficult to raise. These include discussion about end of life care and the question of 'what is family legacy beyond wealth?' [Interview, S(c) 12].

The capacity of an interdisciplinary collaborative process to support difficult intergenerational conversations indicates potential for other aspects of elder law, such as planning care for a relative who requires additional support, managing disputes with care providers, or making decisions on behalf of a person who no longer is considered to have legal capacity. One collaborative solicitor noted:

> You might have a family where there's a dispute about what's the best care for a parent. That might be between the siblings, or it might involve the parent... someone is in an aged care facility… those sorts of things…I think it [collaborative practice] is very suitable. [Interview, M(c) 7]

Discussing the possibilities for the use of a collaborative process in planning for aged care, one collaborative solicitor observed:

> … [the collaborative process] opens up the potential for broader family discussion around all of that, and if it's properly facilitated, it can be a positive experience. If it's not, and people are just left to their own devices, they either won't have the conversation, because it's too hard and they don't know-how. Or it will be destructive, because it's not facilitated, and it will turn into a shitfight. [Interview, S(c) 12]

---

105 Daicoff (n 31).

Thus, succession planning and elder law represents a rich opportunity for the collaborative process, not only for legal dispute management, but also to engage in preventative law, and planning for care and end of life decisions.

(b) Employment Law

The research indicated that employment law presents an immediate opportunity for collaborative practice. Employment law is a broad term for the body of law that addresses the relationship between an employee and their employer.[106] It includes issues such as contract law, discrimination, harassment and workplace bullying.[107] While it does not generally involve family relationships, participants considered the relationship between employer and employee, especially in smaller enterprises, to suggest an opportunity for collaborative practice. Furthermore, a participant with experience in the field noted that this area of law is already characterised by a less adversarial approach to dispute management: 'employment lawyers, as a rule, understand how the system works and so tend to be …more conciliatory, more pragmatic than our friends in commercial law...' [Interview, S(c) 5]. This interviewee also noted that litigation is comparatively rare in employment matters. Instead, cases are generally managed through non-litigation dispute management processes such as conciliation, and tribunal determination [Interview, S(c) 5]. While these methods are successful in keeping people out of court, they are perceived as 'flawed' due to a pressured and positional approach [Interview, S(c) 5]. Collaborative practice presents an opportunity for employers and employees to address matters by reference to their own goals, values and interests, rather than positional negotiations centred on the predicted outcome of a determinative process.

The rarity of litigation in employment law was described as a 'double-edged sword' [Interview, S(c) 5] for the introduction of collaborative practice. On the one hand, the fact that many cases are already managed out of court means that a process designed from the ground up for settlement would make intuitively good sense to practitioners [Interview, S(c) 5]. On the other hand, the low incidence of litigation means that the potential costs of a trial are not so strong an incentive for innovative new approaches such as collaborative practice [Interview, S(c) 5]. The fact that non-litigation dispute management is already well established in employment law means that collaborative practice faces a competitive field. However, participants indicated that existing solutions are focussed more on efficiency than

106 See, e.g., Louise Floyd, *Employment Law* (Lawbook Co, 2010) xi; Paul Harpur, *Employment Law* (LexisNexis Butterworths, 2015).

107 Floyd (n 106).

on providing a client-orientated process. This suggests a gap in current service provision that could be filled by collaborative practice where there is a benefit to maintaining or repairing the relationship between the parties. This is certainly the case where they will be working together in the future,[108] but the value of parting on good terms should not be underestimated. For the employer, the way that the cessation of employment is managed sends a strong message about an organisation's culture, to employees, and in some cases to the general public. For the employee, a less adversarial process maintains their reputation for finding a new position and may lessen the negative psychological consequences of job loss.[109]

(c) Commercial Law

Several theorists have suggested an untapped potential in the use of collaborative practice in the commercial world.[110] Maxwell describes the collaborative process as 'the business imperative of our time.'[111] Commercial collaborative practice has the potential to allow firms to benefit from the advice and planning skills of lawyers, while still committing to managing a dispute with reference to their own goals and values. Doing so avoids the damage that an adversarial process can cause to commercial entities.[112]

As described in this research, the benefits in the collaborative process are emphasised when the parties have an ongoing relationship, mutual interests, where their dispute involves non-legal issues, when there is a framework for mutual trust, and addressing appropriate costs of the dispute. While these factors are strongly expressed in personal and family areas of law, they are also present in commercial disputes, suggesting an opportunity exist in this field. One mediator in the present research noted that the commercial environment and family practice each faced 'the same fundamental problem … the process of resolving this could

---

108 See Mcmorrow (n 100) 133.

109 Julia Anaf, Frances Baum, Lareen Newman, Anna Ziersch and Gywneth Jolley, 'The Interplay Between Structure and Agency in Shaping the Mental Health Consequences of Job Loss' (2013) 101010 *BMC Public Health* 1: explores the consequences of job loss among 33 employees at the Adelaide Mitsubishi factory; Connie R Wanberg, 'The Individual Experience of Unemployment' (2012) 63 *Annual Review of Psychology* 369; cf Martin Salm 'Does Job Loss Cause Ill Health' (2009) 18(9) *Health Economics* 3: found no ill health effects (mental or physical) caused by exogenous job loss.

110 Tania Sourdin, 'Collaborative Law: Using it in Commercial and Business Disputes' (2007) in Law Council of Australia National Convention 21-22 March 2007, Sydney; Hoffman (n 31); Heather Heavin & Michaela Keet, 'Skating to Where the Puck Will Be: Exploring Settlement Counsel and Risk Analysis in the Negotiation of Business Disputes' (2013) 76 *Saskatchewan Law Review* 191, 196.

111 Lawrence R Maxwell, 'The Collaborative Dispute Resolution Process is Catching on in the Civil Arena' (2005) Presentation to IACP Core Collaborative Practice Skills Institute, June 2005, Dallas.

112 Ibid.

actually not just cost us lots of money but actually damage the business itself that we're trying to resolve an issue around' [Interview, M(t) 6].

In considering whether a collaborative process should be recommended for a commercial matter, it is important to consider the potential benefit for the parties, and screen for appropriate cases. The literature on screening in collaborative practice is focussed on matters most relevant to family law such as domestic violence, drug use, and inequality of bargaining positions on the basis of traditional gender roles.[113] Such issues may come to bear on other types of matters, but are not so prevalent in areas of commercial law. Contrastingly, there is little need to screen for the presence of a relationship, or mutual interests in divorce or civil separation matters. By its nature, marriage involves a substantial integration of the parties' affairs. There is usually an emotional need to transition to a post-separation relationship, especially if children are involved.[114] In commercial matters, these factors cannot be taken for granted. Understanding the past, present and future relationship between parties, and the extent of their mutual interests, may be important in deciding whether a collaborative process should be recommended. For example, deciding whether collaborative process may be suitable for a commercial matter may involve considering whether there is an organisational need to heal the relationship between the parties.[115] Likewise, the presence of mutual interests and non-legal issues suggest that collaborative practice will provide the means to address these aspects of the dispute that are important to the parties.

In commercial and business law disputes, relational contract theory provides a useful heuristic for identifying matters that are suited to the collaborative process. MacNeil proposes that contracts fall on a spectrum, with discrete contracts at one extreme.[116] These are simple one-off transactions conducted by parties at arms-length.[117] At the other end of the spectrum, relational contracts are agreements that support a long-term economic relationship between legally distinct but economically integrated entities. Relational contracts embody

---

113 See, e.g., John Lande and Forrest S Mosten, 'Collaborative Lawyers' Duties to Screen the Appropriateness if Collaborative Law and Obtain Clients' Informed Consent to use Collaborative Law' (2010) 25(2) *Ohio State Journal on Dispute Resolution* 349, 358. Nancy Ver Steegh, 'The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non-Collaborative) Lawyers' (2009) 38 *Hofstra Law Review* 699, 707; Henry Kha, 'Evaluating Collaborative Law in the Australian Context' (2015) 26 *Australasian Dispute Resolution Journal* 178; Tesler (n 101) 129.

114 See, e.g., Hoffman (n 31) 3.

115 Mcmorrow (n 100) 133: collaborative practice is considered by Irish collaborative practitioners to be suited to supporting reinstatement as a remedy in Employment matters.

116 Ian MacNeil, 'Relational Contract Theory: Challenges and Queries' (2000) 95(5) *Northwestern Law Review* 877, 894-5.

117 Ibid.

characteristics that are relevant to the collaborative process, such as an ongoing relationships, mutual interests, trust and a greater reliance on good will to maintain their bargain.[118] If the commercial relationship between parties is governed by a relational contract, then this alone may suggest that collaborative practice could be an effective choice of process.

Hoffman argues that the most promising field for non-family lawyers who are trained in the collaborative process lies in transactional negotiations.[119] A collaborative approach to front-end negotiations is not strictly collaborative practice, because collaborative practice is defined largely by its approach to avoiding litigation, and litigation is rarely a feature of such work.[120] Nevertheless, the skills and approaches involved in collaborative processes are likely to be of great appeal to clients looking to start or renew their relationship in a productive manner that emphasises value creation.[121] Sourdin says that the field of construction in particular has taken significant steps in this regard, through processes of alliancing.[122] This contractual practice is designed to emphasise mutual interest by 'sharing the pain and gain' [Interviews, S(t) 1] of events in the construction process. Zeytoonian notes that collaborative practice can effectively blend transactional and dispute management approaches in ways that are not encouraged in the traditional paradigm.[123]

Collaboration in front end transactional work could lay the groundwork for a whole lifecycle approach to collaborative legal services for contracts.[124] For example, two parties preparing for an ongoing commercial relationship may begin with a skilled multidisciplinary team at the negotiation stage. They may then agree in their contract a mutual intention to reassemble the same team of lawyers, decision-makers, and experts should a dispute arise in its interpretation or execution.[125] Consistent with this proposal, a traditional lawyer suggested that the best time to introduce the idea of the collaborative process would be before their dispute had arisen, so as to avoid the influence of animosity or mistrust on their decision making [Interview, S(t) 1].

---

118 See, e.g., Macaulay (n 29); *Amey Birmingham Highways Limited v Birmingham City Council* [2018] EWCA Civ 264.

119 Hoffman (n 31) 8.

120 Ibid.

121 Hoffman and Ash (n 92).

122 Sourdin (n 24)150-3.

123 Michael Zeytoonian, Paul Faxon, 'Two Rivers Converge in Collaborative Law' (2009) Harvard Negotiation Law Review Online <https://www.hnlr.org/2009/04/two-legal-rivers-converge-in-collaborative-law/>.

124 See, e.g., Tesler (n 101) 219.

125 The consensual nature of collaborative practice suggests that this early planning should be a statement of intent rather than a mandatory dispute management clause.

The research has identified that the potential of collaborative practice is not limited to family law, and has highlighted elder law, employment and commercial law as fields suited to expansion. The next section addresses measures that may support the greater use of collaborative practice.

8.5 Supporting the Greater use of Collaborative Practice in Australian Civil Disputes

(a) Education and Awareness

The research identified a lack of education and awareness among lawyers and clients as a barrier to the expansion of collaborative practice. Improving awareness of the collaborative process is about educating lawyers and potential clients, first in the availability of the process, then in its salient features and intent. The end goal should be for solicitors to understand the collaborative process as well as they understand processes such as litigation and mediation, and thus normalise the process as an option for clients. There are, however, benefits associated with increasing even basic awareness. Knowledge throughout the legal profession that a process called collaborative practice exists, as distinct from other dispute management methods, would be a significant step because it would provide a foundation for further engagement.

The research suggests a good place to start is mainstream legal education in providing new lawyers with an introduction to the collaborative process. Dedicated collaborative practice elective courses are only offered in two Universities.[126] If only a small number of Australian law students receive dedicated collaborative practice training, their presence in the profession can have a significant effect in developing awareness and countering misconceptions about the collaborative process.

The growth of the collaborative process in family matters has been driven mainly by practitioners and early champions.[127] This includes both the efforts of individual practitioners, and promotional activities by practitioner organisations such as practice groups and collaborative practice associations. Research participants discussed strategies they had employed to improve the awareness and understanding of collaborative practice among family law clients. One solicitor discussed the importance of providing clients with

---

126 University of Technology Sydney, '79247 Collaborative Law' (2019) *UTS Handbook 2020* (15 January 2020) <http://handbook.uts.edu.au/subjects/details/78247>; Monash University 'LAW5410 – Collaborative Practice' *Monash University Handbook* (2020) (15 January 2020) <https://handbook.monash.edu/2020/units/LAW5410>.

127 Such as Benjamin J and Marilyn Scott, see Chapter 5.

information on all the options available to them: What we tend to do is every time a new client makes an appointment… we send out a letter saying… you should have a think about the various ways of resolving your issue… [Interview, M(t) 6]. At the collaborative practice association level, practitioners supported an increase in awareness by client education initiatives, such as producing brochures, books, and documentaries, and through client information sessions.[128]

The enthusiasm and follow-through of individual practitioners and champions of the process will continue to be a powerful driving force for the expansion of the process. There is a need to further supplement this with greater recognition in Australian legal institutions, as was important to the development of mediation.[129] Collaborative practitioners described the importance of outreach to law societies to ensure that information on collaborative practice is provided in existing resources. It is important, for example, that law society glossaries and web directories include the collaborative process alongside other entries on dispute management [Interview, Solicitor (c) 13]. Integration with legal advice services outside of the collaborative practice movement serves as a way to ensure parties are aware of the full range of their dispute management options, and to normalise the process by its inclusion in 'mainstream' discourse.

(b) Cost and Accessibility

The cost of collaborative practice was sometimes identified as a barrier to its growth. One possible solution is to reconsider the availability of legal aid[130] for the process. Legal aid is not offered to parties in Australian collaborative practice matters. The Family Law Council notes that the collaborative process may 'present practical problems in the legal aid context'.[131] These problems relate mainly to the need to retain new independent counsel if the matter is to be litigated. If a legal aid solicitor were disqualified under the participation agreement, then both that solicitor and the Commission itself would be disqualified from further representation.[132] The Commission believed that it would need to accept the risk of briefing private counsel. This risk was considered too onerous for two reasons. First, it would

128 See Chapter 5 [5.2].

129 See, e.g., Sourdin (n 24) 23.

130 See, Council of Australian Governments, 'National Partnership Agreement on Legal Assistance Services' (28 June 2017).

131 Family Law Council (n 52) 5 [vi].

132 Ibid.

'double' the cost of the legal aid.[133] Second, it would create logistical difficulties because there is only a limited pool of private solicitors who accept legal aid work— particularly so 'in smaller centres and regional areas.'[134] Ironically, for some legal aid participants, legal aid already deters litigation by limiting the provision of aid to negotiations, and not litigation. In such cases there would appear to be little reason not to embrace a collaborative process as one of the options available to participants.

The concerns raised by the Commission all relate to a strict interpretation of the disqualification provision as requiring imputed disqualification, where not only the lawyer but all lawyers at their firm are disqualified. Imputed disqualification is not required by the Australian Collaborative Practice Guidelines[135], or Australian law. Even the *Uniform Collaborative Law Act* (US), which requires imputed disqualification, permits parties to modify the collaborative practice agreement to provide an exception for pro bono representation,[136] or where a government entity is a party.[137] In either case, the collaborative and traditional lawyers must be kept separate. The IACP 'Standards and Ethics'[138] carve out parallel exceptions:

> The application of the prohibition to a professional working in the same firm or in association with the Collaborative Professional does not apply if the Participation Agreement expressly exempts a professional who (1) is a member of an organization or firm providing services to the client without fee, or a government agency, and (2) has been isolated from any participation in the Collaborative Process.[139]

These exceptions in overseas legislation and ethical standards provide a clear path to the provision of collaborative practice services using legal aid. The parties can sign a participation agreement that allows for an exception to imputed disqualification for representation that relies on legal aid, so long as the representing lawyer is isolated from the collaborative matter. Alternatively, it is open to the parties to forego imputed disqualification entirely, applying the principle of disqualification to the lawyer, but not the law firm.

---

133 Ibid.

134 Ibid.

135 Law Council of Australia (n 13) s 60 – s 63.

136 *Uniform Collaborative Law Rules and Uniform Collaborative Law Act 2010* (US Model Legislation) s 10.

