The challenges for collaborative lawyers in providing CP processes

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This article reports on research examining the delivery of Collaborative Practice ('CP') services in family law. Challenges experienced in the provision of CP a decade after the introduction of collaborative law into the Australian legal system were identified. The data reported can inform the design and delivery of this model of problem-solving for efficient and effective collaborative law service provision in both regional and metropolitan areas. The study investigated the experiences of private CP service providers in a major regional city in Queensland and in metropolitan Sydney NSW. The research found that having a practice group for the collaborative practitioners was a key factor in maintaining the provision of CP within a community. While clear opportunities were found for establishing CP there are also obstacles yet to be overcome. These challenges are the focus of this article and where applicable the differences that exist in practice between locations are highlighted.

1 Introduction

Collaborative Practice ('CP') is a multidisciplinary approach used primarily in family disputes to reach settlement on legal, financial, property, child and relationship issues. CP is based on the idea of both clients and their lawyers meeting together with other professional disciplines, such as financial advisers, to assist the clients in reaching agreement on separation issues and any future co-parental roles. All parties agree that the lawyers and associated professionals will disqualify themselves from representing the parties outside the collaborative process. This is referred to as the 'disqualification agreement'. Through a series of meetings the parties address their concerns. These meetings follow a business meeting format, setting agreed agendas to discuss and negotiate all issues identified for the restructuring of parenting roles or complete dissolution of the marriage.

In this study CP service delivery was examined in two different locations, one a major regional city in south west Queensland and the other in metropolitan Sydney NSW, to assess the current experience by practitioners in this form of legal assistance. The research involved focus group sessions with sixteen collaboratively trained professionals, including lawyers, financial specialists, coaches, case managers and child specialists, to identify challenges and opportunities experienced by them with a view to better informing the design and delivery of this model of problem-solving to enable provision of effective legal service.

A principal objective of the project was to illuminate understanding of what factors might hinder or assist the collaborative practitioner. This article outlines the research methodology used; analyses and presents some focus

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group data; discusses some of the key factors that influence collaborative practitioners; and finally reflects on concerns and positive aspects collaborative practitioners have in their practice, and identifies future research to be undertaken. The research is unique as it crosses two states in a comparative study. CP is a service that, if delivered well, will be of benefit to the whole Australian community and may alleviate some of the load and cost pressures currently experienced in the Family Court system and by governments.[1]

A Background

CP is still relatively new in Australia. After 10 years it was considered timely to investigate how well the transplant from the US is surviving.[2] As Tesler has noted:

> Collaborative lawyers have much to learn and much to unlearn in order to get good at this work. The place where that learning most often happens is in two systems that emerge spontaneously wherever CP flourishes: case-specific interdisciplinary collaborative teams, and local — interdisciplinary CP groups.[3]

The latter dynamic was investigated in this research as the site at which changes and challenges are located.[4] Supporting the literature the vital importance of a functioning practice group was brought home in this research when looking at a more established metropolitan practice group, where some members have a recognised CP practice within their general family law practice, and a relatively new regional city practice group, where the newest members are yet to conduct a CP matter. Essentially the challenges experienced in the established metropolitan group were amplified in the regional practice group across all areas. The literature around law and rurality highlights specific issues for legal practice in regional and rural areas. Location is a factor that impacts on the way in which CP can be developed to provide a sufficient number of CP professionals to form into a cohesive critical mass of practitioners operating collaboratively in trustful relationships.

For regional respondents an obstacle in relation to the development of a new co-operative professional relationship can be the element of reduced privacy experienced by rural dwellers. As Pruitt has noted rural residents rarely remain anonymous, the sparseness of population creates a:

> high density of acquaintance in social relationships particularly among similar social groups, small town gossip, especially if it was negative operates as an informal

1 See further Maria Alba-Fisch, 'Collaborative Divorce: An Effort to Reduce the Damage of Divorce' (2016) 72 *Journal of Clinical Psychology* 444.

2 See the founder of CP discussion in Stu Webb and Ron Ousky, 'History and Development of Collaborative Practice' (2011) 49 *Family Court Review* 249.

3 Pauline H Tesler, 'Goodbye Homo Economicus: Cognitive Dissonance, Brain Science, and Highly Effective Collaborative Practice' (2009) 38 *Hofstra Law Review* 635, 636.

4 See eg, Laura Banks et al, 'Hunter-Gatherer Collaborative Practice' (2011) 49 *Family Court Review* 249; Luke Salava, 'Collaborative Divorce: The Unexpectedly Underwhelming Advance of a Promising Solution in Marriage Dissolution.' (2014) 48 *Family Law Quarterly* 179.

> social control [lack of anonymity] ... enables and disables, inhibits and disinhibits rural residents ... by constructing the social spaces ... in ways that limit agency and subjectivity.[5]

But more significantly the competition among lawyers for a slice of the family law business available in a finite region clearly concerned the regional lawyers. These, along with other identified factors highlighted by this research, are areas in need of consideration for satisfactory development of practice groups to support the flourishing of CP in the Australian environment.