137 Ibid s 11.

138 International Academy of Collaborative Professionals, 'Standards and Ethics' (2018) 3.12C.

139 Ibid.

Another possibility is the funding of collaborative practice matters on a pro-bono basis. Rayward asks: '[i]s there a place for a pro bono collaborative practice clinic in Australian family law?'[140] The question is answered with an enthusiastic 'yes', noting that such a clinic could provide access to collaborative practice for families with lower economic means, promote the process to the broader community, and provide opportunities to teach and mentor among collaborative professionals.[141] In essentially all cases, such clinics depend on a core of enthusiastic practitioners providing services for reduced or no remuneration.[142] However, as Gaies and Parnell note, practitioners may be attracted to the opportunities for experience, training and networking with other collaborative professionals that such clinics present.[143]

The inclusion of non-legal roles within interdisciplinary collaborative practice may also raise the question of whether supportive or pseudo-therapeutic roles might be funded through public medicine, an area that has been more successful in resisting 'efficiency' cuts than its legal cousin.[144] Some people in family law already rely on subsidised psychology services under a mental health plan, in order to manage a mental condition that is associated with, or exasperated by, the ordinary stressors of divorce.[145] Integration of psychological support with legal negotiations, as is common in the collaborative process, could enhance the effectiveness of both dispute management and therapeutic support.

(c) Cultural Change and the 'Paradigm Shift'

This research found adversarial attitudes are being replaced by a gradual strengthening of a more cooperative culture in the legal profession, and a renewed emphasis on commerciality, collegiality, and empathy. This confirms past research on some segments of the profession. Howieson found a 'constructive approach'[146] in the culture of Australian family lawyers, and explained it as a capacity to 'balance the adversarial aspects of the matter with the

---

140 Clarissa Rayward, 'Is There a Place for a Pro Bono Collaborative Practice Clinic in Australian Family Law?' (2014) 14(1) *Collaborative Review* 14-15.

141 Ibid.

142 Jeremy S Gaies and Teresa F Parnell, 'What's in it for Us? How Pro Bono and Low Bono Collaborative Programs Benefit Collaborative Professionals' (2014) 14(1) *Collaborative Review* 27, 27-8.

143 Ibid.

144 See, e.g., Emmanuel Kerkyasharian, 'Crisis in Legal Aid' (2018) *Bar News* 18.

145 See, Australian Government Department of Health, 'Better Access to Psychiatrists, Psychologists and General Practitioners Under the MBS (Better Access) Initiative: Fact Sheet for Allied Health Professionals' (2017).

146 Jill Howieson, 'The Professional Culture of Australian Family Lawyers: Pathways to Constructive Change' (2011) 25(1) *International Journal of Law, Policy and the Family* 71, 80.

opportunity to be conciliatory where possible… and take into account the peculiar nature of each client's case.'[147]

Ardagh considers that the rise of collaborative practice in Australia is itself an indication 'that legal culture is further responding to the move towards more consensual resolution of disputes'.[148] A common perspective among participants was that this change in the profession is spurred, at least in part, by the priorities and values of a new generation of lawyers, which differ markedly from those who have come before.

This presents a more receptive environment for collaborative practice than is characterised by North American descriptions of 'hired guns',[149] 'white knights',[150] and 'gladiators.'[151] Traditional solicitors, who participated in the present research, perceived value in less adversarial methods for managing matters and a willingness to explore new ways to achieve positive results for their clients.

Yet even practitioners who are open to new approaches face a challenge in adapting to a new way of doing things. Studies of mediation suggest that while lawyers understand the efficiency arguments for settlement, the value of a client-centred approach, where clients are 'the architects of their own futures'[152] is often missed.[153] Traditional solicitors considered that the collaborative process would be 'counter-intuitive' to how they would ordinarily approach a matter: '[m]ost backend lawyers and pushers… are quite adversarial… it would be counterintuitive to how we resolve disputes' [Interview, S(t) 1]. Overcoming the law school enculturation in positive law adversarial is required:

> I think litigators naturally tend to seek out leverage and pressure points and use the rules that are available to the advantage of their clients, so it's a bit counterintuitive when you've honed to those skills to then put them to one side and to work through a collaborative process..' [Interview, S(t) 3]

147 Ibid 80-1.

148 Anne Ardagh, 'Repositioning the Legal Profession in ADR Services: The Place of Collaborative Law in the New Family Law System in Australia' (2008) 12 *Queensland University of Technology Law Journal* 238, 252.

149 Tesler (n 101).

150 Gamache (n 81) 1461.

151 Ibid; Tesler (n 101).

152 Dafna Lavi, 'Can the Leopard Change his Spots?! Reflections on the "Collaborative Law" Revolution and Collaborative Advocacy '(2011) 13 *Cardozo Journal of Conflict Resolution* 61, 67.

153 See, e.g., Olivia Rundle, 'Barking Dogs: Lawyers Attitudes Towards Direct Disputant Participation in Court Connected Mediation of General Civil Cases' (2008) 8 *Queensland University of Technology Law and Justice Journal* 77.

A collaborative solicitor described that they were motivated to make the paradigm shift, by a need to provide the best possible service to their clients:

> I was in a conciliation for a sexual harassment matter, and I was sitting there just going, my God everything I've done so far, all my stuff through uni, and I used to go out to courts and support Barristers…everything I've done hasn't prepared me for this, and that was the hook. I wanted to be the best advocate or advisor to the person. And what I've learned since is that it's about not stopping with that adversarial skill. [Interview, S(c) 5]

It appears Australian legal culture is less and less resistant to the idea that matters can (and usually should) be managed outside of court. The shift to processes such as mediation have pathed the way. What then can be done to support and bolster the 'paradigm change' necessary for effective collaborative practice? This research found that collaborative practice training is effective in supporting the paradigm shift by creating opportunities for reflection on the role of lawyers. One lawyer at a collaborative training realised:

> …I don't think I've ever asked a client what is important to them. I've always expected and thought that a client was coming to me for advice. That's what they're paying me money for, and so I would solve the problem for them, tell them what their entitlements are, and then buckle up and fight… [Interview, S(c) 12]

Incorporating opportunities for reflection on professional roles early on in law schools would allow practitioners to paradigm shift before adversarial habits have taken hold. Law schools have been identified as having an important role of influence in the development and normalisation of less adversarial approaches such as mediation and lawyer-assisted negotiations.[154] Education institutions should continue to develop their offerings to position themselves as paradigm-shifters and leaders in second-generation dispute management.

This research has confirmed cultural resistance to the use of collaborative practice exists. This resistance is especially significant regarding aspects of the collaborative process that extend the idea of what a lawyer should do, or the aspects of a dispute that they should consider salient. However, the experiences of collaborative practitioners suggest that

---

154 See, e.g., Kathy Douglas, 'The Role of ADR in Developing Lawyers' Practice: Lessons from Australian Legal Education' (2015) 22(1) *International Journal of The Legal Profession* 71, 84; Pauline Collins, 'Student Reflections on the Benefits of Studying ADR to Provide Experience of Non-Adversarial Practice' (2012) *Australasian Dispute Resolution Journal* 204; James Duffy and Rachel Field, 'Why ADR must be a mandatory Subject in the Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-believer' (2014) 25 *Australasian Dispute Resolution Journal* 9, 18-9.

collaborative process training can support the internal shift to a client-centred approach, which is integral to interest-based negotiations.

(d) Legislative Measures

Australia does not presently have a collaborative practice statute, or other express recognition of the collaborative process at the statutory level. This research suggests that there is a compelling case for the introduction of law that recognises and regulates the collaborative process.[155] Such statutory support would serve to improve confidence in the process, and protect consumers of legal services by ensuring that services held out as collaborative process meet minimum standards. The objectives of legislating for collaborative practice are discussed next.

(i) Measures to Clarify the Relationship Between Collaborative Practice and Civil Procedure

First, it is argued that there is an opportunity to clarify the relationship between collaborative practice and statutes governing civil procedure.[156] In the *Civil Dispute Resolution Act 2011*, s4 could be amended to clarify that collaborative practice is a 'process facilitated by another person' for the purpose of demonstrating 'genuine steps to resolve a dispute', consistent with McClelland's statement.[157]

With respect to the *Family Law Act 1975,* it may be of benefit to expressly recognise that an interdisciplinary collaborative process that includes a registered Family Dispute Resolution Practitioner as a collaborative neutral meets the definition of Family Dispute Resolution.[158] Taking this step does not amount to a substantial change in the effect of the legislation, but will provide reassurance to lawyers and clients that the collaborative process will be considered a genuine effort to manage their matter.

(ii) Definition and Minimum Standards

Second, a statutory definition and minimum standards would be an important step in integrating the process at the statutory level. A statutory definition reduces the risk that consumers will be misled by different processes marketed under the same name. Theorists

---

155 Kha (n 16).

156 See Fairman (n 44) 259: on this function of the *Uniform Collaborative Law Rules and Uniform Collaborative Law Act 2010.*

157 Robert McClelland, *Australian Financial Review* (22 July 2011) 41: quoted in chapter 6, 6.7.

158 *Family Law Act 1975* (Cth) s 10F.

have noted the importance of flexibility in collaborative practice,[159] and a minimal definition is recommended to support experimentation and continued development.

For this reason, collaborative process should be defined to require that the process is governed by a binding participation agreement between the parties, and that collaborative lawyers be personally disqualified from participation in litigation if the matter is not concluded. The issue of imputed disqualification should remain open to the parties, meaning that they may decide whether other lawyers at the same firm may represent them in litigation, so long as the lawyers are isolated from the collaborative process.

There are three advantages to allowing parties to be represented by a lawyer in the same firm as the collaborative lawyer. First, it substantially addresses the challenges identified with providing collaborative practice to legal aid, and pro bono clients.[160] Second, it facilitates the use of collaborative practice in firms that are very tightly integrated with a particular client, such as the government solicitor and in-house counsel.[161] Third, it reduces the fear that long-term clients may be permanently lost if a collaborative matter is not successful.

The drawback of not requiring imputed disqualification is that firms' economic interests may conflict with their client's interests in reaching a consensual agreement. This affects one of the plurality of reasons that the disqualification agreement is considered effective. Other functions, such as specialisation, overcoming the prisoner's dilemma, and creation of a safe negotiating environment remain intact.[162] On balance, it is suggested by this research that the parties and their lawyers are in the best position to determine whether the benefits of imputed disqualification outweigh the costs in their particular circumstances.

(iii) Confidentiality and Privilege

Under present arrangements, collaborative practice relies on the settlement privilege protections in s 131 of the *Evidence Act* (Cth) to prevent communications in the collaborative process from being adduced in court. This may be supplemented by express contractual provisions within the participation agreement. There are several exceptions to this statutory protection, such that the Family Law Council concluded that the *Evidence Act* 'does not

---

159 Stu Webb and Ron Ousky (n 56) 217; Tesler (n 101) 36.

160 Law Council of Australia (n 13) 5 [vi].

161 Christian W Fabian, Brian A Slade, 'Breaking Up is Hard to Do: Is Collaborative Law an Option for Resolving M&A Disputes?' (Mayer Brown, 2014) 5 <http://martindale.com>: imputed disqualification under the *Uniform Collaborative Law Rules and Uniform Collaborative Law Act 2010* is a barrier to its use in United States merger and acquisition disputes.

162 As discussed in Chapter 3, 3.3(c).

provide an appropriate level of protection for the confidentiality of communications and material produced during the collaborative process.'[163] A solution proposed by the Family Law Council is to amend the *Family Law Act* to provide protections for privilege and confidentiality in the collaborative law process, similar those provided in family dispute resolution by s 10H and 10J.[164] However, this would only apply to family law matters, and many of the most sensitive issues for confidentiality and privilege will relate to other applications of the process. Commercial interview participants were particularly concerned about the potential for misuse of information obtained during the collaborative process. It is suggested therefore that a general collaborative law act would be a better vehicle for providing the assurances of privilege and confidentiality necessary to facilitate the collaborative process.

(iv) Collaborative Practice Training

This research suggests that the collaborative process works best when all participants are trained in the collaborative process [Survey, D5]. In order to maintain the philosophy and values of the collaborative process, it is desirable that at least collaborative trainers and coaches (and preferably all collaborative professionals) be required to be trained in the collaborative process. The Australian *Collaborative Practice Standards for Training* and *Collaborative Practice Standards for Trainers*[165] provide a suitable starting point for training and accreditation legislation. Following the mediation path to growth self-governance through collaborative associations related to the nature and requirements of training would permit greater flexibility and innovation and also achieved the desired increase in use of collaborative practice. The hurdles found through this research, can all be overcome and provide a new option for parties in dispute that may offer more societal harmony, client satisfaction and lawyer wellbeing. The following section provides an example that could be followed.

8.6 Examples of Non-Family Collaborative Practice Matters

This section integrates the findings of the research to illustrate approaches to collaborative practice outside of family law. These examples are not claimed to represent the only way that collaborative practice may be used in these fields. Collaborative practice has a long history of

163 Family Law Council (n 52) 43.
164 *Family Law Act 1975* s 10H, s 10J.
165 Law Council of Australia (n 13).

practitioner innovation and diversity of practice that will no doubt apply equally to non-family matters. Rather, these examples demonstrate how the collaborative process may be adapted for use in new circumstances, while retaining its core intent and philosophy.

(a) An Estate Planning Matter

(i) Pre-dispute

Peter is a widowed retired business-person who is experiencing declining health. He has two daughters, Summer and Sandy. Peter was quite successful in business. He owns six hair salons which have been managed by Summer since his retirement. Sandy is a single parent with two preschool children.

The salon business has significant assets but its revenue fluctuates greatly year-by-year. Peter contacts a solicitor to discuss estate planning. Peter experienced great unrest in his family after his mother's passing. He stresses to his solicitor that the manner in which his possessions are distributed must not cause unhappiness between his daughters. Peter's solicitor recommends a collaborative approach to the estate based on open discussion between himself and his daughters, who are to be the main beneficiaries.

(ii) Preparation

Peter's solicitor writes to Summer and Sandy to invite them to participate in a collaborative process. The letter summarises the expectations, obligations and values associated with the process. The letter also includes a list of local lawyers who are trained in collaborative practice for wills and estates matters. Summer and Sandy each agree to participate in the process, and each retain their own collaborative lawyer. The parties and lawyers have an initial phone conference where they identify the professional skills that will best support them through the process. At the recommendation of Peter's solicitor, the parties agree to include a financial planner with experience in large and complex estates, and a business valuer. The three parties sign a collaborative process agreement that sets out obligations to act transparently and in good faith and acknowledges that the parties may not be represented by the collaborative solicitors in subsequent litigation in relation to the estate. The principle of disqualification still applies, even though there is no immediate cause of action. The collaborative practice agreement is drafted to prevent lawyers from participating in a claim during probate or other litigation.

(iii) Four Way Meetings

The parties meet at a neutral location with their lawyers present. The lawyers serve to facilitate the uncovering of interests, and creative problem solving in addition to providing legal advice. During these discussions Peter discusses that he would like to pass on his hair dressing empire to Summer as his legacy and set up Sandy as a silent partner in the business to provide an ongoing income. However, Sandy wishes to return to university once her children are older and would prefer a more predictable income to support this goal.

In open discussions Summer discloses that she does not enjoy the management side of the business— a fact she didn't feel comfortable sharing with her father in the past. Her passion is cutting hair for modelling competitions, and she is finding the management of the business unbearably dull.

(iv) Agreement

In the first meeting Peter suggests selling all but the very first salon. This salon has special significance for Peter on an emotional level and is still among the most profitable. Summer will continue to manage this business and will purchase the salon over time from Peter. Peter will invest the proceeds of the sale to support his retirement, with the remainder to be divided between his daughters upon his passing. The financial planner recommends a trust structure that will support Peter's retirement goals and reduce the tax liability that will be faced by the estate. The business valuer helps the parties to reach an agreed fair value for the first salon and provides an opinion on the likely proceeds of selling the other salons. The outcome of the process is not binding. Peter will still have to amend his will, and make changes to the business structure to give effect to the outcome. Even so, the parties sign an explicitly hortative memorandum of what was agreed. This non-legal document includes the underlying interests that informed their reasoning and includes other matters discussed such as family values and the hopes that the family members have for the future.

(v) Debrief

Following the collaborative matter, the full collaborative team meet to debrief on the case, and to pursue any opportunities for professional development. The parties are also invited, but the debrief meeting is not billed as part of the collaborative process.

(b) Commercial Collaborative Practice Matter

(i) Pre-dispute

Company X is a large Australian-owned mobile phone manufacturer. Company X sells 'X-phones' directly to Australian consumers through its website, shipping from a factory in Shenzhen, China. Their sales have been steadily increasing, and they are looking to improve the efficiency of their supply chain by inviting a logistics company to build and maintain a dedicated warehousing and shipping facility beside their factory in China. A Chinese Logistics Firm, Company Y has delivered X-phones for years and appears to be the ideal candidate for the role.

Transactional counsel for both companies has identified the importance of the ongoing commercial relationship, and the high degree of mutual interests in the matter, and so agreed that any disputes that emerge will be managed through the collaborative process. The contract between the parties includes a statement of intent that outlines an explanation of the collaborative process, the reasons for choosing the process, the approach that the parties will take towards coaching, and the appointment of independent experts. The parties include a list of suggested experts fields such as language and cultural advisors, tax and finance who may be valuable contributors.

A year after they began work on the factory a dispute emerged between the companies. Company X alleges that an error by Company Y has resulted in the accidental leaking of their new phone model prior to its launch. The parties disagree over liability, and quantum relating to the leak of information. Further, the companies disagree over several of the finer points of service delivery.

(ii) Preparation

Noting the company's contractual commitment to collaborative practice, the lawyer who negotiated the original contract meets with Company X management to discuss suitability for collaborative practice. In this meeting, the lawyer reminds the client of the requirements of collaborative practice, including good faith negotiation, open discovery, and the disqualification of counsel. The lawyer is mindful of the ongoing relationship and mutual interests between the parties as a strong reason to recommend a collaborative process but must also consider the willingness of the company representatives to participate fully and in good faith. In particular, it is important to be mindful of potential misuses, such as delay, or power issues that could impact the process. The parties agree on a disqualification clause that

includes imputed disqualification, to achieve the highest possible commitment to collaboration. The parties discuss the scope and extent of disclosure that will be necessary to support the collaborative matter, and how they will manage any disagreement over disclosure, such as by appointing a trusted third-party to issue a decision. It is decided that no agreements will be final until written and signed by the parties. The parties agree that they will use an interdisciplinary process, using single shared coach, a neutral language and cultural advisor.

(iii) Four Way Meetings

The parties meet at a neutral location with commercial representatives, lawyers and third-party neutrals. The lawyers maintain the agenda and pace of the matter, allowing the single neutral coach to focus on facilitating the discussion. The coach is especially important in setting the tone for the early negotiations because this is the first collaborative dispute for both companies, and their experience in past negotiations has generally followed a positional approach. In later meetings their non-partisan perspective may be helpful in addressing impasses. The cultural advisor assists the parties in managing their different communication styles and business approaches, all representatives speak fluent English, but the cultural advisor can serve as a de facto translator if an idea is challenging to translate for linguistic or cultural reasons.

In subsequent four-way meetings the parties, supported by their lawyers, and collaborative neutrals proceed through the familiar steps of facilitative interest-based negotiation. These comprise problem definition, information gathering, option generation, testing options, negotiations and finally agreement. The parties may receive legal advice from their lawyers throughout the process, and this advice will usually be provided openly in four-ways. Yet the law is just one of the plurality of aspects that will be relevant to the process. Between meetings, the parties may confer with their lawyers or the neutrals to debrief on aspects of the process that went well or could go better, and to plan for the next meeting. Collaborative professionals may also discuss the matter with one another with an eye on professional development, or to address issues that are impacting on the collaboration.

(iv) Agreement

In the fourth meeting, the parties reach agreement. The parties are not limited to the options that may be awarded by a court, so they decide that they will invest in a new electronic stock tracking system to reduce the potential of leaked information on models in the future. The

parties each pay half of the cost of its development in lieu of damages related to the breach, and they arrange meetings between employees to address the service delivery issues. The agreement is confirmed in written form and the parties set a date to finalise and sign the agreement.

(v) Debrief

As in the wills and estates matter, the full collaborative team meet to debrief on the case, and to pursue any opportunities for professional development. The parties are also invited, but the debrief meeting is not billed.

8.7 Directions for Future Research

The research process has identified three areas as fertile ground for future discovery.

First, there is a need for basic information about the extent and nature of collaborative practice as it is applied in Australian family law matters. Membership of collaborative practice organizations provides an indication of available practitioners. However, the data collected as part of this research suggest that only a portion of that membership make use of collaborative practice regularly. There is a need for a national effort to collect information on how many matters are addressed using collaborative practice, what models are being used, and what the substantive outcome of such matters is for the parties, including process costs.

Second, there is a need for specific and focused research in the areas of wills and estates and franchise law—two fields that participants in the present research consistently identified as presenting immediate opportunities for collaborative practice. In particular, there is value in examining how family law collaborative practice models can be adapted for this use, including how professionals from disciplines other than law can be included to address all aspects of the dispute.

Third, there is a need for research into the intersection of collaborative practice and preventative law. The research identified several areas where the parties did not have a legal action against one another but could still benefit from collaboration. For example, collaborative process being used as a tool in estate planning. A collaborative process might also be employed in contract law, both in initial negotiations and as a preferred method of dispute management. Inquiry into preventative applications might examine how the collaborative process functions without disqualification, and how interdisciplinary professionals can contribute in a preventative or planning context.

8.8 Conclusions: What the Research has Revealed

This research was inspired by the question of why the collaborative process has not taken hold in a wider range of Australian disputes. The research, using an exploratory method, began by reviewing the present use of collaborative practice in Australia. A desk review of professional materials and literature review confirmed that the use of collaborative practice in Australia has strongly focussed on family matters. Practitioners have more recently begun a tentative expansion to use in Wills and Estates practice. Commercial collaborative matters are exceedingly rare, despite continued interest in the application of the collaborative process to this area.

This led to the research questions to uncover what makes disputes suitable for the collaborative process. The empirical data, together with an interpretative analysis of the literature, and desk review indicates that collaborative practice is a suitable choice of process where there are ongoing relationships, mutual interests, complex non-legal issues, a framework for mutual trust, and appropriate quantum. These factors help to explain why the collaborative process has been so effective in moving between jurisdictions internationally. Since process suitability is dependent on the relationship between the parties, and their mutual interests and involvements, it is not as affected by differences in domestic law as other dispute management processes.

These factors also help to explain the connection with family law, because while they are present in a variety of matters, they may be assumed in family law. However, this finding does not suggest that the collaborative process should remain mainly in family law. Rather, it is evident that the process is capable of being adapted to a much broader range of contexts where these factors are present. This extends even to matters in the corporate sphere of law. While some collaborative practitioners perceive corporate matters as black and white, traditional lawyers were quick to point out the interpersonal aspects of their work. Interview and survey responses from traditional practitioners suggested that the commercial environment is defined as much by relationships between employees of different companies, and the interplay of mutual interests, as by the web of contractual agreements that support transactions. As relational contract theory explains, agreements between organisations are often based on trust, evolve over time, and are best considered in their totality rather than as discrete individual transactions.

The essential step outside of family matters is to engage in appropriate screening to ascertain the relationship between the parties, the extent of their mutual interests, and their

capacity to participate in a collaborative process with transparency and good faith. The presence of relational contracts is a useful heuristic for determining whether a commercial matter is suited to collaborative practice

This is not to say there are no commercial challenges with respect to the adoption of collaborative practice. The prevalence of repeat and higher-value clients is a barrier to the expansion of the process because repeat clients and lawyers may be especially averse to the risk that their relationship will be interrupted by the disqualification of counsel within the collaborative process. Some traditional solicitors were also concerned about technical matters such as how the line may be drawn on relevant material for discovery, or the degree to which the process is protected by settlement negotiation privilege. There is a strong need for legislation in this area, as well as a need to clearly define the collaborative process at the statutory level. Preferably a minimal definition, comprising only disqualification of individual lawyers, and the use of a participation agreement should be used to allow for innovation and individual choice.

This research has further identified that the commercial world is in an advantageous position for the introduction of the collaborative process. The commercial legal world already include a substantial contingent of lawyers who operate outside of the shadow of court. Many areas of commercial law maintain a functional division between backend lawyers who mainly manage disputes, and front-end lawyers who support pre-contractual negotiations and form contracts between the parties. Front-end lawyers are used to working without recourse to litigation and are therefore well positioned to provide the vanguard for collaborative practice in the commercial world. There is much appeal in an approach where the lawyers and company representatives who agree to a contract also agree to form the initial team to manage any disputes as they may arise in a collaborative process. So far as possible, the parties should endeavour to include the same company representatives in each meeting, so as to retain the personal character of the collaborative process, and to develop knowledge-based trust.

An advantage particular to the commercial world, is the tendency towards higher quantum matters. Some have regarded this as a disadvantage where commercial clients can more easily afford litigation. Such a conclusion should, however, be resisted. The exploration in this research indicates that Australian commercial clients have a diminished appetite for litigation, and that cost is only one of several reasons that out-of-court settlement is preferred. Rather, the greater quantum of commercial matters should be considered an opportunity to refine models of the collaborative process that are tailored to these types of disputes, and that

include comprehensive interdisciplinary support. Two or more coach models are entirely viable for larger commercial matters, as is the inclusion of collaborative neutrals such as valuers, surveyors, engineers, cultural advisors and roles not yet imagined.

This research suggests that Australian businesses are less and less interested in litigation, and increasingly open to approaches that are not disruptive to ongoing commercial relationships. As commercial clients and lawyers move to embrace a less adversarial means to address legal disputes, they would do well to draw on the toolbox of skills and interdisciplinary practices that have been developed by family collaborative practitioners. It is evident the commercial world is ripe for the use of collaborative practice. Lawyers and commercial firms both have much to gain.

This research has explored the terrain for the use of the collaborative process in managing disputes in Australia. It has found answers as to why its use in non-family civil matters is limited and it has provided indications on how this can be moved forward. The benefits have been clearly set forth and there is much to be gained across the board. There are advantages for clients, lawyers and governments in promoting the increasing use of this fascinating dispute management process.

Bibliography

Legislation

California Family Code

Civil Dispute Resolution Act 2011 (Cth)

Evidence Act 1995 (Cth)

Family Court Rules 2004 (Cth)

Family Law Act 1975 (Cth)

Family Law Amendment (Shared Parental Responsibility) Act 2006

Federal Court Act 1976 (Cth)

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Cth)

Legal Profession Uniform Conduct (Barristers) Rules 2015 (Cth)

National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth)

North Carolina General Statute (NC)

Succession Act 1981 (Qld)

Texas Family Code (TX)

Uniform Collaborative Law Rules and Uniform Collaborative Law Act (United States model legislation)

Utah Code of Judicial Administration Rules (UT)

Cases

789TEN v Westpac [2004] NSWCA 594

Alcatel Australia v Scarcella (1998) 44 NSWLR 349

Amey Birmingham Highways Limited v Birmingham City Council [2018] EWCA Civ 264

Bates & Ors v Post Office [2019] EWHC 606

Biotechnology Australia Pty Ltd v Pace (1988) 15 NSWLR 130

Booker Industries Pty Ltd v Wilson Parking Pty Ltd (1982) 149 CLR 600

Bropho v Human Rights and Equal Opportunity Commission [2004] FCAFC 16

Burger King Corporation v Hungry Jack's Pty Ltd (2001) 69 NSWLR 558

Carter v Boehm (1766) 97 E.R. 1162

Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) 24 NSWLR 1

Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55

Curtain v Curtain [2016] FamCa 577

Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543

Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640

Elizabeth Bay Developments Pty Ltd v Boral Building Service Pty Ltd (1995) 36 NSWLR 709

Emirates Trading Agency LLC v Prime Mineral Exports Pty Ltd [2014] EWHC 2104

Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49

Ex parte Elsee (1830) Mont 69

Ex Parte Lloyd [1822] Mont 70

Fairleigh & Wills and Ors [2011] FamCA 431

Georges (Liquidator) in the matter of Sonray Capital Markets Pty Ltd (in liq) [2010] FCA 1371

Hera Resources Pty Ltd v Gekko Systems Pty Ltd [2019] *NSWSC 37*

Hillam & Barret [2019] FamCA 193

Hooper Bailie Associated Ltd v Natcon Group Pty Ltd (1992) 28 NSWLR 194

Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (1993) 31 NSWLR 91

In re Mabray (2010) 366 D.W.3d 16 Tex. App Houston 1st Dis

JC Williamson v Lukey [1931] 45 CLR 282

Jones v National Coal Board [1957] 2 QB 55

Mandell v Mandell (2010) 36 Misc. Ed 797 Sup. Ct.

Masters Home Improvement Pty Ltd (Formerly Shellbelt Pty Ltd) and Woolworths Limited v North East Solution Pty Ltd [2017] VCSA 88

Mellish v Motteux (1792) 170 E.R. 113

Paciocco v Australia and New Zealand Banking Group Limited [2015] FACFC 50

Ponder v Therrien (2006) KJQB 176

Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234

Riemann v Riemann (No 5) [2017] FamCA 986;

Salway v Fegley [2017] FamCA 410

Simic v Norton [2017] FamCA 1007

Strahan & Strahan [2019] FamCAFC 31

United Rail Services Ltd v Rail Corporation of New South Wales [2009] NSWCA 177

Walford v Miles [1992] 2 AC 128

Yam Seng Pty Ltd v International Trade Corp Ltd (2013) 1 All ER (Comm) 1321

Yuill v Yuill [1945] All ER 183

Articles / Books / Reports

Abney, Sherrie R, *Civil Collaborative Law: The Road Less Travelled* (Trafford, 1st ed, 2011)

Abney, Sherrie, 'Moving Collaborative Law Beyond Family Disputes' 38(2) *Journal of the Legal Profession* 277

Agee, Jane, 'Developing Qualitative Research Questions: A Reflective Process' (2009) *International Journal of Qualitative Studies in Education* 431

Aldiabat, Khaldoun M, Le Navenec, Carole-Lynne, Data Saturation: The Mysterious Step in Grounded Theory Method (2018) 23(1) *The Qualitative Report* 245

Alexander, Nadja, 'Introducing Collaborative Practice as a Method of Dispute Resolution: What should I be able to expect from my lawyer? Hired Gun or Problem Solver?' (22 March 2014) International Institute for Conflict Engagement & Resolution, Hong Kong

Alexander, Nadja, ‘Mediation and the Art of Regulation’ (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 1

Alexander, Nadja, ‘What’s Law got to do with it? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions’ (2001) 13 *Bond Law Review* Art 5

Anaf, Julia, Baum, Frances, Newman, Lareen, Ziersch, Anna and Jolley, Gywneth, ‘The Interplay Between Structure and Agency in Shaping the Mental Health Consequences of Job Loss (2013) 110 *BMC Public Health* 1

Anonymous, *The Secret Barrister: Stories of the Law and How It’s Broken* (Macmillan, 2018)

American Psychological Association, *APA Dictionary of Psychology* (2020)

Ardagh, Anne, ‘Repositioning the Legal Profession in ADR Services: The Place of Collaborative Law in the New Family Law System in Australia’ (2008) 12 *Queensland University of Technology Law Journal* 238

Ardagh, Anne, ‘Evaluating collaborative law in Australia: A case study of family lawyers in the ACT’ (2010) 21 *Australasian Dispute Resolution Journal* 204

Attia, Marriam & Edge, Jullian, ‘Be(com)ing a Reflexive Researcher: A Developmental Approach to Research Methodology’ (2017) 4(1) *Open Review of Education Research* 33

Australian Association of Collaborative Professionals, ‘Submission to the ALRC Enquiry into the Family Law System’ (8 November 2018)

Australian Bureau of Statistics, 'National Health Survey 2004-05: Summary of Results' (2006)

Australian Government, Attorney General’s Department, ‘Alternative Dispute Resolution’<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx>

Australian Government Productivity Commission, ‘Access to Justice Arrangements’ (2014)

Australian Government Productivity Commission, 'Report on Government Services' (2020)

Australian Law Reform Commission, ‘Family Law for the Future— An Inquiry into the Family Law System: Final Report (2019) *ALRC Report #135*