Despite CP having commenced in 1990 there has been a relative paucity of empirical qualitative research studies, especially in Australia, on the emergence and evolution of this practice. The literature about the practice has mainly been generated to provide practitioners with practical information and qualitative data in professional journals.[6]

Major empirical studies include Macfarlane's[7] conducted in Canada and North America. This research into collaborative family law ('CFL') used in-depth interviews of lawyers and their clients in sixteen collaborative matters. These interviews were conducted at the beginning, middle and exit stages of these cases. The findings of this study comprehensively covered variations in CFL practice between the sample groups; the motivations for lawyers in taking up CFL and those of their clients for choosing this process. The negotiation experience was highlighted, including the change from adversarial bargaining to interest-based bargaining, the handling of clients' emotions during a negotiation session, the role of legal advice during the negotiations and the impact on the negotiation style by the disqualification agreement; and the lawyer-client relationships in relation to control and responsibility, privilege, and advocacy. Some of Macfarlane's findings informed the framing of the focus group questions for this article. The findings also reported on aspects of using a multidisciplinary approach and the roles of allied professionals; how outcomes compared to those obtainable through the usual lawyer-lawyer negotiations or trial; the relationship between CFL and mediation; costs and timing as well as ethical issues and policy issues relating to funding, accreditation of collaborative lawyers, and professional codes of conduct.

The next significant study, for the purposes of this article, was the report published by Sefton[8] in 2009. An aim of this study was to gather quantitative data to benchmark the number of cases undertaken in the United Kingdom during 2006/2007 following a robust uptake of collaborative law training by

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5 Lisa R Pruitt, 'Place matters: domestic violence and rural difference' (2008) 23 *Wisconsin Journal of Law, Gender & Society* 347, 364.

6 See, eg, *The Collaborative Review*; *The Journal of the International Academy of Collaborative Professionals*, and especially the studies conducted and reported by Linda Wray.

7 Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* (Department of Justice Canada, 2005); See also William H Schwab, 'Collaborative Lawyering: A Closer Look at an Emerging Practice' (2004) 4 *Pepperdine Dispute Resolution Law Journal* 351: provided an empirical 'snapshot' which was mainly confined to gathering demographic details and data about training, experience in dispute resolution processes and reflection on the logistics of the lawyer's most recent collaborative matter at 367–8.

8 Mark Sefton, *Collaborative Family Law: A Report for Resolution* (Resolution, 2009).

family lawyers.[9] This report gathered data relating to practice changes over time, client and case characteristics, settlement rates and how these outcomes compared to those of traditional processes in terms of time and costs. The second aim of this study is relevant to this article because qualitative data was gathered via focus groups from collaborative lawyers who were active practice group members. This included exploration of how CL has been working in practice, the multidisciplinary potential of the process, as well as potential process benefits and challenges and the quality of agreed outcomes. The findings from this part of the study[10] included the lawyers' personal attitudes to the benefits of CL; the importance of careful assessment or 'screening' for client and case suitability; changes to the client-lawyer relationship; the high degree of trust required between lawyers to function well in the process; and the roles and contribution of allied professionals in the process.[11] The Sefton methodology of using focus group discussions with some forty lawyer members of five practice groups and the qualitative data gathered from these two hourly sessions provided the best fit for providing a comparative benchmark for the focus groups in this study.

B Methodology

The study was conducted in a major regional city in Queensland and in metropolitan Sydney NSW. The project used a grounded theory approach[12] to investigate the experience of private legal service providers. Data from regional and metropolitan areas was collected through a series of three focus groups. This allowed comparisons to be made between challenges that may be location specific when entry to the process is through private legal practices. Ethical clearance from both researchers' universities, Office of Research and Higher Degrees, was approved prior to undertaking the research, and all sixteen participants voluntarily consented to be involved in the research. The professionals participating in the study are all trained in the use and techniques of CP, with some having much more experience in practice than others.

A grounded theory approach was adopted using a qualitative research method for the focus groups. This approach sought exploratory data, in order to observe emerging issues with concepts and theory from the current literature. This approach employs the ability to observe and compare participants' data, to determine what is happening for the person in their domain and to draw tentative conclusions where possible rather than testing a specific hypothesis. It provides for conclusions from which further research can be undertaken.

The focus groups for this project were offered during the regular scheduled

9 Katherine Wright, 'The evolving role of the family lawyer: the impact of collaborative law on family law practice' (2011) 23 *Child and Family Law Quarterly* 370, 371.

10 Sefton, above n 8, vii.

11 Ibid viii; See further, Wright, above n 9: this study compared the Irish experience with that of the 2009 Resolution study in England and Wales. The methodology used semi-structured interviews with 16 family law solicitors ranging in duration from 40 to 120 minutes.

12 See further, Anselm L Strauss and Juliet M Corbin, *Grounded Theory in Practice* (Sage Publications, 1997); Anselm L Strauss, *Qualitative Analysis for Social Scientists* (Cambridge University Press, 1987); Barney G Glaser, *Doing Grounded Theory: Issues and Discussions* (Sociology Press, 1998).

practice group meetings, a second focus group was offered in Queensland to accommodate practitioners that could not make the first session. There were 16 participants over the three groups.[13] Each focus group session lasted 1 hour and was conducted at the premises of two private legal firms. Professions represented were mostly lawyers but also included financial specialists, psychologists and social workers, reflecting the professional mix of collaborative practice. Participants were trained in the collaborative process. The participants ranged from experts, with many years of collaborative practice experience, to novice practitioners.

The focus group participants received a copy of the topics for discussion ahead of time so that more informed answers could be given and practice group members had the opportunity to consider and discuss the questions/topics beforehand. Each area for discussion contained in the agenda was read aloud by the facilitator and participants were then invited to respond. Areas addressed (outlined in Table A),[14] included the process, relationships with those involved, and substantive outcomes. The factors which influence practitioners in their adoption of a collaborative approach and any practice differences between the two locations were also considered.

The facilitation followed focus group protocol so that there was no influence from the facilitators and participants had a relaxed environment with maximum opportunity for interaction.[15] The facilitation was standardised so that there was no influence and little interruption from the facilitators. The focus groups were conducted with one or both researchers present as facilitators and followed the focus group process using the common series of topics.