Australian Law Reform Commission, 'Review of the Federal Justice System' (1999)

Bamber, Roger, ‘Happier Endings’ (29 May, 2006) *The Lawyer* 31

Banks, Laura, Bigsby, Lorna, Conroyd, Maureen, First, Cynthia, Griffin, Celia, Grissom, Billie, Lancaster, Brad, Millar, Deb, Perry, Anne, Scudder, Kevin, and Shushan, Jeff, 'Hunter-Gatherer Collaborative Practice' 49(2) *Family Court Review* 249

Baron, Paula, Corbin, Lillian, and Gutman, Judy, 'Throwing Babies Out with the Bathwater? – Adversarialism, ADR and the Way Forward 40(2) *Monash University Law Review* 283

Bathurst, TF, 'The Role of the Courts in the Changing Dispute Resolution Landscape' (2012) 35(3) *University of New South Wales Law Journal* 870

Beale, Hugh, and Dugdale, Tony, 'Contracts Between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2(1) *British Journal of Law and Society* 45

Beasley, Richard, 'Muse: Rake ABC Television' (2010) *Bar News: The Journal of the NSW Bar Association* (Winter 2010) 115

Beaton Consulting, Beyond Blue, 'Annual Professions Survey: Research Summary' (2007)

Beck, Connie, Sales, Bruce, and Benjamin, Andrew, 'Lawyer Distress: Alcohol Related Concerns among a Sample of Practicing Lawyers' (1995) 13 *International Journal of Law and Psychiatry* 233

Behrendt, Larissa, *Aboriginal Dispute Resolution: A Step Towards Self-Determination and Community Autonomy* (Federation Press, 1st ed, 1995)

Benjamin, Andrew, Sales, Bruce and Darling, Elaine 'Comprehensive Lawyer Assistance Programs: Justification and Model' (1992) 16 *Law and Psychology Review* 113

Berger, Roni, 'Now I See it Now I Don't Researcher's Position in Reflexivity in Qualitative Research (2013) 15(2) *Qualitative Research* 219

Bergin, Adele and Jimmieson, Nerina, 'Explaining Psychological Distress in the Legal Profession: The Role of Overcommitment' (2013) 20 *International Journal of Stress Management* 13

Bingham, Tom, *The Rule of Law* (2010)

Blake, Susan, Browne, Julie & Sime, Stuart, *A Practical Approach to Alternative Dispute Resolution* (Oxford, 4th ed, 2011)

Boulle, Laurence and Field, Rachel, *Australian Dispute Resolution Law and Practice* (LexisNexis Butterworths, 1st ed, 2017)

Boyd, John-Paul E, 'What Would I Choose? Canadian Lawyer's Views on Dispute Resolution Practice' (2018) 17(2) *The Collaborative Review* 6

Bronte, Emily, *Wuthering Heights* (1847)

Brown, Henry, and Marriot, Arthur, *ADR Principles and Practice* (Sweet & Maxwell, 3rd ed, 2011)

Brown, William RJP, Gehrman, Lauren and Zimmerman, Jeffrey, 'Duel or Dual: An Interdisciplinary Approach

to Parenting Coordination for Uber-Conflicted Parenting Relationships' (2017) 55(3) *Family Court Review* 345

Bryant, Anthony and Charmaz, Kathy (eds) *The Sage Handbook of Grounded Theory* (Sage, 2007)

Buckley, Ross P, 'The Applicability of Mediation Skills to the Creation of Contracts' (1992) 3 *Australian Dispute Resolution Journal* 227

Buddle, Cliff, *South China Morning Post* (31 March 2016) 'Hong Kong Divorce Professionals Promote Radical Alternative to Court Action'

Bush, Robert Baruch, 'Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments' (1989) 66 *Denver University Law Review* 335

Cameron, Nancy J, *Collaborative Practice: Deepening the Dialogue* (Continuing Legal Education Society of British Columbia, 2014)

Cameron, Nancy, 'Collaborative Practice in the Canadian Landscape' (2011) 49(2) *Family Court Review* 221

Cameron, Nancy, Gamache, Susan, Gardner Brown, Doreen, Shapiro, Ellen, and Sterling, Judith, *Collaborative Practice: Deepening the Dialogue* (Continuing Legal Education Society of British Columbia, 2014)

Capelli, Sergio, Gallagher, Shaun, 'Dispute Resolution Boards—Prevention is Better than a Cure (2009) 128 *Australian Construction Law Newsletter* 24

Carter, John, *Contract Law in Australia* (LexisNexis, 7th ed, 2018)

Cecchi-Dimeglio, Paoloa and Kamminga, Peter, 'The Changes in Legal Infrastructure: Empirical Analysis of the Status and Dynamics Influencing the Development of Collaborative Law Around the World' (2014) *Journal of the Legal Profession* 191

Charmaz, Kathy, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (Sage, 2006) 165

Carter, Nancy, Bryant-Lukosius, Denise, DiCenso, Alba, Blythe, Jennifer, Neville, Alan J, 'The Use of Triangulation in Qualitative Research' (2014) 41(5) *Oncology Nursing Forum* 545

Castles, Margaret, 'Barriers to Unbundled Legal Services in Australia: Canvassing Reforms to Better Manage Self-Represented Litigants in Courts and in Practice' (2016) 25 *Journal of Judicial Administration* 237

Chanen, Jill Schachner 'Collaborative Counsellors' (June 23, 2006) *American Bar Association Journal*

Charmaz, Kathy *Constructing Grounded Theory* (Sage, 2nd ed, 2006) 46

Charmaz, Kathy, 'Continuities, Contradictions, and Critical Inquiry in Grounded Theory (2017) 16 *International Journal of Qualitative Methods* 1

Chessell, Austin, ‘Putting Children First: Consider Collaborative Law and Arbitration as Out-of-Court options this Family Dispute Resolution Week’ (2015) 159 *Solicitors’ Journal* 30

Chung, Frank ‘Australia’s most expensive divorce wraps up after 14 years and $40 Million in Legal Fees (28 March 2019) <news.com.au>

Clark, Kathleen ‘Use of Collaborative Law in Medical Error Situations’ (2007) 19 *Health Lawyer* 19

Cochran, Robert, ‘Legal Ethics and Collaborative Practice Ethics’ (2010) *38 Hofstra Law Review* 537

Collins, 'Resistance to the Teaching of ADR in the Legal Academy' (2015) 26 *Australasian Dispute Resolution Journal* 64

Collins, Pauline, ‘Student Reflections on the Benefits of Studying ADR to Provide Experience of Non-Adversarial Practice’ (2012) *Australasian Dispute Resolution Journal* 204

Collins, Pauline, Scott, Marilyn, ‘The Essential Nature of a Collaborative Practice Group for Successful Collaborative Lawyers’ (2017) 28 *Australasian Dispute Resolution Journal* 12

Condliffe, Peter, *Conflict Management: A Practical Guide* (LexisNexis Butterworths, 6th ed, 2019) 2

Connelly, Michael, *The Lincoln Lawyer* (Little, 2005)

Connolly, Peter, ‘The Adversary System— Is It Any Longer Appropriate’ (1975) 49 *Australian Law Journal* 439

Connolly, Peter, ‘By Good Disputing Shall the Law be Well Known’ (1975) 49 *Australian Law Journal* (1975)

Council of Australian Governments, ‘National Partnership Agreement on Legal Assistance Services’ (28 June 2017)

Cooper, Donna and Field, Rachel, ‘The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an Independent Practitioner’ 8(1) *Queensland University of Technology Law and Justice Journal* 159

Cox, Gay & Sharples, Syd, ‘Wouldn’t You Want to Know?’ (2008) 8 *Collaborative Review* 10

Crowley-Cyr, Linda, 'Promoting Mental Wellbeing in Law Students: Breaking-Down Stigma & Building Bridges in the Online Legal Environment' (2014) 14 *Queensland University of Technology Law Review* 129

Counsel, Caroline, ‘What is this Thing Called Collaborative Law’ (2010) 85 *Family Matters* 77

Curd, Martin V, ‘The Logic of Discovery: An Analysis of Three Approaches’ (1980) 56 *Scientific Discovery, Logic, and Rationality* 201

Daicoff, Susan Swaim, 'The Future of the Legal Profession' (2011) 37(1) *Monash University Law Review* 7

Daicoff, Susan, 'Law as a Healing Profession: The Comprehensive Law Movement' (2005) 6(1) *Pepperdine Dispute Resolution Journal* 1

Davies, G and Leiboff, J, 'Reforming the Civil Litigation System: Streamlining the adversarial framework' (1995) 25 *Queensland Law Society Journal* 111

Delaney, Marie, and Wright, Ted, 'Plaintiffs' Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation' (Justice Research Centre, 1997)

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

Dickens, Charles, *Bleak House* (1853)

Doraisamy, Jerome, 'Collaborative Practice 'Should be Applicable to all Areas of Law' (20 June 2019) *Lawyer's Weekly*

Douglas, Kathy, 'The Evolution of Lawyers' Professional Identity: The Contribution of the ADR in Legal Education' (2013) 18(2) *Deakin Law Review* 315

Douglas, Kathy, 'The Role of ADR in Developing Lawyers' Practice: Lessons from Australian Legal Education' (2015) 22(1) *International Journal of The Legal Profession* 71

Douglas, Kathy, 'The Teaching of ADR in Law Schools: Promoting Non-Adversarial Practice in Law' (2011) 22 *Australasian Dispute Resolution Journal* 49

Douglas, Kathy and Batagol, Becky, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40 *Monash University Law Review* 758

Douglas, Susan and Douglas, Kathy, 'Re-imagining Legal Education: Mediation and the Concept of Neutrality' (2014) Journal of the Australasian Law Teachers Association 1

Duff, Antony, Farmer, Lindsay, Marshall, Sandra and Tadros, Victor (eds), *The Trial on Trial: Volume 2, Judgement and Calling to Account* (2006)

Duffy, James and Field, Rachel, 'Why ADR Must be a Mandatory Subject in the Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-Believer' (2014) 25(1) *Australasian Dispute Resolution Journal* 9

Dumas, Alexandre, *The Count of Monte Cristo* (1844)

Duncan, Graham 'Specialisation at the Bar' (2008) 5 *New South Wales Bar Association News* 9

Economides, Kim M, Haug, Alfred A, and McIntyre, Joe, 'Toward Timeliness in Civil Justice' (2015) *Monash*

Law Review 414

Encyclopaedic Australian Legal Dictionary (Lexis Advance, 2020)

Epstein, Lee and King, Gary, 'Exchange: Empirical Research and the Goals of Legal Scholarship: #1 The rules of inference' (2002) *69 University of Chicago Law Review* 1

Fabian, Christian W, Slade, Brian A, 'Breaking Up is Hard to Do: Is Collaborative Law an Option for Resolving M&A Disputes?' (Mayer Brown, 2014) 5 <www.martindale.com>

Fagerstrom, Karen, Kalish, Milton, Nurse, Rodney, Ross, Nancy, Thompson, Peggy, Wilde, Diana, Wolfrum, Thomas, *Divorce: A Problem to be Solved; not a Battle to be Fought* (Brookwood, 1997)

Fairman, Christopher, 'A Proposed Model Rule for Collaborative Law' (2005-6) 21 *Ohio State Journal on Dispute Resolution* 73

Fairman, Christopher M, 'Growing Pains : Changes in Collaborative Law and the Challenge of Legal Ethics' (2008) 30(2) *Campbell Law Review* 237

Family Law Council (Australia), 'Collaborative Practice in Family Law: A Report to the Attorney General' (2006)

Family Law Council and Family Law Section of the Law Council of Australia, 'Best Practice Guidelines for Lawyers Doing Family Law Work' (4th ed, 2017)

Farrar, John, Boulle, Laurence, 'Minority Shareholder Remedies—Shifting Dispute Resolution Paradigm' (2001) 13(2) *Bond Law Review* 1

Field, Rachel and Duffy, James, 'Law student psychological distress, ADR and sweet-minded, sweet-eyed hope' (2012) 23(3) *Australasian Dispute Resolution Journal* 195

Field, Rachael 'Using the Feminist Critique of mediation to Explore "The Good, The Bad, and The Ugly" Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia' (2006) 20(5) *Australian Journal of Family Law* 44

Field, Rachael, 'What was Alternative Dispute Resolution (ADR)? What is Dispute Resolution' (1 December 2016) *Australian Dispute Resolution Network* <www.adrresearch.net>

Fink, Arlene, *Conducting Literature Reviews: From the Internet to Paper* (Sage, 5th ed, 2019)

Finkelstein, Ray, 'The Adversarial System and the Search for Truth' (2011) 37(1) *Monash University Law Review* 135

Fisher, Roger, Ury, William L, and Patton, Bruce, *Getting to Yes: Negotiating an Agreement Without Giving In* (Houghton Mifflin, 3rd ed, 1991)

Fisher, Tom, Gutman, Judy, and Martens, Erika, 'Why Teach Alternative Dispute Resolution to Law Students? Part one: past and current practices and some unanswered questions (2006) *Legal Education Review* 125

Fiss, Owen M, 'Against Settlement' 93 (1984) 93 *Yale Law Journal* 1073

Flick, Uwe, An Introduction to Qualitative Research (Sage, 5th ed, 2014)

Floyd, Louise, *Employment Law* (Lawbook Co, 2010) xi

Follet, Mary Parker, Metcalf, Henry C (ed), Urwick, L (eds), *Dynamic Administration: The Collected Papers of Mary Parker Follett* (Harper & Brothers Publishing, 1942)

Foran, Patrick, 'Adoption of the Uniform Collaborative Law Act in Oregon: The Right Time and for the Right Reasons' (2009) 13(3) *Lewis & Clark Law Review* 787

Fotherby, William, 'Law that is Pro Se (Not Poetry): Towards a System of Civil Justice that Works for Litigants Without Lawyers' (2010) *Auckland University Law Review* 54

Fox, William, *International Commercial Agreements* (Kluwer Law International, 3rd ed, 1988)

Frey, Bruce B (ed) The Sage Encyclopaedia of Educational Research, Measurement, and Evaluation (Sage, 2018)

Frost, Robert, *Mountain Interval* (1916)

Frydlinger, David , Hart, Oliver and Vitasek, Kate, 'A New Approach to Contracts' (2019) 97(5) *Harvard Business Review* 116

Gaies, Jeremy S and Parnell, Teresa F 'What's in it for Us? How Pro Bono and Low Bono Collaborative Programs Benefit Collaborative Professionals' (2014) 14(1) *The Collaborative Review* 27

Galanter, Marc and Palay, Thomas, *Tournament of Lawyers: The Transformation of the Big Law Firm* (University of Chicago Press, 1991)

Galanter, Marc S, Henderson, William D, 'The Elastic Tournament: The Second Transformation of the Big Law Firm (2008) 60 *Stanford Law Review* 1867

Gamache, Susan, 'Collaborative Practice: A New Opportunity to Address Children's Best Interest in Divorce' (2005) 65(4) *Louisiana Law Review* 1455

Gamache, Susan, 'Collaborative Divorce Coaching: Working Toward a Definition and Theoretical Location for the Family Therapist'(2013) 13 *Collaborative Review* 24

Gang, Daye, 'Collaborative Practice and Poverty: Contextualising the Process and Accommodating the Market (2016) 27 *Australasian Dispute Resolution Journal* 158

Gibbs, Graham R, *Analyzing Qualitative Data* (Sage, 2007) Ch 4.