By using the focus group methodology the participants had the support and encouragement of being members of a group and the opportunity for responses to be triggered by the statements of others. This enables a rich level of discussion to develop. This qualitative data gathering approach is most suited to the grounded research methodology as it provides a very rich source of qualitative data. Each participant in the focus group was coded by speaker number for anonymity. The transcribed data was then mined independently by the two researchers to identify common areas, concerns and issues. The independent results were then compared between the researchers to verify their findings and to further refine emerging themes commonly identified.

A limitation of the study is the small number of respondents reflecting the still small number of collaborative practitioners in Australia. Nevertheless, this exploratory research provides qualitative data which provides insights into the current practice experience of collaborative practitioners working in the field of family law. Clearly more research is needed, including on the level of awareness in the community of the existence of collaborative practice options to resolve disputes. While this would provide valuable additional insight into the success of collaborative practice, this study chose to focus on

13 One focus group in New South Wales consisted of seven participants and the two Queensland focus groups had five and four participants.

14 Focus groups topics see Table A.

15 Jenny Kitzinger, 'The Methodology of Focus Groups: The Importance of Interaction between Research Participants' (1994) 16 *Sociology of Health and Illness* 103.

collaborative practitioners across two locations in Australia given the paucity of such research.

2 Analysis

The focus group data demonstrated that factors impacting on practitioners, such as, location, practice group processes, training, support and relationships with others, affected their ability to operate as collaborative practitioners and thus, ultimately, the provision of collaborative law. The following section develops each of these themes as key aspects found in the research.

Practice group processes

The overriding findings in relation to practice groups was the essential importance of the practice group in sustaining practitioner interest, facilitating ongoing learning and further qualifications, developing trusting professional relationships and giving support for collaborative practitioners in practice.

This vital relationship between the practice group and collaborative law community is well documented[16] and was endorsed by this study:

> 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.[17]

However, the challenges of transitioning from traditional professional practice to CP and the dedication this requires was felt strongly by the participants and was particularly identified by regional practitioners: '... the main thing ... is getting together ... to keep the fire burning ... because if the fire goes out its harder to stoke up and get it started ...'. The need to keep enthusiasm and the importance of having a practice group to maintain the impetus for establishing CP was endorsed. Without a practice group:

> you lose, not virtually the enthusiasm for it but the impetus going on with collaborative and so it's been excellent to have the practice group to have people to talk to and people to ... keep the enthusiasm going.

As well as keeping up enthusiasm, accessing up-to-date knowledge and providing a structure to enable time for learning and developing professional relationships were identified as values of the practice group. These key practice group functions clearly indicate their dynamic role in developing communities of collaborative professionals:

> the group is everything ... this monthly meeting ... help(s) sustain a commitment to cooperative bargaining through learning from the successes and learnings from others.

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16 Pauline H Tesler, 'Collaborative Family Law' (2004) 4 *Pepperdine Dispute Resolution Journal* 317; Wright, above n 9 citing Mark Sefton, *Collaborative Law in England and Wales: Early Findings. A Research Report for Resolution* (Resolution, 2009) 4–5.

17 Note quotes are not identified by professional background to protect the identity of the speakers.

Not only does the practice group support and sustain the paradigm shift[18] required for acquiring transdisciplinary knowledge and skills, it also facilitates the creation of a co-operative professional culture. These transitional functions clearly indicate the challenges inherent in moving from being sole practitioners to being co-operative practitioners:

> It's about building up that level of trust with the other local practitioners, so that we feel comfortable — if we get an enquiry we can ring a colleague and make those connections.

There is also the degree of commitment that is required to successfully transition into CP and build a cohort in the early stages of a developing practice:

> we only have approximately half a dozen, eight or so registered collaborative practitioners, so I think we need to be getting together as regularly as possible and one of the challenges ... is that we all have other commitments, business, children, family issues etc.

Further issues were identified around the life span and fluidity of practice groups, particularly in smaller communities with people coming and going. This highlights the need for nascent practice groups to establish process and structure to maintain a business anthropology approach that records artefacts.[19] It was seen as important to keep:

> any record of what has succeeded and what to avoid, so we do not repeat the same errors ... in small communities people moving on, losing that hard won professional wisdom and collective experience and needing to rebuild again ... more experienced legal practitioners talked about there being a life cycle of a practice group as well and ... to be conscious of building in a practice group [the] inherent ability to be able to change and adapt overtime, not to simply fade away.

Useful suggestions on how to maintain a healthy practice group included addressing the needs of members, having a critical mass, balancing administrative concerns with substantive interests of the group and keeping open verbal communication channels:

> we made a conscious decision to have ... at least half of our meetings ... [where we] were actually talking about the collaboration as well as watching the videos, doing the training and talking about our own experiences as they are going along ... it keeps everybody more interested ... and more focussed ...

As the practice groups mature the focus moves from the initial setting up of systems and protocols to establishing a practice clinic for professional development. For example, the more mature practice group reported that:

> We have established a management committee, so we have a representative from each office on the subcommittee and the management committee ... they meet separately and get the majority of the admin tasks done, so by the time we get to the meeting, much more time and focus [is] on the training, which is what everybody wants.

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18 Tesler, 'Collaborative Family Law', above n 16.

19 See, eg, Nancy Cameron, 'Collaborative Practice in the Canadian Landscape' (2011) 49 *Family Court Review* 221; Katy Mason and Sheena Leek, 'Communication practices in a business relationship: Creating, relating and adapting communication artifacts through time' (2012) 41 *Industrial Marketing Management* 319.

Finally, a strong indication of the importance of relationship comfort and trust levels and the mentoring capabilities of a practice group to meet transitional challenges was also reported:

> We have always had a mentoring committee or a couple of people who were more experienced in it who were specifically noted as the mentors ... that we try and have time in the meetings where we can just talk about how we are dealing with them ... and what we are finding useful ...

These findings clearly articulate the complex functions of practice groups and the necessity to get the practice group 'right' if the collaborative community is to flourish. First, there is the need for an administrative function to accommodate development of protocols, documentation, information sharing, marketing and the general business of running an interest-based organisation. Second, the educative function is crucial to consolidate new learning and support continuing learning to facilitate professional and cultural transitions for all professionals. A regular calendar of topic seminars, guest speakers and master classes is useful, as well as a robust social program to maintain enthusiasm and sustain commitment. Third, a mentoring program will support both the intra and interprofessional development that the practice group members experience. This may include regular general practice clinics as well as individual mentoring assistance. A practice group is more than a 'club', it is the vehicle for professional change which requires planning and execution and continuing enthusiasm and commitment.

Location

Location and its impact on the way in which CP can be developed is an issue. A couple of clear differences arose in this research between those in a metropolitan practice group and those in a regional group. For regional respondents an obstacle in relation to the development of a new co-operative professional relationship could be the impact of small town professional gossip, especially if it was negative. Interestingly one regional respondent referred to clients not wanting to hang out dirty laundry in public: '... it gets back to the problem of a small town ... how much do people open up to talk about their problems'.

The insularity of a small country town also posed disadvantages for 'newbie' collaborative practitioners:

> ... we are acutely aware, as people with some or limited experience that we need to build a practice group that reflects our needs as practitioners and is democratic and open but also reflects the needs of living and working in a small regional community, which is very different to lifestyle and practice in large areas.

Issues can arise at the outset in establishing a cohesive practice group between the competitive private legal practices in a regional area:

> the inherent problems of a small town ... establishing procedures and protocols and co-operating with each other in the first place ... the issues that we firstly have to tackle is what's the appropriate suitability criteria and when you have a small town, particularly if there is competitiveness, everyone will say their's are the most suitable ... it requires cooperation between people who potentially are competing with each other and the nature of private practice is that you promote how good you are.

Reaching a sufficient number of collaboratively trained professionals to fill the roles required as a 'team' to conduct matters, was identified as one of the challenges to the further engagement with CP. For one participant

> getting the critical mass of trained practitioners across different sectors who are comfortable working together. It's also about altering the perception of the value or not of CP, particularly in the private sector for legal firms ...

As well as establishing a cohesive practice group, location was also perceived as a problem for the regional group in accessing suitable training locally, working within a competitive professional context and the reticence of the client demographic.

Assessment of client suitability for a collaborative process

Some clear differences in approach across the CP groups to client suitability assessment were found. Perhaps of significance was the noting that assessment of client suitability, often referred to as 'screening,' can be seen as either a 'screening in' or a 'screening out' process. Although it was generally noted that no one is ineligible, but rather some parties may be more ready than others at the time of assessment. For instance, one practice group developed an agreed model for checking suitability of a client for a collaborative process. This assessment checklist perhaps reflects the level of case difficulty those group members felt confident to handle. If this is so, then the confidence of the practitioner is a factor this research found may influence assessment of clients' suitability. This developmental view is demonstrated in the following two views. The first demonstrates a 'screening in' approach with a filtering for when the process is to commence:

> it is a critical phase to have a full client assessment prior to referring to any sort of collaborative process ... which is why we worked really hard on developing a model of practice which included that front end assessment. The front end assessment really establishes and conveys whether the clients are ready, willing and able to engage in the CP. The assessment then informs two forms of referral, if they are ready, willing and able, great, they can go straight through and we know we can maximise their success ... and if they are not, then we can identify those factors which inhibit their ability to engage in the process and refer them to some supportive work until they do get to that time when they are ready, willing and able to engage, so they are not lost.

The second example describes a 'screening out' approach which is fundamentally different with a more legalistic, rather than a multidisciplinary, framing:

> my approach would have been to screen them out and then it would be up to the client to see whether they should screen themselves in ... I would make my own little assessment with the client about whether I should push it.

Thus, issues around client suitability may also reflect the level of competence, confidence and experience of the members of a practice group. Assessing suitability is an area where collaborative practitioners could benefit from more training at the early stages of their careers. This would ensure their own concerns do not become entangled in their assessment of client suitability making selection a gamble. There was an indication that the more experienced

practitioners in a supportive practice group were more confident in taking on harder cases. This raises the question as to whether there may be an element of screening for each practitioner's perceptions of their adequacies, as well as the client's suitability:

> we have taken on more difficult clients than we would have originally, or at least I have and I think a few of the other practitioners have too. When we first assessed people that weren't suitable and now we are thinking that the court system is even more traumatic and would be more difficult with them, so maybe they are people we should be considering, so we have had those discussions at meetings about suitability.

The assistance of coaches for more experienced practitioners to take on more difficult cases indicates not only maturity of practice but also increasing acceptance of a multidisciplinary approach:

> for me ... the first clients I took on ... I had clients that I probably wouldn't want to take on ... I certainly wasn't equipped then and even now I probably wouldn't be equipped unless you had the right coach, a very supportive coach working with the parties, but yes, I have definitely taken on more complex matters than I would have initially.

In summary it would appear that taking on the harder clients often has something to do with practitioner confidence and experience in the process as much as the suitability criteria imposed on clients. Recognition that a practitioner's experience with and confidence in the process is likely to affect how the screening may be conducted is therefore an area for further research.

Lawyer — Professional relationships

Some participants noted no great difference to their normal adversarial practises, but some clearly distinguished between adversarial and collaborative approaches. There is a sense of wearing two different hats within a practice. For some: '... it is difficult to switch from one to the other mentally'.