Gilligan, Carol, *In A Different Voice: Psychological Theory and Women's Development* (Harvard, 1982)

Gilson, Ronald J, and Mnookin, Robert H, 'Disputing through Agents: Cooperation and Conflict Between Lawyers in Litigation' (1994) 94(2) *Colombia Law Review* 509

Glaser, Barney G 'All is Data' (2007) 2(6) *Grounded Theory Review* 1

Glaser, Barney G and Strauss, Anselm, *Awareness of Dying* (Aldine, 1965)

Glaser, Barney G and Strauss, Anselm, *The Discovery of Grounded Theory* (Aldine, 1967)

Goleman, Daniel, *Vital Lies, Simple Truths: The Psychology of Self-Deception* (Bloomsbury, 1998)

Goren Slovin, Sherri, 'The Basics of Collaborative Family Law— A Divorce Paradigm Shift' (2008) 18(2) *American Journal of Family Law* 74

Gray, Anthony, 'Good Faith and Termination for Convenience Clauses in Australia' (2012) 5(4) *International journal of Private Law* 352

Gutman, Judy, 'Legal Ethics in ADR Practice: Has Coercion Become the Norm?' (2010) 21 *Australasian Dispute Resolution Journal* 218

Gutman, Judy, 'Litigation as a Measure of Last Resort: Opportunities and Challenges for Legal Practitioners with the Rise of ADR' 14(1) *Legal Ethics* 1

Gutterman, Sheila M, *Collaborative Law: A New Model for Dispute Resolution* (Bradford, 2004)

Hansen, Susan, Schroeder, Jeanne, Gehl, Kathy, 'The Child Specialist Role in Client Choice of Process: Focusing on the Children and Enhancing Value' (2013) 13(1) *Collaborative Review* 13

Harpur, Paul, *Employment Law* (LexisNexis Butterworths, 2015)

Healy, Connie, *Collaborative Practice: An International Perspective* (1st ed, Taylor and Francis, 2017)

Healy, Connie, 'The Child Specialist' (2012) 12(1) *Collaborative Review* 22

Heavin, Heather and Keet, Michaela 'Skating to Where the Puck Will Be: Exploring Settlement Counsel and Risk Analysis in the Negotiation of Business Disputes' (2013) 76 *Saskatchewan Law Review* 191

Heinz, John and Laumann, Edward O, *Chicago Lawyers: The Social Structure of the Bar* (Northwestern University Press, 2nd ed, 1994)

Heller, Randy J, 'Using Research to Explore Competency and the Role of the Mental Health Professional in CP.

What Do “They” Do? (2012) 12(1) *Collaborative Review* 25

Hickie, Ian B, Davenport, Tracey A, Luscombe, Georgina M, Rong, Ye, Hickie, Megan L, Bell, Morag I, 'The Assessment of Depression Awareness and Help-Seeking Behaviour: Experiences with the International Depression Literacy Survey (2007) 7(1) *BMC Psychiatry* 48

Hoffman, David A, ‘A Healing Approach to the Law: Collaborative Law Doesn’t have to be an Oxymoron’ (9 October 2007) *Christian Science Monitor* 9

Hoffman, David, ‘Collaborative Law in the World of Business’ (2003) 6(3) *The Collaborative Review* 1

Hoffman, David A, 'Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR' (2008) 1(4) *Journal of Dispute Resolution* 1

Hoffman, David, ‘What the #@!* are they Fighting About?!?: Reflections on Fairness, Identity, Social Capital and Peacemaking in Family Conflicts’ (2015) 53(4) *Family Court Review* 509

Hoffman, David and Ash, Dawn, ‘Building Bridges to Resolve Conflict and Overcome the “Prisoner’s Dilemma”: The Vital Role of Professional Relationships in the Collaborative Law Process’ (2010) 2 *Journal of Dispute Resolution* 271

Hoffman, David A, and Schepard, Andrew, ‘To Disclose or not to Disclose? That is the Question in Collaborative Law’ (2020) 58(1) *Family Court Review* 83

Holmes CJ, Catherine, ‘Supreme Court of Queensland Annual Report 2018-19’ (2019)

Hopt, Klaus, and Steffek, Felix, (eds*) Mediation: Principles and Regulation in Comparative Perspective* (Oxford, 2013)

Howieson, Jill, 'The Professional Culture of Australian Family Lawyers: Pathways to Constructive Change' (2011) 25(1) *International Journal of Law, Policy and the Family* 71

Hulley, Steven B, Cummings, Steven R, Browner, Warren S, Grady, Deborah and Newman, Thomas B (eds), *Designing Clinical Research* (Wolter Kluwers Health, 4th ed, 2013)

International Academy of Collaborative Professionals, ’First Collaborative Practice Training in Japan’ <www.collaborativepractice.com/event/first-collaborative-practice-training-japan>

Jackson, Krist, Bazely, Patricia, *Qualitative Data Analysis with NVivo* (Sage, 2019)

Jolowicz, JA, ‘Adversarial and Inquisitorial Models of Civil Procedure’ 52 *International Civil Law Quarterly* 281

Karp, Martin L, ‘One Bar Association’s Odyssey’ (2018) 57(2) *Judge’s Journal* 24, 25.

Katz, Leslie, ‘Bleak House in Australian Courts’ (2009) 26 *NSW Bar Association News* 70

Keet, Michaela Wiegers, Wanda, & Morrison, Melanie, ‘Client Engagement Inside Collaborative Law’ (2008) 24 *Canadian Journal of Family Law* 145

Kelk, Norm, Luscombe, Georgina, Medlow, Sharon, Hickie, Ian, 'Courting the Blues: Attitudes towards depression in Australian Law Students and Lawyers (Brain and Research Institute, 2009)

Kelly, Barbara, and Solomon, Linda, ‘The Nuances of Neutrality for the Neutral Mental Health Professional’ (2013) 13(1) *Collaborative Review* 16

Kenny, Méabh and Fourie, Robert, ‘Tracing the History of Grounded Theory Methodology: From Formation to Fragmentation’ (2014) 19 *The Qualitative Report* 1

Kerkyasharian, Emmanuel ‘Crisis in Legal Aid’ (2018) 2 *Bar News* 18

Kha, Henry, ‘Evaluating Collaborative Law in the Australian Context (2015) 26 *Australasian Dispute Resolution Journal* 178

Klein, Kenneth S, 'Truth and Legitimacy (in Courts)’ (2016) *Loyola University Chicago Law Journal* 1

Korn, Marion, 'Fitting the Fuss to the 'Form': The Ethical Controversy Over Collaborative Law Contracts' (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 279

Kötz, Hein, Civil Justice Systems in Europe and the United States (2003) 13 *Duke Journal of Comparative & International Law* 63

Kuhn, Thomas S, *The Structure of Scientific Revolutions* (University of Chicago Press, 2nd ed, 1970)

Kramer, Roderick M and Tyler, Tom R (eds), *Trust in Organizations: Frontiers of Theory* (Sage, 1996)

Kwok, Emily, and Kenny, Dianna T, ‘Misattributed Paternity Disputes: The Application of Collaborative Practice as an Alternative to Court’ (2015) 26(3) *Australasian Dispute Resolution Journal 127*

Lambert, Michael J, Barley, Dean E, ‘Research Summary of the Therapeutic Relationship and Psychotherapy Outcome’ (2001) 38(4) *Psychotherapy Theory Research & Practice* 357

Lande, John, ‘An Empirical Analysis of Collaborative Practice (2011) 49 *Family Court Review* 257

Lande, John, ‘Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin’ (2008) 1 *Journal of Dispute Resolution* 203

Lande, John, ‘Principles for Policymaking about Collaborative Law and Other ADR Processes’ (2007) 22 *Ohio State Journal on Dispute Resolution* 6

Lande, John, ‘Taking Advantage of Opportunities in “Litigotiation”’ (2015) 21 *Dispute Resolution Magazine* 40

Lande, John, ‘The Promise and Perils of Collaborative Law’ (2005) 12 *Dispute Resolution Magazine* 29

Lande, John and Mosten, Forrest S, ‘Collaborative Lawyers’ Duties to Screen the Appropriateness if Collaborative Law and Obtain Clients’ Informed Consent to use Collaborative Law’ (2010) 25(2) *Ohio State Journal on Dispute Resolution* 349

Landsman, Stephen, ‘A Brief Survey of the Development of the Adversary System (1983) *Ohio State Law Journal* 713

Landsman, Stephen, ‘So What? Possible Implications of the Vanishing Trial Phenomenon’ (2004) 1(3) *Journal of Empirical Legal Studies* 973

Larcombe, Wendy, and Fethers, Katherine, 'Schooling the Blues? An Investigation of Factors Associated with Psychological Distress Among Law Students' (2013) 36 *University of New South Wales Law Journal* 390

Laumann, Edward O, and Heinz, John P, ‘Specialization and Prestige in the Legal Profession: The Structure of Deference’ (1977) 2(1) *American Bar Foundation Journal* 155

Lavi, Dafna, ‘Can the Leopard Change his Spots?! Reflections on the ‘Collaborative Law’ Revolution and Collaborative Advocacy, (2011) 13 *Cardozo Journal of Conflict Resolution* 61

Law Council of Australia, 'Protocol to Provide Balanced Framework for Legal Professional Privilege Claims' (Media release, 26 July 2019) https://www.lawcouncil.asn.au/media/media-releases/protocol-to-provide-balanced-framework-for-legal-professional-privilege-claims

Law Council of Australia and Law Institute of Victoria, ‘Report into the Rural, Regional and Remote Areas Lawyers Survey’ (2009)

Lee, Harper, *To Kill a Mockingbird* (J.B. Lippincott & Co, 1960)

Leeuw, Frans L, Schmeets, Hans, Schmeets, JJG, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* (Edward Elgar Publishing, 2016)

Lincoln, Abraham, ‘Draft of a Lecture on Practicing Law’ in Basler, Roy P, *Collected Works of Abraham Lincoln* (Rutgers, 1953)

Liverani, Mary Rose, ‘Canberra Law Firms Set the Pace on Collaborative Law’ (2005) 43 *Law Society Journal* 20, 20

Lopich Lawyers, ‘A Move to Collaborative Dispute Resolution‘ (18 January 2019) www.lopichlawyers.com.au/legal-problem-solving

Lopich, Lorraine, ‘Collaborative Practice — 'We Already Do That" (2007) 9(9) *ADR Bulletin* 1

Lopich, Lorraine, ‘How Was Collaborative Law Introduced to Australia’ (2012) <lopichlawyers.com.au>

Lopich, Robert, 'Collaborative Law— an Australian Experience' (2008*) Alternative Resolutions: State Bar of Texas Alternative Dispute Resolution Section* 14

Luban, David, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988)

Macquarie Dictionary (2020)

Macaulay, Stewart, ‘Non-Contractual Relations in Business: A Preliminary Study’ (1963) 28 *American Sociological Review* 55

Macfarlane, Julie, ‘Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project’ (2004) 1(13) *Journal of Dispute Resolution* 18

MacFarlane, Julie, ‘The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases’ (Department of Justice, Canada 2005)

Macfarlane, Julie, *The New Lawyer: How Settlement is Transforming the Practice of Law* (University of British Colombia Press, 2008)

Macneil, Ian R, ‘Contracting Worlds and Essential Contract Theory’ (2000) 9 *Social & Legal Studies* 431

Ian MacNeil, 'Relational Contract Theory: Challenges and Queries' (2000) 95(5) *Northwestern Law Review* 877

Mallon, Patricia, ‘Collaborative Practice: An Overview’ (2009) *Irish Judicial Studies Journal* 3

Marcucci, Carla, ‘Italy’s Current Challenge: Transforming Baccarat Crystal into Everyday Glasses’ (2019) *The Collaborative Review* 10

Marshall, Patricia, ‘Political Competence and the Mediator: a New Strategy for Managing Complexity and Stress’(2008) *Queensland University of Technology Law and Justice Journal* 176

McCabe, Heather A, Scott, Charity ‘Seminar in Public Health Law and Policy in an Interprofessional Setting: Preparing Practitioners for Collaborative Practice at the Macro Level’ (2016) 44 *Journal of Law, Medicine & Ethics* 56

McClelland J ‘Reasonableness— A Fundamental Aspect of a Lawyer’s Duty to the Court and the Administration of Justice’ (2018) Address to Australian Disputes Centre, 8 February 2017

McClelland, Robert, *Australian Financial Review* (22 July 2011) 41

McConville, Mike, and Chui, Wing Hong (eds) *Research Methods for Law* (Edinburgh University Press, 2nd ed, 2017)

McEwan, Ian, *Atonement* (Jonathan Cape, 2001)

McGhee, Gerry, Marland, Glen R and Atkinson, Jacqueline, 'Grounded Theory Research: Literature Reviewing and Reflexivity (2007) 60(3) *Journal of Advanced Nursing* 334

McLaren, Richard and Sanderson, John, *Innovative Dispute Resolution: The Alternative* (Carswell Thompson Professional, 1994)

MacNeil, Ian, 'Relational Contract Theory: Challenges and Queries' (2000) 95(5) *Northwestern Law Review* 877

Marshall, Patricia, 'Political Competence and the Mediator: a New Strategy for Managing Complexity and Stress'(2008) *Queensland University of Technology Law and Justice Journal* 17

McNamara, Judith, Cockburn, Tina, and Campbell, Catherine, *Good Practice Guide (Bachelor of Laws): Reflective Practice* (Australian Learning and Teaching Council, 2013)

McShane, Michael, 'Good Practice Guide (Bachelor of Laws): Appropriate Responses to Legal Issues: ADR' (Australian Learning and Teaching Council, 2013)

Melé, Domènec and Rosanas, Joseph 'Power, Freedom and Authority in Management: Mary Parker Follett's "Power-With"' (2003) 3(2) *Philosophy of Management*

Melville, Herman, *Moby Dick* (1851)

Menkel-Meadow, Carrie, *Dispute Processing and Conflict Resolutions: Theory, Practice and Policy* (Ashgate, 2003)

Menkel-Meadow, Carrie, "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyer's Responsibilities' (1997) 38 *South Texas Law Review* 407

Menkel-Meadow, Carrie, 'Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR' (1997) 44 *University of California Los Angeles Law Review* 1613

Menkel-Meadow, Carrie, 'Legal Negotiation in Popular Culture: What are We Bargaining for?' (2005) *Law and Popular Culture* 583

Menkel-Meadow, Carrie (ed), *Mediation: Theory, Policy and Practice* (Routledge, 2nd ed, 2018).

Menkel-Meadow, Carrie, 'The Trouble With the Adversarial System in a Postmodern Multicultural World (1996) 38 *William and Mary Law Review* 5

Merlin, Robert Joseph, 'The Collaborative Law Process Rules: This is how we do it' (April 2018) *Florida Bar Journal* 36

Merriam-Webster Dictionary (2020)

Metcalf, Henry C, Urwick, L (eds) *Dynamic Administration: The Collected Papers of Mary Parker Follett* (Harper & Brothers Publishing, 1942) Published as Volume III in Thompson, Kenneth, (ed) *The Early Sociology of Management and Organisations* (Routledge, 2014)

Michelagnoli, Mariachiara, 'Italy: Breaking News! Collaborative Practice on Trial!' (2015) 15(2) *Collaborative Review* 20

Mitchell, Catherine, 'Contracts and Contract Law: Challenging the Distinction Between the 'Real' and 'Paper' Deal' 29(4) *Oxford Journal of Legal Studies* 675

Mnookin, Robert H, and Kornhauser, Lewis, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88(5) *Yale Law School* 950

Moon, Jennifer A, *A Handbook of Reflective and Experiential Learning* (Routledge Falmer, 2004)

Moore, Christopher, *The Mediation Process: Practical Strategies for Resolving Conflict* (John Wiley & Sons, 4th ed, 2014)

Morely, Iain, *The Devil's Advocate: A Short Polemic on How to be Seriously Good in Court* (Sweet & Maxwell, 3rd ed, 2015)

Mosten, Forrest S, 'Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making' (2008) 1 *Journal of Dispute Resolution* 163

Mosten, Forest, *Collaborative Divorce Handbook: Effectively Helping Families Without Going to Court* (Jossey-Bass, 2009)

Mosten, Forrest S, *Unbundling Legal Services: A Guide to Delivering Legal Services a la Carte* (American Bar Association, 2000)

Mosten, Forrest, Potter Scully, Elizabeth, *Unbundled Legal Services: A Family Lawyer's Guide* (American Bar Association, 2017)

Mulcahy, Linda, Wheeler, Sally (eds), *Feminist Perspectives on Contract Law* (Glass House Press, 2005)

Murphy, Ronalda, 'Is the Turn Toward Collaborative Law a Turn Away from Justice?' (2004) 42(3) *Family Court Review* 460

Nagorcka, Felicity, Stanton, Michael and Wilson, Michael, 'Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice' (2005) 29 *Melbourne University Law Review* 448, 452

National Alternative Dispute Resolution Advisory Council 'Legislating for Alternative Dispute Resolution: A Guide for Government Policy-Makers and Legal Drafters' (Australian Government, 2006)