Also, there may be additional factors here for regional generalists, rather than family law specialists:

> It is difficult to wear more than one hat, so when you are practicing in litigation and then changing over to collaborative I think it's a real challenge for a lot of smaller town practitioners because a lot of us are generalist, we are not all specialized, so we are trying to do a lot of different aspects of law all at one time.

Shedding the embedded experiences of a litigation lawyer is challenging, especially in the area of eschewing the 'sympathy' factor that often triggers protective lawyering and which can have a detrimental effect on the well-being of legal practitioners. One participant clearly identified this professional struggle:

> lawyers need to make that adjustment to the process. So, if you are a litigation lawyer, it just doesn't come so easily and that is the experience that I had ... both lawyers, particularly where one client has a very attractive case to advocate where there is likely to be a lot of empathy and sympathy for that client and the other one is less attractive and perhaps a little bit of a bully and you are trying to negotiate and

> everyone wants, well at least one person wants to do the best for the long time suffering client who has the attractive case, so that can be a problem in that dynamic.

Another challenge is making sure that both lawyers are collaboratively trained and understand fully the collaborative approach:

> we not only need the client to be on board, we need the team to be on board as well because you need to have a good team that will step up to the plate and look at ... a neutral scenario to come up with solutions ... we need both lawyers to be collaboratively trained so they are both on the same page.

If only one lawyer has the requisite training and the other does not then issues arise regarding resistance to the process or lack of skill and experience in this non-trial process:

> it has been indicated as a challenge for some of the people in the practice group when they are wanting to embrace it but the other party has a non-trained collaborative lawyer or even when they have had the conversation there ... seems to be some sort of a resistance about embracing or understanding that process ... again I think that is a challenge around ... how we promote collaborative law ...

Importantly, it is not only comparable training that is an issue, but also the relationship with other lawyers which can impact on the tone and progress of the matter. Participants believed that if a lawyer is not committed to the process, then the process will fail:

> I think that a lot of the issues really come down to who the other lawyer is on the other side and what your relationship is like with them ... that can set quite a different tone for the meetings themselves and the way the matter progresses. We have all come across lawyers who are trained but who we know aren't committed to a process, which colours the way it progresses.

An interesting point was made as regards the differences in the stage one is at in one's professional life and the impact this may have on the manner of practice:

> there is [sic] seasons in lawyers' careers and one of the earlier seasons is where they have enough information to know how to run a case but they are still empire building and reputation building as opposed to lawyers who are at the other end, seen it all and have been through a million gullies and they are a bit more laid back and prepared to compromise and the compromiser versus the highly energized competitive person — there can be a problem with that dynamic.

Client — Professional dynamics

For some lawyers having face-to-face interactions with the client on the other side was challenging. It is new ground and it is very unfamiliar. However, a very useful observation was given by a coach about how a coach can assist with the challenges lawyers face in building rapport with the opposing client:

> often I spend a lot of time working with lawyers around how to manage the client on the other side and engage with them and build rapport ... without feeling like you are advocating for them in a way that sides them against their own client, so that real high level communication and analysis and how that leads to a dynamic or a lack ... is really important in the process ... if you ignore it, you can run into trouble with tension in the collaborative group, including the client and often you are unaware of what actually is even going on, unless it's part of your own professional discussion from the beginning.

Having one willing collaborative participant was identified as not being so hard to achieve but getting the other party to join in the process is another difficulty:

> we may be able to bring in client A, but persuading and convincing client B that this is the way to go, where client B may think that this is being imposed upon them to get an advantage for client A, that's where I am still really needing to get those skills in relation to the screening and uptake process.

Working in multidisciplinary teams

One of the challenges of general family law practice is the breadth of client services required to handle matters that have property, business, financial issues as well as family, children and relational issues. In the CP model the limits of the lawyers' competence range can be extended and enhanced by the inclusion of specialist professionals who can offer greater depth in related services:

> the multidisciplinary model offering so much more value to the parties because lawyers just can't cover the field in terms of just bringing those skills to the table ... and I feel very much that having the child consultant and in property matters having a financial expert there just gives so much value to the client ...

Generally, two clients are assisted by their own lawyers, plus, when required, a communication coach to support and prepare them for communicating and negotiating, a single financial expert to scope possibilities for financial restructuring and a child specialist to inform co-parental planning.

The use of financial advisors and accountants as well as child specialists was supported as beneficial to the process:

> I have also had the benefit of working with both ... a collaborative financial advisor and a collaborative accountant and they have also been invaluable for different reasons. A collaborative accountant can come in and advise at a high level without having to incur the costs of a detailed valuation by giving an indication of the value of a company or whatever and a collaborative financial advisor can provide a lot of comfort and structure to perhaps the less financially sophisticated party of the relationship.

A consideration that arose in this area related not only to the multidisciplinary nature of teams but also in a small close-knit community the essential need for building trust and respectful relationships. This can sometimes be difficult when there is a sense, particularly in the adversarial world, of the importance of maintaining reputation and client base for profitability. It can also be difficult for newly trained collaborative practitioners coming into the community to gain entry and experience:

> The teams aren't drawn from a central source, but they are based on existing relationships between members of law firms who may have moved here and ... why they choose that person is based on personal experience ... and also their perception of who is a good fit for the team ... people are hesitant to step out of their existing local neighbourhoods of CP because they have got tried and true people ... and that is one of the major barriers to the newbies breaking in ...

Important too for multidisciplinary teams was the need to be more aware of what each discipline can bring to the CP group[20] and to break through the professional silo structuring that dominates the Australian family law system:

> there is still a lot we could do to learn about what exactly each other does or can contribute and our preferences and that's ... getting those barriers down rather than being in silos.

Participant lawyers were asked about working with allied professionals in a multidisciplinary team and when they thought was the best time to do this. Most experienced practitioners overwhelmingly supported the inclusion of a coach, a communication neutral who prepares clients to participate and communicate effectively in the meetings, In interdisciplinary collaborative practice a single coach neutral, who can impartially keep the meetings focused and support effective and respectful communication, is utilised.[21] Preference was indicated for having a coach at the beginning of the process, rather than joining later and to provide clarity about the role of the coach for the parties:

> I think 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 ... I think to get that coach in can be a bit tricky once you have started.
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> ... not an interloper coming in perhaps after the first or second meeting but from the start, all parties are made aware of who is going to be involved and what their contributions ... can be.

The view was also expressed that the background presence of a coach can assist the lawyers in their changed roles:

> I would like to have a neutral that would be consulted right from the beginning ... if you know that there is a neutral in the background that might even help the lawyers maintain equilibrium as far as their own relationship with each other ...

A further set of challenges arise in relation to the selection of a team and the benefit of having a neutral coach who can assist with stabilising the team dynamics:

> my view is that pretty much once you have used them [coaches] in a matter you kind of want to have them in all matters because they are really very helpful for that personal dynamic and even being able to have your client seeing them outside of it which makes the meetings progress in a more useful way ... If I had a choice I would probably have a coach at all of them.

Lawyer — Business concerns

For lawyers, the collaborative process can present both benefits and obstacles. Some of the obstacles included their personal business concerns, making a profit, losing clients, and reputational concerns. In a regional area there is a limited supply of family law clients that lawyers are competing for and in private practice one has to make money, so they are concerned that if they do

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20 See, eg, Alba-Fisch, above n 1.

21 See also Pauline H Tesler, 'Collaborative Law Neutrals Produce Better Solutions' (2003) 21 *Alternatives to the High Cost of Litigation* 1.

not follow the litigation process they may be limiting their income. This spectre of losing client base is a real concern for many practitioners, for example:

> you have got the attitude of ... 'Oh, I would like to do collaborative law, but I am not going to sign away the right to go to court' ... and that's where I think there is a financial aspect to it and I think that ... some practitioners will never embrace it, and just because ... they like litigation ... Some I think see it as losing clients, losing their client base, but from a personal perspective, collaboration isn't cheap, if you have a complicated matter ...

It is noted that this concern for potential loss of client base is often firmly held despite strong data indicating that settling rather than going to judgment at trial is a significant outcome in family law practice.[22]

Other participants reported that the costs of settlement in collaborative law were comparable to those of settlement in the traditional frame, but importantly while similar sums were spent they were spent in a different way, leading to a superior holistic outcome that covers more than just the legal issues. So here the challenge was: '... myth busting with lawyers about not getting as much of a financial gain'.

For some, there was a need to be persuaded by published research findings about financial returns:

> if there was empirical data that would show me, to convince me to go over, then I probably would ... If you are economically driven and that's the way you have been enculturated it's very difficult to come back from that.

Future research is needed to compare the income from collaborative law matters with the fees for the usual lawyer-to-lawyer negotiated consent orders. In such research it may be prudent to clarify between turnover and profit, as more complex matters may also have high procedural costs.

An important question for the legal profession is whether there is a serious professional issue arising from the 'belief' that it is in the 'client's best interests' to take a matter to trial to allow a party to have their day in court, to have their lawyer fight their case and to have their matter decided by a judge to fulfil the duty to the client when there is a perceived financial incentive for the lawyer. The selection of process has to be balanced with a duty to the justice system and providing 'just, quick, and cheap' services for the resolution of the client's matter at the earliest opportunity. As one respondent stated:

> that's the elephant in the room ... the Law Society pushes so hard with the ethical responsibilities and tries to get everybody to understand that the first duty is to administration of justice and then to the client ...

Also, there may be competition for a firm's resource allocation and problems arising from previous litigation encounters with the other lawyer. There is obviously personal fallout in the profession from bad litigation experiences

22 Family Court of Australia, *Annual Report 2014–2015* (2015) 52–5: of all the Family Court matters filed (20 397) in 2014/2015 67 per cent (13 662) were Consent Order applications and of the 685 cases that proceeded to trial 39 per cent of those settled before judgment; see further, Forrest S Mosten, 'Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court' (2009) 43 *Family Law Quarterly* 489.

and this fallout carries over into future professional contact, but it has the potential to be magnified in collaborative law because of the need to be part of a team which has a functional level of professional trust in play. As one participant explained:

> with the commitment there is going to be a competition between the lawyer's practice which deals with litigation and collaboration, not only is there a competition with the amount of personal resources you can devote but it's also a competition with your own mental process ... the small town problem ... if you have had difficult litigation with other lawyers, that difficult litigation can then spill over into the relationship you have with them ... where there is high competition with lawyers trying to present themselves as the best lawyers in town ...

One alarming response related to gaining a reputation as being 'less of a lawyer' with a fear of advertising that you are collaboratively trained. This is concerning given the extensive amount of work that has been done through legislation, regulations and practice notes, as well as speeches by Attorneys-General and judges supporting the development and provision of dispute resolution processes in family law.[23] The participant elaborated:

> comments I have received from other lawyers who aren't collaboratively trained that you are a lesser of a lawyer if you are collaboratively trained and why would you want to put yourself out there ... you may suffer some detriment further down the track for being known as a lawyer who doesn't want to have the fight — so very entrenched in an adversarial system. So ... [the question is] ... whether you actually want to put on your website that you are collaboratively trained.

This is problematic given that the emerging practice of CP is being largely sponsored by collaborative practitioners through their website advertising and other measures to inform the public about the availability and suitability of CP.