National Australian Dispute Resolution Advisory Council 'Dispute Resolution Terms' (Australian Government, 2003)

National Alternative Dispute Resolution Advisory Council 'Teaching Alternative Dispute Resolution in Australian Law Schools' (Australian Government, 2012)

National Conference of Commissioners on Uniform State Laws 'Uniform Collaborative Law Act with Prefatory Note and Comments*'* (2010)

Nettle J, Geoffrey, 'Ethics – The Adversarial System and Business Practice' (2005) 10(1) *Deakin Law Review* 67

Nisbet, Robert A, Perrin, Robert, *The Social Bond* (Knopf, 2nd ed, 1977)

Nurse, Rodney, Thompson, Peggy, 'One Perspective: Coaching to the "End": Expanding the Goal' *The Collaborative Review* (2010) 16

O'Brien CJ, Kerry, 'District Court of Queensland Annual Report 2018-19' (2019)

O'Connor, Vivienne, 'Common and Civil Law Traditions' (International Network to Promote the Rule of Law, 2012)

Orwell, Sonia and Angus, Ian (eds), *The Collected Essays, Journalism and Letters of George Orwell* (Harcourt, Brace and World, 1968)

Parker, Christine, 'The "Moral Panic" over Psychological Wellbeing in the Legal Profession: A Personal or Political Ethical Response?' (2014) 37(3) *University of New South Wales Law Journal* 1103

Parker, Gordon, 'Depression Among Lawyers' (2012) 110 *Precedent (Australian Lawyers Alliance)* 17

Patton, Michael, 'Enhancing the quality and credibility of qualitative analysis' 34 *Health Sciences Research* (1999) 1189

Paulson, Leonie, 'Lawyers and Depression' (2009) 31(2) *Bulletin (Law Society of South Australia)* 22

Peppet, Scott R, 'The Ethics of Collaborative Law' (2008) *Journal of Dispute Resolution* 131

Pike, Lisbeth, Murphy, Paul, 'The Columbus Project in the Family Court of Western Australia' (2006) 44(2) *Family Court Review*

Pike, Lisbeth, Murphy, Paul 'The Columbus Pilot in the Family Court of Western Australia: What the Parents Said' (2004) 10(2) *Journal of Family Studies* 239

Pollard, John, 'Collaborative Law Gaining Momentum' (2007) *Law Society Journal* (NSW)

Pollard, John, 'History of Collaborative Law' (2006) *Television Education Network Public Papers*

Pound, Roscoe, 'The Causes of Popular Dissatisfaction with the Administration of Justice' (1964) 10(4) *Crime & Delinquency* 355

Queensland Association of Collaborative Practitioners 'Collaborative Contract' (unpublished, held on file by author)

Radan, Peter¸ Gooley, John V, and Vickovich, Ilja, *Principles of Australian Contract Law: Cases and Materials* (LexisNexis Butterworths, 4th ed, 2017)

Rayward, Clarissa, 'Is There a Place for a Pro Bono Collaborative Practice Clinic in Australian Family Law' (2014) 14(1) *The Collaborative Review* 14

Rayward, Clarissa, *Splitsville: How to Separate, Stay out of Court and Stay Friends* (2014)

Renauf, Gordon, Anderson, Jill, and Lovric, Jenny, 'Pro Bono Opportunity in Discrete Task Assistance' (2003') 41 *Law Society Journal* 54

Resolve Estate Law, 'Collaborative Practice Training for Wills and Estates: beginning, building and sustaining a peace-making practice' (2020) <www.resolveestatelaw.com.au/collaborative-training>

Rhoades, Helen, Astor, Hilary, Sanson, Ann and O'Connor, Meredith, 'Enhancing Inter-Professional Relationships in a Changing Family Law System' iv (University of Melbourne, 2008)

Richards, Lyn, *Handling Qualitative Data: A Practical Guide* (Sage, 2005)

Riddle, Stewart, Harmes, Marcus, Danaher, Patrick (eds), *Producing Pleasure in the Contemporary University* (Sense, 2017)

Ridley, Diana, *The Literature Review: A Step-by-Step Guide for Students* (Sage, 2008)

Riekert, Justin, 'Alternative Dispute Resolution in Australian Commercial Disputes: Quo Vadis?' (1990) 11 *Australian Construction Law Newsletter* 17

Riskin, Leonard and Westbrook, James, 'Integrating Dispute Resolution into Standard First Year Courses: The Missouri Plan' (1989) 39 *Journal of Legal Education* 509

Robinson, JA 'The Adversarial System and the Best Interests of the Child in Divorce Litigation: some thoughts regarding collaborative law as a means to resolve parental disputes'(2016) 18(5) *Potchefstroom Electronic Law Journal* 1527

Robson, Colin, *Real World Research* (Blackwell, 2nd ed, 2002)

Roley, Ryan, 'The Alaska Model for Collaborative Law' (2014) <www.ryanroley.com>

Rose, Chip, *Collaborative Family Law Practice* (1996)

Rundle, Olivia, 'Barking Dogs: Lawyers Attitudes Towards Direct Disputant Participation in Court Connected Mediation of General Civil Cases' (2008) 8 *Queensland University of Technology Law and Justice Journal* 77

Rundle, Olivia, 'Lawyers' Perspectives on "What is Court-Connected Mediation for?"' (2013) 20(1) *International Journal of the Legal Profession* 33, 50

Rundle, Olivia, 'Unpacking the Adversarial Advocate' (2013) *Australian Dispute Resolution Research* <https://adrresearch.net/2013/12/04/unpacking-the-adversarial-advocate/>

Ryan, Donal, *A Slanting of the Sun* (2015)

Salava, Luke, 'Collaborative Divorce: The Unexpectedly Underwhelming Advance of a Promising Solution in Marriage Dissolution' (2014) 48(1) *Family Law Quarterly* 179

Salem, Richard, 'The Alternative Dispute Resolution Movement: An Overview' (1995) 49 *Arbitration Journal* 3

Salm, Martin, 'Does Job Loss Cause Ill Health' (2009) 18(9) *Health Economics* 3

Sampford, Charles, Blencoe, Sophie and Condlin, Suzanne (eds) *Educating Lawyers for a Less Adversarial System* (Federation Press, 1999)

Sandeen, Sharon, 'Professional Learning Communities and Collaborative Teams: Tools to Jump-Start the Learning Outcomes Assessment Process' (2013) *North Eastern University Law Journal* 189

Schachner Chanen, Jill, 'Collaborative Counsellors' (June 23, 2006)

Schelling, Thomas, *The Strategy of Conflict* (Harvard University Press, 1960)

Schneider, Andrea Kupfer, 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' (2002) 7 *Harvard Negotiation Law Review*

Schwab, William H 'Collaborative Lawyering: A Closer Look at an Emerging Practice' (2004) 4(3) *Pepperdine Dispute Resolution Law Journal* 354

Scott, Marilyn, 'Collaborative Law: A New Role for Lawyers', (2004) 15 *Australasian Dispute Resolution Journal* 207

Scott, Marilyn AK, 'Collaborative Law: Dispute Resolution Competencies for the "New Advocacy" (2008) 11 *Queensland University of Technology Law Journal* 213

Scott, Marilyn and Collins, Pauline, 'The Challenges for Collaborative Lawyers in Providing CP Processes' (2017) 31 *Australian Journal of Family Law* 27

Sefton, Mark, 'Collaborative Law in England and Wales: Early Findings: A Research Report for Resolution' (2009)

Seigle, Jeff, 'Creative Approaches to Providing Collaborative Services to People of Modest Means' (2014) 14(1) *The Collaborative Review* 24

Shapiro, Debra L, Sheppard, Blair H and Cheraskin, Lisa 'Business on a Handshake' (1992) 8 *Negotiation Journal* 365

Shankar, Subramaniam, 'Farewell Justice, Hello Collaborative Law'(12 October 2007) *Christian Science Monitor* 222

Shields, Richard W, 'On Becoming a Collaborative Professional: From Paradigm Shifting to Transformative Learning Through Critical Reflection and Dialogue' (2008) *Journal of Dispute Resolution* 427

Silver, Marjorie (ed), *The Affective Assistance of Counsel: Practicing Law as a Healing Profession* (Carolina Academic Press, 2007)

Simmons, Martha, 'Collaborative Law at 25: A Canadian Study of a Global Phenomenon' (2016) 49 *University of British Colombia Law Review* 669

Sinclair, Tina, Peters, Tricia, Picard, Marguerite, *Breaking up Without Breaking Down: Preserving Your Health, Your Wealth and Your Family* (Grammar Factory, 1st ed, 2017)

Slusser, Margaret M, Garcia, Luis I, Reed, Carole-Rae, McGinnis, Patricia Quinn, *Foundations of Interprofessional Collaborative Practice in Health Care* (Elsevier, 2019).

Smyth, Bruce, Bonython, Wendy, Rodgers, Bryan, Keogh, Elizabeth, Chisholm, Richard, Butler, Ross, Parker, Robyn, Stubbs, Matt, Temple, Jeromey and Vnuk, Maria, 'Certifying mediation: a study of section 60I certificates' (2017) 2/2017 *Australian National University Centre for Social Research and Methods Working Papers*

Sourdin, Tania, *Alternative Dispute Resolution* (Lawbook co, 5th Ed, 2016)

Sourdin, Tania, 'Five Reasons Why Judges Should Conduct Settlement Conferences' (2011) 37(1) *Monash Law Review* 145

Sourdin, Tania and Burstyner, Naomi, 'Justice Delayed is Justice Denied' (2014) 4(1) *Victoria University Law and Justice Journal*

Sourdin, Tania, 'Not Teaching ADR in Law Schools? Implications for Law Students, Clients and the ADR Field' (2012) 23 *Australasian Dispute Resolution Journal* 148

Spain, Larry R, 'Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation can be Ethically Incorporated into the Practice of Law' (2003) 56(1) *Baylor Law Review* 150

Spiegelman, James J, ‘Access to Justice and Access to Lawyers’ (2007) 29 *Australian Bar Review* 136

Standley, Kate, Davies, Paula, *Family Law* (Palgrave Macmillan, 8th ed, 2013)

Stebbins, Robert, *Exploratory Research in the Social Sciences* (Sage, 1st ed, 2011)

Stebbins, Robert, ‘The Internet as a Scientific Tool for Studying Leisure Activities: Exploratory Internet Data Collection (2010) 29 *Leisure* Studies 469

Stern, Lana, ‘Wolf in Sheep's Clothing: Why It's Difficult for Collaborative Professionals to Make That "Paradigm Shift" and What To Do If They Don't!’ (2017) 16(1) *Collaborative Review* 19

Sternlight, Jean R, ‘Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia,’ (2004-5) 80 *Notre Dame Law Review* 681

Stewart, Doug, ‘Expand the Pie Before you Divvy it Up’ (1997) *Smithsonian Magazine* 78

Stingl, Gaylene A, ‘Statistical Data Regarding Financial Specialists as Team Members in CP Cases’ (2012) 12(1) *Collaborative Review* 24

Sue, Valerie M and Ritter, Lois A, *Conducting Online Surveys* (Sage, 2015)

Swan, Christopher, ‘The Interdisciplinary Collaborative Practice Model of Dispute Resolution (2017) 39 *Bulletin (Law Society of South Australia)*

Tesler, Pauline, ‘Collaborative Law: A New Paradigm for Divorce Lawyers’ (1999) 5(4) *Psychology, Public Policy and Law* 967

Tesler, Pauline H, ‘Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts’ (2008) *Journal of Dispute Resolution* 95

Tesler, Pauline H, ‘Collaborative Family Law’ (2004) 4 *Pepperdine Dispute Resolution Law Journal* 317

Tesler, Pauline H, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (American Bar Association, 3rd ed, 2017)

Tesler, Pauline, ‘Collaborative Law: Where Did it Come From, Where is it Now, Where is it Going’ (1999) *The Collaborative Quarterly* (May 1999)

Tesler, Pauline, ‘The Evolving Role of the Divorce Financial Planner in Collaborative Practice‘ (2010) (unpublished) <http://academia.com>

Tesler, Pauline H, ‘Goodbye Homoeconomicus: Cognitive Dissonance, Brain Science, and Highly Effective Collaborative Practice‘ (2009) 38 *Hofstra Law Review* 635

Tesler, Pauline H, 'Informed Choice and Emergent Systems at the Growth Edge of Collaborative Practice' (2011) 49(2) *Family Court Review* 239

Tesler, Pauline, 'Interview with Peggy Thompson PhD' (2002) 4(2) *Collaborative Review* 1

Tesler, Pauline, 'It takes a System to Change a System: An Interview with Peggy Thompson PhD Co-creator of the Collaborative Divorce Model' (2002) 4(2) *Collaborative Review* 1

Tesler, Pauline, 'The Evolving Role of the Divorce Financial Planner in Collaborative Practice' (2010) (unpublished)

Tesler, Pauline, Thompson, Peggy*, Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move on With Your Life* (Harper Collins, 2007)

Trakman, Leon E and Sharma, Kunal, 'Agreements to Negotiate in Good Faith' (2014) 73(3) *The Cambridge Law Journal 598*

Traum, Lara and Farkas, Brian, 'The History and Legacy of the Pound Conferences' (2017) 18 *Cardozo Journal of Dispute Resolution* 677

Urbis, 'National Profile of Solicitors 2018' (2019)

Ver Steegh, Nancy, 'The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non-Collaborative) Lawyers' (2009) 38 *Hofstra Law Review* 699

Victorian Law Reform Commission, 'Civil Justice Review' (Victorian Government, 2008)

Victorian Law Reform Commission, 'Victims of Crime in the Criminal Trial Process' (Victorian Government, 2016)

Voegele, Gary, Ousky, Ronald, Wray, Linda 'Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes' (2007) 33 *William Mitchell Law Review* 973

Wanberg, Connie R, 'The Individual Experience of Unemployment' (2012) 63 *Annual Review of Psychology* 369

Webb, Stu, 'Collaborative Law: A Practitioner's Perspective on Its History and Current Practice' (2008) 21 *Journal of the American Academy of Matrimonial Lawyers* 155

Webb, Stu, 'From the Collaborative Corner: How We Did Things' (2001) 3(2) *The Collaborative Review*

Webb, Stu and Ousky, Ron, *The Collaborative Way to Divorce: The Revolutionary Method that Results in Less Stress, Lower Costs and Happier Kids— Without Going to Court* (Penguin, 2007)

Webb, Stu and Ousky, Ron, 'History and Development of Collaborative Practice' (2011) *49 Family Court*

Review 213

Webb, Stuart, 'An Idea Whose Time has Come: Collaborative Law: An Alternative for Attorneys Suffering 'Family Law Burnout' (2000) 13(5) *Matrimonial Strategist* 7

Wendel, W Bradley 'Civil Obedience' (2004) 104 *Columbia Law Review* 363

Wengraf, Tom, *Qualitative Research Interviewing: Biographic Narrative and Semi-Structured Methods* (Sage, 1st ed, 2001)

Wiegers, Wanda Anne and Keet, Michaela, 'Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities' (2008) 46 *Osgoode Hall Law Journal* 733

Winick, Bruce and Wexler, David, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003)

Wood Brooks, Alison, 'Emotion and the Art of Negotiation' (December 2015) *Harvard Business Review* 55

Woodward, John, 'Walking the Tightrope: Exploring the Relationship between Confidentiality and Disputant Participation' (2019) 30 *Australasian Dispute Resolution Journal* 25

Lord Woolf, 'Access to Justice Report to the Lord Chancellor on the Civil Justice System of England and Wales' (1995)

Wolski, Bobette, *Skills, Ethics and Values for Legal Practice* (Lawbook Co, 2009)

Wolski, Bobette, 'Collaborative Law: an (Un)ethical Process for Lawyers' 20 (2017) *Legal Ethics* 224

Wolski, Bobette, 'On Mediation, Legal Representatives and Advocates' (2015) 38 *University of New South Wales Law Journal* 5

Wolski, Bobette, 'The "New" Limitations of Fisher and Ury's Model of Interest-Based Negotiation: Not Necessarily the Ethical Alternative' (2012) 16 *James Cook University Law Review* 127

World Health Organisation, 'Framework for Action on Interprofessional Education & Collaborative Practice' (2010)