Disqualification

The disqualification provision is probably, at first instance, one of the major challenges to the uptake of collaborative law and may present as a disincentive to some practitioners and to some clients. This concern may be more pronounced in regional areas where client numbers are geographically finite, clients may have long term loyalties to certain legal firms, or the number of lawyers to choose from in town may be limited[24]:

> I think in family law there is probably more competition than in any other area of law, with the exception of perhaps conveyancing. There are a lot of family lawyers in town, so there is competition for that work ... if there is a lot of competition for the work then lawyers become more competitive against each other, which when people are competitive with each other they are less likely to be good collaborators.

An initial response from a lawyer who is not so familiar with the process is that it would be counterintuitive to agree to such a provision. As one participant explained:

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23 See, eg, Productivity Commission, *Access to Justice Arrangements*, Report No 72 (September 2014) ch 8, vol 2.

24 See eg, Janet L Wallace and Lisa R Pruitt, 'Judging Parents, Judging Place: Poverty, Rurality, and Termination of Parental Rights' (2012) 77 *Missouri Law Review* 95.

> one of the main fears that private practitioners that I speak to have is the disqualification aspect where if a matter cannot be resolved through collaborative processes ... the collaborative practitioner is then unable to carry forward the client's matter if the matter is not resolved collaboratively and litigation becomes necessary.

Again the lawyer's financial considerations may come into play with the disqualification provision when considering the process selection:

> one example I have that was a very large property case and the other lawyer said that 'I am not prepared to risk losing this client in a family law case' because it was presumably a lucrative case, so that's a conflict that lawyers have with their own practice, with their own financial interests.

Interestingly participants tended to talk about how the disqualification provision negatively impacted on the 'other' lawyer rather than commenting on how they viewed the provision.

Communication

Communicating collaboratively is an acquired ability and was identified in relation to lawyers who don't 'get it', and who are not able to provide the requisite level of lawyer/client communications. A collaborative practitioner noted:

> it can go off the rails, if you don't get the process, talk to everybody all the time, talk to your client, take some control and not let the client run off on their own tangents ... [many say they are] committed to the process but don't actually get it. I am seeing one falling over now and it's because of that, because the dynamic between the client and that lawyer is not good — [the] lawyer does not have a rapport with anyone else in the room and hasn't had enough communication with her client.

Distinguishing between the court process and the focus on obtaining a decision, and the conflict management aspect of collaborative law is the basis for another challenge. A participant expressed this in terms of the:

> challenge of being able to get the clients to commit to the process ... I believe that there are very few cases that are not suitable, even for the difficult ones, the court option is not the best outcome — it will resolve their matter but it will never resolve their issues and that they are the ones who need the collaborative process more than anyone else really, to learn how to manage conflict ...

The importance of communication and keeping communication channels open was frequently acknowledged by participants as being crucial. As well as being honest and having trust in the team a less combative communicative ability is required:

> I would say having the professional on the other side that you trust and having some mutual respect ... to me is 90% of the way ... That open communication, that ability to pick up the phone.

In traditional legal practice most negotiations between lawyers are conducted via correspondence. Unfortunately, a culture has seemingly developed around legal correspondence engaging in excessive legalism and formality. If a practitioner is still using this mode in collaborative law they haven't made a clear paradigm shift. Thus retaining some elements of the traditional process will contaminate the experience of the new process:

> they will only want to communicate through letters and then I will get the letter on the letter head ... I think their heart is in the right place but they don't sort of get it, they have moved into that default litigious ... covering themselves, I think they are nervous ...

For CP practitioners it is essential to build collegiality and professional relationships based on trust, so one of the challenges at the beginning of practice is to get over any distrust hurdle.[25] This may be addressed by practitioners gaining professional trust in the more neutral supportive territory of the practice group:

> Trust is an important aspect in this whole process and with those just starting out, it may be difficult getting over the hurdle of building trust with others ... the trust issue was my big one to get over to start off.

Part of this challenge includes being able to constructively debrief with a colleague after a meeting. This identifies a possible training issue to assist practitioners in gaining knowledge:

> honesty in there as well ... if you feel you haven't done something well or you feel that one of the other team members haven't done it well ... have the conversation, don't brush it under the carpet and think it will go away, because it will come back at you in three minute's time ... it takes a lot of guts to do, it's also got to be done diplomatically, but acknowledging your own mistakes and somehow dealing with whatever mistakes people make, so it's a learning curve, it also keeps it on track.

Again, a lawyer's self-assessment of their skills indicated that understanding the basic process is not a problem but finessing has to follow basic training:

> I was disappointed in the client professional dynamic in my most recent experience, I felt I really lacked the skills to really sell the message of how important this option was in the dynamics of this client's particular situation, so I guess I am still crying out for some skills and some strategies so that I can get that dynamic to work in the right way with the client.

Participants brought to the fore the continuing issue of the need to raise client awareness of collaborative law. Further communication concerns include levels of awareness, not only within the professional sphere but also among prospective clients: '[t]here are so many stakeholders in relationship breakdown in family law so really just getting ... everyone interested and fully understanding ... there is a lot of people who truly don't understand how the process works.'

While this lack of community familiarity with the process is acknowledged by participants there still appears to be some uncertainty about how to address this problem. The need for client education is referred to by a number of participants:

> ... community education where you get client demand ... I think familiarity ... if they don't know that it's available then they are not going to demand or ask.

Achieving such education was seen to have some hurdles:

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25 See also, Mark Telford and Sotirios Santatzoglou, '"It was about trust" — Practitioners as policy makers and the improvement of inter-professional communication within the 1980s youth justice process' (2012) 32 *Legal Studies* 58.

> I need to work out how I can get the message out to my local community that this is a much better pathway to go down in resolving your separation issues.