Voegele, Gary, Ousky, Ronald, Wray, Linda, 'Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes' (2007) 33 *William Mitchell Law Review* 97

Wray, Linda, 'IACP Research Regarding Collaborative Practice (Basic Findings)' (2012) 12(1) *Collaborative Review* 6

Wray, Linda, 'International Academy of Collaborative Professionals Practice Survey' (2010) <www.collaborativepractice.com>

Wray, Linda, Kelly, Barbara, Heller, Randy, Williger, Nancy, Osborne, Anu, Cordover, Adam, Galbraith, Brian, and Scudder, Kevin, '2015 Divorce Experience Study' (IACP, 2015)

Wray, Linda, Kelly, Barbara, 'IACP Client Experience Survey' (2017) 6(1) *The Collaborative Review* 10

Youens, Bernadette, Smethem, Lindsay, Sullivan, Stefanie, 'Promoting Collaborative Practice and Reciprocity in Initial Teacher Education: Realising a 'Dialogic Space' through Video Capture Analysis' (2014) 40(2) *Journal for Education for Teaching* 101

Zalusky Berg, Nancy, 'Drinking the Kool-Aid' (2009) in Wray, Linda and Zalusky Berg, Nancy, 'Point Counter-Point: Collaborative & Cooperative Law', 17 November 2010 Minnesota Bar Association

Zeytoonian, Michael A, 'What Makes Collaborative Law Collaborative Law (Really)? (2015) 15(2) *Collaborative Review* 17

Zeytoonian, Michael, Faxon, Paul, 'Two Rivers Converge in Collaborative Law' (2009) *Harvard Negotiation Law Review Online* <https://www.hnlr.org/2009/04/two-legal-rivers-converge-in-collaborative-law/>

Zimmerman, Reinhard and Whittaker, Simon (eds), *Good Faith in European Contract Law* (2000)

Codes of Conduct and Professional Guidelines

American Bar Association, *Model Rules of Professional Conduct* (2018)

Australian Solicitor's Conduct Rules (2015)

Bar Standards Board (England and Wales), *Code of Conduct for Barristers BSB Handbook* (1 July 2019)

Colorado Bar Association Ethics Committee, 'Formal Opinion 115: Ethical Considerations in the Collaborative and Cooperative Law Contexts' (2007)

Family Law Council and Family Law Section of the Law Council of Australia, 'Best Practice Guidelines for Lawyers Doing Family Law Work' (4th ed, 2017),

International Academy of Collaborative Professionals 'Standards and Ethics' (2018)

Law Council of Australia, 'Australian Collaborative Practice Guidelines for Lawyers' (2010)

Mediation Standards Board, 'National Mediator Accreditation System' (1 July 2015)

National Health and Medical Research Council, Universities Australia, *National Statement on Ethical Conduct in Human Research* (2007)

Queensland Law Society, 'Guideline on Collaborative Law' (2008): endorsed by the QLS Council, 31 January 2008

Solicitors Regulation Authority (England and Wales) *SRA Code of Conduct* 2011

Websites

Associazione Italiana Professionisti Collaborativi <www.praticacollaborativa.it>

Australian Dispute Resolution Advisory Council, 'ADRAC Charter' <adrac.org.au/charter>

Australian Association of Collaborative Professionals <www.collaborativeaustralia.com.au>

Collaborative Divorce Vancouver, <www.collaborativedivorcebc.com>

Collaborative Practice Canberra 'What is Collaborative Law?' <www.collaborativepracticecanberra.com.au>

Collaborative Practice Marin <www.collaborativepracticemarin.org>

Collaborative Professionals NSW <collaborativeprofessionalsnsw.org.au/commercial>

Collaborative Professionals of Canada <www.collaborativepracticecanada.ca>

Collaborative Professionals WA <www.collaborativeprofessionalswa.com.au>

Collaborative Professionals WA 'Breaking up Together' <www.breakinguptogether.com.au>

CollaborativeSA' <www.collaborativesa.com.au>

Irish association of Collaborative Professionals <www.acp.ie>

International Academy of Collaborative Professionals <www.collaborativepractice.com/>

Law Society of New South Wales 'Collaborative Law' <https://www.lawsociety.com.au/advocacy-and-resources/publications-and-resources/my-practice-area/collaborative-law>

Melca <http://www.melca.com.au>

Question Pro 'Exploratory Research: Definition, Methods, Types and Examples' (2020) <https://www.questionpro.com/blog/exploratory-research/>

Resolution <www.resolution.org.uk>

Vereniging van Collaborative Professionals <www.vvcp.nl>

Victorian Association of Collaborative Professionals <www.vacp.com.au/collaborative-professionals>

Presentations

Bathurst CJ, TF 'Dispute Resolution in the Next 40 Years: Repertoire or Revolution' (Speech, 1 December 2011, New South Wales Law 40th Anniversary Conference)

Bergin J, Patricia 'The Global Trend in Mediation; Confidentiality; and Mediation in Complex Commercial Disputes: An Australian Perspective (Speech, 20 March 2014, Mediation Conference (Hong Kong))

Black Sikorske, Caroline, Day, Deborah, Harris, Nancy, Lewis, Mike Magill, Adam, Stern, Lana, 'Advanced Negotiation: Understanding and Using Team Dynamics in Collaborative Practice' (Conference Presentation, May 17 2013, Collaborative Family Law Council of Florida, Inaugural Collaborative Family Law Conference: Collaborative Practice: The Future is Now!')

Brennan, Sir Gerard, 'Key Issues in judicial administration' (Speech, 20 September 1996, 15th Annual Conference of the Australian Institute of Judicial Administration)

Hayne J, Kenneth, 'The Vanishing Trial' (2008) (Speech, 23 January 2008, Supreme and Federal Courts Judges Conference)

Hayne AC, Kenneth, 'Restricting Litigiousness' (Speech, 13 April 2003, 13th Commonwealth Law Conference)

Kirby, Michael, 'Alternative Dispute Resolution, A Hard-Nosed View of its Strengths and Limitations' (Speech, 29 July 2009, The Institute of Arbitrators & Mediators Australia South Australian Chapter AGM)

Lopich, Robert, 'Civil (non-family) Collaborative Practice – The Way of the Future?' (Conference Presentation, 12 September 2016, National Mediation Conference (Australia))

Malcolm CJ, David K 'Protecting Abused Children in the Family Court: Towards Best Practice' (Speech, 7 October, 2003, Child Protection Forum in Family Court Matters)

Martin CJ, Wayne, 'Creating a Just Future by Improving Access to Justice' (Speech, 24 October 2012, Community Legal Centres Association WA Annual Conference)

Martin CJ, Wayne, 'Improving Access to Justice through the Procedures, Structures and Administration of the Courts' (Speech, 21 August 2009, Address to the Australian Lawyer's Alliance, Western Australian State Conference)

Martin CJ, Wayne 'Managing Change in the Justice System' (Speech, 14 September 2012, 18th Association Internationale des Jeunes Avocats Oration)

Mason, Sir Anthony, 'The Future of Adversarial Justice' (Speech, 17 August 1999, 17th Annual Australian Institute of Judicial Administration Conference)

Nugent, Timothy, 'Collaborative Practice in Australian Civil Disputes' (Conference Presentation, 15 April

2019, National Mediation Conference (Australia)*)*

Nugent, Timothy, 'Opportunities for Collaborative Law in Commercial Partnerships' (Conference Presentation , 12 September 2016, National Mediation Conference (Australia))

Sourdin, Tania, 'Collaborative Law: Using it in Commercial and Business Disputes' (Conference Presentation, 21-22 March 2007, Law Council of Australia National Convention)

Spiegelman CJ, James, 'Judicial accountability and performance indicators' (Speech, 10 May 2001, 1701 Conference: The 300th Anniversary of the Act of Settlement)

Other

Burton, Peta, 'Interview with Juliet Ford Farrar, Gesini and Dunn and Phil Davey, Dobinson Davey Lawyers [now DDCS Lawyers]' *State Focus* (Southern Cross Ten)

Collaborative Practice Canberra, 'Collaborative Law: A Better Way to Settle Your Family Law Matter' (brochure, 2013)

Hart, Oliver, Vitasek, Kate, 'The Inherent Failures of Long-Term Contracts—and How to Fix Them' (2019) 698 *HBR Ideacast* (podcast)

List, David, in his capacity as President of the Australian Association of Collaborative Professionals, letter dated 30 May 2017 (held on file by author)

McClelland, Robert, 'Minister's Second Reading Speech' (2010) *Hansard* 30 September 2010, 9.41 am

Melca 'Family is Family' (big picture storytelling, 2019)

Melca 'Breaking Up Without the Earthquake: Preserving Your Health, Your Wealth and Your Family' (brochure, nd)

Monash University 'LAW5410 – Collaborative Practice' *Monash University Handbook* (2020) (15 January 2020) <https://handbook.monash.edu/2020/units/LAW5410>

Queensland Association of Collaborative Practitioners 'Lawyers Collaborative Law Participation Agreement'

Queensland Association of Collaborative Professionals 'The respectful way to separate for you and your family' (brochure, 2014)

Queensland Law Society 'Alternative Dispute Resolution' (brochure, 2019)

University of Southern Qld School of Law and Justice, 'Legal Conflict Resolution Law1122' (2019)

University of Technology Sydney, '79247 Collaborative Law' (2019) *UTS Handbook 2020* (15 January 2020)

‘*US Service Mark Registration No* 76521641, Filed on Jun 11, 2003, Registered 26 July 2004, (Abandoned March 15, 2005)

Theses

Degoldi, Brett Raymond, ‘Lawyers Experiences of Collaborative Family Law’ (LLM thesis, University of British Colombia 2007)

Douglas, Katherine, ‘The Teaching of Alternative Dispute Resolution in Selected Australian Law Schools: Towards Second Generation Practice and Pedagogy’ (Phd Thesis, RMIT, 2012)

Heller, Randy J, ‘Exploring Competency and the Role of the Mental Health Professional in Interdisciplinary Collaborative Family Law: What Do “They” Do?’ (PhD Thesis, Nova Southeastern University, 2011)

Howieson, Jillian Alice, ‘Family Law Dispute Resolution: Procedural Justice and the Lawyer-Client Interaction’ (PhD Thesis, University of Western Australia, 2008)

Simmons, Martha Emily ‘Increasing Innovation in Legal Process: The Contribution of Collaborative Law’ (PhD Thesis, Osgoode School of Law, York University, 2015)

Appendices

OFFICE OF RESEARCH
Human Research Ethics Committee
PHONE +61 7 4631 2690| FAX +61 7 4631 5555
EMAIL human.ethics@usq.edu.au

27 April 2018

Mr Timothy Nugent

Dear Tim

The USQ Human Research Ethics Committee has recently reviewed your responses to the conditions placed upon the ethical approval for the project outlined below. Your proposal is now deemed to meet the requirements of the *National Statement on Ethical Conduct in Human Research (2007)* and full ethical approval has been granted.

Approval No.	H18REA076
Project Title	Collaborative practice in Australian civil (non-family) disputes
Approval date	27 April 2018
Expiry date	27 April 2021
Status	**Approved with standard conditions**

The standard conditions of this approval are:

(a) responsibly conduct the project strictly in accordance with the proposal submitted and granted ethics approval, including any amendments made to the proposal;
(b) advise the University (email: ResearchIntegrity@usq.edu.au) immediately of any complaint pertaining to the conduct of the research or any other issues in relation to the project which may warrant review of the ethical approval of the project;
(c) promptly report any adverse events or unexpected outcomes to the University (email: ResearchIntegrity@usq.edu.au) and take prompt action to deal with any unexpected risks;
(d) make submission for any amendments to the project and obtain approval prior to implementing such changes;
(e) provide a progress 'milestone report' when requested and at least for every year of approval;
(f) provide a final 'milestone report' when the project is complete;
(g) promptly advise the University if the project has been discontinued, using a final 'milestone report'.

For (d) to (g) forms are available on the USQ ethics website:

https://www.usq.edu.au/current-students/academic/higher-degree-by-research-students/conducting-research/human-ethics/forms-resources

Please note that failure to comply with the conditions of approval and the *National Statement (2007)*, may result in withdrawal of approval for the project.

Yours sincerely,

Mrs Nikita Kok
Ethics Officer

Research Participant Information

Project details

Title of Project:	Collaborative practice for Australian civil (non-family) disputes
Human Research Ethics Approval Number:	H18REA076

Researcher contact details

Principal Investigator Details

Timothy Nugent
Email: timothy.nugent@usq.edu.au
Telephone: (07) 4631 2916
Mobile: 0406603371

Description

The researcher is conducting research into the experiences of professionals in the legal industry, and their views on collaborative and adversarial modes of legal practice.

Participation

Your participation will involve responding to an anonymous online survey in relation to an emerging form of dispute resolution called collaborative practice. The survey will take approximately twenty minutes to complete.

In addition to the survey, the researcher is conducting optional follow-up interviews where participants may further discuss their views on this subject. These will usually be conducted via phone or video conferencing and will take approximately thirty minutes. You will have the opportunity to indicate whether you would like to participate by following instructions at the end of the survey.

Your participation in this project is entirely voluntary. If you do not wish to take part you are not obliged to. If you decide to take part and later change your mind, you are free to withdraw from the project at any stage. However it will not be possible to withdraw responses to the survey after submission.

If you wish to withdraw from the project, please contact the Primary Investigator, Timothy Nugent, using the contact details at the top of this form. Your decision whether you take part, do not take part, or to take part and then withdraw, will in no way impact your current or future relationship with the University of Southern Queensland.

Expected Benefits

There will be no direct benefit to research participants. However, this research may benefit members of the legal profession, and the community generally, by supporting the development of appropriate and effective Australian civil dispute resolution systems.

Collaborative practice is still emerging as a form of dispute resolution. Your views can help us to better understand the role of this tool in the Australian dispute resolution landscape, and to build recommendations for its modification or further deployment.

Risks

There are minimal risks associated with your participation in this project. These include:

Time imposition risk: Research participants will spend time participating in the research, which might otherwise have been directed towards other uses. The researcher will aim to minimise any time imposition upon participants.

Social risk: Participation in research can sometimes have a negative impact on social relationships. To minimize this risk, your participation or decision not to participate will be kept in strict confidence. This will not impact on your relationship with the researcher or the University of Southern Queensland.

Privacy and confidentiality

Participation in the survey is fully anonymous. If you elect to participate in the optional interview, your identity and contact details will be held in confidence and cannot be connected to the anonymous survey. Identifiable information will not be disclosed in any published research output.

Interviews may be audio recorded and transcribed to support accuracy. Following standard practice, audio files will be held securely for a minimum of 5 years following the publication of reports or articles resulting from data collection and then securely destroyed. Please indicate to the researcher if you would prefer that the interview not be recorded. You may request a copy of the transcript to check for accuracy. Any data collected as a part of this project will be stored securely as per University of Southern Queensland's Research Data Management policy. This policy may be viewed at https://policy.usq.edu.au/documents/151987PL.

Consent to participate

Submitting a response to at least part of the survey will be considered to indicate consent to participate in the survey, and to the use of submitted data for research. You may change your mind and withdraw at any time by not submitting the survey, however data cannot be withdrawn after submission.

If you decide to participate in a follow-up interview you will be provided a consent form to confirm your agreement to participate in this project. Please sign this form and return via email or in person.

Questions or further information about the project

Please contact the Primary Investigator, Timothy Nugent in relation to any queries about this project. Contact details are provided on the front page of this information sheet.

Concerns or complaints regarding the conduct of the project

If you have any concerns or complaints about the ethical conduct of the project you may contact the University of Southern Queensland Ethics Coordinator on (07) 4631 2690 or email ethics@usq.edu.au. The Ethics Coordinator is not connected with the research project and can facilitate a resolution to your concern in an unbiased manner.

Thank you for taking the time to help with this research project. Please keep this sheet for your information.

University of Southern Queensland

Consent Form for Interview

Project Details

Title of Project:	Collaborative practice in Australian civil (non-family) disputes
Human Research Ethics Approval Number:	H18REA076

Research Team Contact Details

Principal Investigator Details

Timothy Nugent
Email: timothy.nugent@usq.edu.au
Telephone: (07)4631 1082
Mobile: 0406 603 371

Statement of Consent

By signing below, you are indicating that you:

- Have read and understood the participant information sheet.
- Have had any questions answered to your satisfaction.
- Understand that if you have any additional questions you can contact the Principal Investigator, Timothy Nugent using the contact details above.
- Understand that the interview may be audio recorded unless indicated otherwise.
- Understand that you are free to withdraw at any time, without comment or penalty.
- Understand that you can contact the University of Southern Queensland Ethics Coordinator on (07) 4631 2690 or email ethics@usq.edu.au if you do have any concern or complaint about the ethical conduct of this project.
- Are over 18 years of age.
- Agree to participate in the interview.

Participant Name	
Participant Signature	
Date	

Please return this sheet to the researcher prior to participation in the interview

Civil Law Collaborative Practice Survey

Welcome to the civil law collaborative practice survey. This survey will gather perspectives on collaborative practice, particularly in relation to the potential use of collaborative practice in new areas of law. The survey will take approximately twenty minutes to complete. Your participation in this project is entirely voluntary.

If you agree to anonymously participate, you will be asked to share your views in relation to collaborative practice. At the conclusion of the survey you will be asked if you would be willing to further discuss your views in an interview. This is an optional step and is not necessary to participate in the survey.

Submitting a response to some or all survey questions will be considered to confirm consent to the use of response data for research purposes. Your participation is confidential and anonymous. Published research outputs will not contain identifiable information. It is possible to save a partial response to resume at a later time using a temporary password.

For further information, a participant information sheet for this research is available **here** (https://drive.google.com/open?id=1FwTTaf0kq0MCPcxiMQbfYbJiy1CwBNBx). If you have any questions in relation to this research, you may contact the researcher at timothy.nugent@usq.edu.au (mailto:timothy.nugent@usq.edu.au?subject=Collaborative%20law%20survey) or on (07) 4631 2916.

If you have any concerns or complaints about the ethical conduct of the project you may contact the University of Southern Queensland Ethics Coordinator on (07) 4631 2690 or email ethics@usq.edu.au (mailto:ethics@usq.edu.au). The Ethics Coordinator is not connected with the research project and can facilitate a resolution to your concern in an unbiased manner.

There are 30 questions in this survey.

Professional background

What is your current profession?

Choose one of the following answers
Please choose **only one** of the following:

- ◯ Solicitor
- ◯ Barrister
- ◯ Accountant
- ◯ Financial planner
- ◯ Mediator / Coach
- ◯ Psychologist
- ◯ Other

In which fields of law have your practiced?

Only answer this question if the following conditions are met:
-------- Scenario 1 --------
Answer was 'Solicitor' at question '1 [xprof]' (What is your current profession?)
-------- or Scenario 2 --------
Answer was 'Barrister' at question '1 [xprof]' (What is your current profession?)

Check all that apply
Please choose **all** that apply:

- [ ] Commercial and business law
- [ ] Construction
- [ ] Conveyancing
- [ ] Property law
- [ ] Employment law
- [ ] Family law
- [ ] Medical negligence
- [ ] Personal injury (non-medical)
- [ ] Criminal law
- [ ] Wills and estates
- [ ] Elder Law
- [ ] Tax law
- [ ] Intellectual Property Law
- [ ] Other:

Which areas of law would you consider to be most relevant to your clients?

Only answer this question if the following conditions are met:
Answer was 'Accountant' *or* 'Mediator / Coach' *or* 'Psychologist' *or* 'Other' *or* 'Financial planner' at question '1 [xprof]' (What is your current profession?)

Check all that apply
Please choose **all** that apply:

- [ ] Commercial and business law
- [ ] Construction
- [ ] Conveyancing
- [ ] Property law
- [ ] Employment law
- [ ] Family law
- [ ] Medical negligence
- [ ] Personal injury (non-medical)
- [ ] Criminal law
- [ ] Wills and estates
- [ ] Elder Law
- [ ] Tax law
- [ ] Intellectual Property Law
- [ ] Other:

What is Collaborative Practice?

For the purpose of this survey, collaborative practice may be understood in reference to the definition provided by the International Academy of Collaborative Practitioners (below).

Collaborative Practice is a voluntary dispute resolution process in which parties settle without resort to litigation.

In Collaborative Practice:

1. The parties sign a collaborative participation agreement describing the nature and scope of the matter;

2. The parties voluntarily disclose all information which is relevant and material to the matter that must be decided;

3. The parties agree to use good faith efforts in their negotiations to reach a mutually acceptable settlement;

4. Each party must be represented by a lawyer whose representation terminates upon the undertaking of any contested court proceeding;

5. The parties may engage mental health and financial professionals whose engagement terminates upon the undertaking of any contested court proceeding; and

6. The parties may jointly engage other experts as needed.

Do you have any initial reactions, or comments about how this definition relates to your experience or understanding of collaborative practice?

Please write your answer here:

Your experience with collaborative practice (1/2)

What was your awareness of collaborative practice prior to participating in this research?

Choose one of the following answers
Please choose **only one** of the following:

- ◯ I had not heard of collaborative practice.
- ◯ I had heard of collaborative practice, but would not be able to explain the process to a client.
- ◯ I would be able to explain the collaborative practice process to a client.
- ◯ I have a detailed knowledge of collaborative practice.
- ◯ I have expert knowledge of collaborative practice.

Which of the following statements reflect your experience with collaborative practice?

Only answer this question if the following conditions are met:
Answer was 'I would be able to explain the collaborative practice process to a client.' *or* 'I have a detailed knowledge of collaborative practice.' *or* 'I have expert knowledge of collaborative practice.' at question '6 [xawareness]' (What was your awareness of collaborative practice prior to participating in this research?)

Check all that apply
Please choose **all** that apply:

- ☐ I have discussed collaborative practice with a client as a method of resolving a dispute.
- ☐ I have completed collaborative practice training with a collaborative practice trainer.
- ☐ I have professionally participated in a matter under a collaborative practice agreement. (where both parties have signed a collaborative practice agreement)
- ☐ None of the above.

Your experience with collaborative practice (2/2)

How would your describe your training in collaborative practice (e.g. Texas method, Canadian method etc.)

Only answer this question if the following conditions are met:
Answer was at question '7 [xexperience]' (Which of the following statements reflect your experience with collaborative practice?)

Please write your answer here:

Approximately how many matters under a collaborative practice agreement have you participated in? (matters where both clients have signed a collaborative practice agreement)

Only answer this question if the following conditions are met:
Answer was 'I have professionally participated in a matter under a collaborative practice agreement. (where both parties have signed a collaborative practice agreement)' at question '7 [xexperience]' (Which of the following statements reflect your experience with collaborative practice?)

Please write your answer(s) here:

matters that resulted in a comprehensive settlement agreement.

matters terminated under a term of the participation agreement.

matters otherwise terminated.

matters presently ongoing.

Have you discussed collaborative practice with a client as a means of resolving a matter in an area other than family law?

Choose one of the following answers
Please choose **only one** of the following:

- ◯ yes
- ◯ no

If possible, what was the general nature of the most recent such matter?

(in which you discussed collaborative practice as described above)

Only answer this question if the following conditions are met:
Answer was 'yes' at question '10 [xdiscussed]' (Have you discussed collaborative practice with a client as a means of resolving a matter in an area other than family law?)

Please write your answer here:

Have you professionally participated in a matter under a collaborative practice agreement that included consideration of legal issues in areas other than family law?

(eg. a non-family law matter, or a matter than included both family-law and commercial law considerations)

Only answer this question if the following conditions are met:
Answer was 'I have professionally participated in a matter under a collaborative practice agreement. (where both parties have signed a collaborative practice agreement)' at question '7 [xexperience]' (Which of the following statements reflect your experience with collaborative practice?)

Choose one of the following answers
Please choose **only one** of the following:

- ◯ yes
- ◯ no

If possible, what was the general nature of the most recent such matter?

(in which you professionally participated as described above)

Only answer this question if the following conditions are met:
Answer was 'yes' at question '12 [xcivilnonfamily]' (Have you professionally participated in a matter under a collaborative practice agreement that included consideration of legal issues in areas other than family law? (eg. a non-family law matter, or a matter than included both family-law and commercial law considerations))

Please write your answer here:

Have you participated in any collaborative practice matters that related primarily to the fields of law listed below?

(please enter the approximate number of matters)

Only answer this question if the following conditions are met:
Answer was 'yes' at question '12 [xcivilnonfamily]' (Have you professionally participated in a matter under a collaborative practice agreement that included consideration of legal issues in areas other than family law? (eg. a non-family law matter, or a matter than included both family-law and commercial law considerations))

Please write your answer(s) here:

Commercial and business law

Construction

Conveyancing

Property law

Employment law

Elder law

Medical negligence

Personal injury (non-medical)

Criminal law

Wills and estates

Tax law

Intellectual property law

Were there any areas of law not mentioned above, in which you have used collaborative practice?

Only answer this question if the following conditions are met:
Answer was 'yes' at question '12 [xcivilnonfamily]' (Have you professionally participated in a matter under a collaborative practice agreement that included consideration of legal issues in areas other than family law? (eg. a non-family law matter, or a matter than included both family-law and commercial law considerations))

Please write your answer here:

Areas of law

There are different views on what types of dispute are suitable to be resolved under a collaborative practice agreement.

In your opinion, how well suited is collaborative practice for resolving disputes in the areas of law listed below?

Please choose the appropriate response for each item:

	not at all suitable	somewhat suitable	suitable	highly suitable
Commercial and business law	◯	◯	◯	◯
Construction	◯	◯	◯	◯
Conveyancing	◯	◯	◯	◯
Property law	◯	◯	◯	◯
Employment law	◯	◯	◯	◯
Family law	◯	◯	◯	◯
Medical negligence	◯	◯	◯	◯
Personal injury (non-medical)	◯	◯	◯	◯
Wills and Estates	◯	◯	◯	◯
Criminal Law	◯	◯	◯	◯
Tax Law	◯	◯	◯	◯
Elder Law	◯	◯	◯	◯
Intellectual Property Law	◯	◯	◯	◯

Thinking about the areas of law you identified as SUITABLE, or VERY SUITABLE, what was the main reason for your response?

Please write your answer here:

Thinking about the ares of law you identified as NOT AT ALL SUITABLE, what was the main reason for your response?

Please write your answer here:

Were there any areas of law not mentioned above, that you consider may be particularly suited to collaborative practice?

Please write your answer here:

Aspects of collaborative practice

The literature discusses several aspects that are commonly part of the collaborative practice process.

Thinking about the use of collaborative practice for commercial disputes, how important is it that the process include each of the aspects listed below?

Please choose the appropriate response for each item:

	Not at all important	Somewhat important	Important	Very important
Lawyer disqualification if the matter proceeds to litigation.	◯	◯	◯	◯
Open disclosure of all relevant information.	◯	◯	◯	◯
Good faith interests-based negotiation.	◯	◯	◯	◯
A mutual commitment to settle.	◯	◯	◯	◯
Inclusion of a neutral third party as a mediator or coach.	◯	◯	◯	◯
Inclusion of professionals with subject matter expertise from disciplines other than law.	◯	◯	◯	◯
Mutual trust between lawyers/other professionals.	◯	◯	◯	◯
That all professionals are collaboratively trained.	◯	◯	◯	◯

Thinking about those aspects that you identified as IMPORTANT, or VERY IMPORTANT, what was the main reason for your response?

Please write your answer here:

Thinking about those aspects which you listed as NOT AT ALL IMPORTANT, what was the main reason for your response?

Please write your answer here:

Legal professional culture

This section is about the culture of the legal profession, and in particular your impression of the response of clients and practitioners to collaborative practice.

Do you agree or disagree with the statements below?

Please choose the appropriate response for each item:

	Strongly disagree	disagree	neither agree nor disagree	agree	strongly agree
Most commercial solicitors would be open to working under a collaborative practice agreement.	◯	◯	◯	◯	◯
Collaborative practice could be of benefit to my (non-family) clients.	◯	◯	◯	◯	◯
It is important to my clients that they have 'their day in court'.	◯	◯	◯	◯	◯
Litigation is the ultimate test of a lawyer.	◯	◯	◯	◯	◯
Collaborative practice is really only suited to family law matters.	◯	◯	◯	◯	◯
Professional education and awareness are a barrier to the growth of collaborative practice.	◯	◯	◯	◯	◯
The disqualification provision is coercive.	◯	◯	◯	◯	◯

	Strongly disagree	disagree	neither agree nor disagree	agree	strongly agree
Lawyers using collaborative practice in civil (non-family) law would be less respected than their traditional adversarial peers.	◯	◯	◯	◯	◯
Client education and awareness is a barrier to the growth of collaborative practice.	◯	◯	◯	◯	◯
The mainstream legal profession values competition more than collaboration.	◯	◯	◯	◯	◯

In your view, does the use of collaborative practice in a commercial setting raise any practical or ethical concerns? If so, what are these?

Please write your answer here:

Has the process of answering this survey prompted any thoughts you would like to share? Or is there anything else you would like to mention?

Please write your answer here:

Demographics (optional)

This section is not compulsory, if you do not wish to provide demographic information, please scroll to the bottom of the page and click submit to complete the survey.

What is your age range?

Choose one of the following answers
Please choose **only one** of the following:

- ◯ 20 - 29
- ◯ 30 - 39
- ◯ 40 - 49
- ◯ 50 - 59
- ◯ 60 - 69
- ◯ 70+
- ◯ Prefer not to say

What is your gender?

Choose one of the following answers
Please choose **only one** of the following:

- ◯ male
- ◯ female
- ◯ other
- ◯ prefer not to say

How long have you practiced in your current profession post-admission / post-qualification?

Choose one of the following answers
Please choose **only one** of the following:

- ◯ I have never practiced
- ◯ 0 - 2 years
- ◯ 3 - 4 years
- ◯ 5 - 6 years
- ◯ 7+ years

Including yourself, how many members of your main profession are there in your workplace?

Only answer this question if the following conditions are met:
Answer was 'Accountant' at question '1 [xprof]' (What is your current profession?)

Choose one of the following answers
Please choose **only one** of the following:

- ◯ 1
- ◯ 2
- ◯ 3-5
- ◯ 6-9
- ◯ 10-19
- ◯ 20-99
- ◯ 100+

What is the postcode of your workplace?

Please write your answer here:

04-10-2020 – 15:14

Submit your survey.
Thank you for completing this survey.

Semi-Structured Interview Guide

Introduction, any questions about the survey, data handling etc.

Discuss IACP definition of collaborative practice as needed.

Collaborative Practice is a voluntary dispute resolution process in which parties settle without resort to litigation.

In Collaborative Practice:

1. The parties sign a collaborative participation agreement describing the nature and scope of the matter;
2. The parties voluntarily disclose all information which is relevant and material to the matter that must be decided;
3. The parties agree to use good faith efforts in their negotiations to reach a mutually acceptable settlement;
4. Each party must be represented by a lawyer whose representation terminates upon the undertaking of any contested court proceeding;
5. The parties may engage mental health and financial professionals whose engagement terminates upon the undertaking of any contested court proceeding; and
6. The parties may jointly engage other experts as needed.

Part A: Experiences with CP

1. How did you become involved with / interested in collaborative practice (CP)?
2. What is your experience with CP?
3. What would you consider would make a civil non-family matter suitable for CP
4. What would make a civil non-family matter less suitable or unsuitable for CP?
5. Have you discussed CP with professional peers from traditional/adversarial practice?
    a) If so, what was your perception of their impression of CP?
    b) If not, is there a reason why? what do you think their impression might be?

Part B: Other forms of dispute

6. What types of disputes do you think CP would be suited to resolving?
7. What factors would be most important to deciding this?
8. Are there any types of clients who you perceive may be particularly interested in CP?

9. Some collaborative processes include professionals from other fields, such as financial planning or psychology. Do you think this would be beneficial in civil non-family CP?
    a) which professions might play a role, and how?

Part C: Legal professional culture

10. What are your thoughts on how collaborative practice is perceived by members of the legal profession generally?
11. Imagine a colleague is interested in collaborative practice methods. What advice would you offer them?
12. What traits are highly valued by members of the legal profession?
13. Do you perceive these traits to be highly valued by clients?
14. Is there anything else you would like to discuss, or any details that I should be mindful of?