That an active approach is required was reinforced:

> just putting a brochure on the table and talking about Collaborative Law just doesn't get the message across because it is still such a foreign concept in our jurisdiction because people are ... wed to their traditional models in the separation process ... negotiation, mediation and litigation ...

This leads to the need for further research backed by funding for extensive information and community education[26] in relation to CP:

> and it's also about being creative in terms of community education programs ... so there is demand driven approach by couples for collaborative law who we are rapidly finding out entire sections of the community don't know about it, have never heard about it, certainly don't understand it and we can make the leap then that if we can provide the information, people are more able to make an informed choice and create a demand for services and we have some strategies in place for that.

While all experienced professionals and many clients readily affirm the value CP can bring to the divorcing process it is the general lack of community knowledge which is a barrier to its uptake. In Texas, where collaborative law thrives, there is provision for the collaborative conduct of family law matters under the Texas Code. A similar legislative approach which allows parties to file their divorce applications and opt into a collaborative stream may assist some lawyers and their clients to proceed on a collaborative basis. The importance of legislative support for uptake of a dispute resolution process has been clearly demonstrated by the Australian provisions for mediation as a prerequisite in children's matters.

3 Discussion

This research has revealed a number of factors acting on collaborative professionals when it comes to their perceptions of CP and how best this can be managed, and adapted. The research highlights many key areas, which are supported by the literature.[27] Internal factors, such as how individual professionals perceive what they should be doing and how they act and external factors such as geographical location and conflicting institutional, governmental and professional demands that need to be addressed holistically have been identified.

The perceptions provided by the participants in the focus groups, aid in understanding where the tensions lie for collaborative practitioners, and the impediments to the uptake and adoption of collaborative law practice which is still in its infancy in Australia. The perceptions held, while reflecting a range of positions, highlight the need for further specific research to assess whether some of the concerns can be readily addressed in order to genuinely improve

26 Productivity Commission, above n 23, 22.

27 See Sefton, above n 8; Tesler, 'Collaborative Law Neutrals Produce Better Solutions', above n 21; Susan Daicoff, 'The Future of the Legal Profession' (2011) 37 *Monash University Law Review* 7; Forrest S Mosten, 'The Future of Collaborative Practice: A Vision for 2030' (2011) 49 *Family Court Review* 282.

the uptake and experience of collaborative law as a mainstream process for family disputes.

The solutions to these interconnected dilemmas are incremental. For instance, the internal factors can be addressed by increasing the coverage of alternative methods of dispute resolution education within law school curricula, improving collegiality and connections through sustaining practice groups and making interconnections between them.

External factors such as the pressure on government to fund access to justice options and for the Family Court to overcome its delays and heavy workload could lead to a turn to methods such as Collaborative Law.[28] However, the need for an evidence based, coordinated and 'collaborative' approach from interested institutions and stakeholders is required:

> you can market something where you have major organisations behind you, government departments ... where you can say that ... it's not just people wanting to be nice to each other, it's a serious discipline that has protocols and standards that have been met ...

4 Conclusion

The participants in this study were committed, trained exponents of CP with many of them highly experienced in sophisticated models of interdisciplinary CP. From their collective wisdom they have identified the opportunities for and benefits of CP. They have also been very generous in sharing their experiences and expertise in identifying the challenges encountered as they pioneer the next generation of family law dispute resolution in the Australian system. The legal professionals and the allied professionals who participated in this study provided information that will assist in addressing the professional cultural changes that this multidisciplinary approach to legal-problem solving raises.

It is the 'challenges' which are the focus of this article so that the requisite support, training and research can be achieved to underpin this exciting transdisciplinary endeavour. CP practice groups may use these findings to better understand the challenges they are facing so they will be able to work towards overcoming them and increasing the delivery, process efficiency and service uptake.

The challenges highlighted in this research include: the central role of cohesive practice groups to adapt to changes, including those of membership; practitioner trust and confidence in their own ability and that of others; availability of mentor support and training; expectations and knowledge of process for practitioners and clients; the ability to switch from adversarial to CP; and the impact of location on practice development. The essential learning is the importance of the maintenance of a sustaining practice group in order to support CP flourishing in the Australian context. The grounded exploratory study undertaken and reported here identifies the areas for focused further investigation in order to support Australian CP. This article benchmarks the issues that need to be understood and planned for by new practice groups with

28 Forrest S Mosten, 'The Future of Collaborative Practice: A Vision for 2030' (2011) 49 *Family Court Review* 282.

some suggested measures already undertaken by the more mature practice group members. It is hoped that the work of the newly incorporated Australian Association of Collaborative Professionals will be able to provide national cohesion for the work ahead.

Table A

Focus Group Discussion Topics and Questions

Process

What are your perceptions of the value or otherwise of your Practice Group to develop and promote CP, including:

- To establish procedures and protocols to follow in dealing with collaborative colleagues.
- To sustain commitment to cooperative bargaining.

What are some observations on the importance or otherwise of ongoing training and development in your Practice Group?

What are some observations on the value or otherwise of sharing practice experiences in your Practice Group?

What are your views on client assessment for suitability for CP?

Relationships / People

What are some observations about client / professional dynamics?

What are some observations about professional / professional dynamics?

What are your perceptions of the value of the contributions of allied professionals, such as Child Consultants and Financial Specialist, to the Collaborative process?

In your view, when should the services of allied professionals be included in the process?

Substance

In your view, are settlement outcomes from CP settlements comparable to those of judgments?

In your view, can the CP impact on the durability of settlement outcomes?

General Questions

What works well in CP?

What are some of the challenges for establishing CP in Family Law?

What are some lessons learned?

What recommendations could be made for future practice?