



FAMILY LAW COUNCIL

COLLABORATIVE PRACTICE IN FAMILY LAW

**A report to the Attorney-General prepared by
the Family Law Council**

December 2006

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For information about this report, or more generally about the Family Law Council's work, please contact the Council's Secretariat at:

Robert Garran Offices
National Circuit
BARTON ACT 2600

Phone 02 6234 4829
Fax 02 6234 4811
Email flc@ag.gov.au

or visit the Council's website at <<http://www.law.gov.au/flc>>.

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Recommendations

Recommendation 1 (page 32)

The Family Law Council and the Law Council of Australia should establish a working group to develop national guidelines for collaborative practice in family law. The working group should comprise members and observers of the Family Law Council and nominees of the Law Council of Australia, who will in turn consult with representatives of each State and Territory together with community-based service providers involved in the new family law system. In undertaking this task, the working group should:

- (a) further disseminate for discussion the draft Guidelines attached in Appendix A to this report
- (b) explore how cross-sector professional relationships may be strengthened to facilitate collaborative practice, and
- (c) consider how best to develop specialist accreditation to ensure a consistent standard of collaborative practice in Australia.

Recommendation 2 (page 33)

The Law Council of Australia should establish a Collaborative Practice Committee to be constituted by lawyers practising in family law and other areas of practice.

Recommendation 3 (page 38)

The regulations referred to in section 60I(8)(aa) of the *Family Law Act 1975* should include a provision that when deciding whether to grant a certificate for the purposes of the section a family dispute resolution practitioner may have regard to a person's participation in a collaborative process.

Recommendation 4 (page 40)

The Law Council of Australia should consider developing and disseminating information about collaborative practice and lists of collaborative practitioners to Family Relationship Centres and community-based service providers of family dispute resolution.

Recommendation 5 (page 45)

The *Family Law Act 1975* should be amended to provide confidentiality of communications in the collaborative process similar to the protections provided to communications made in family dispute resolution by sections 10H and 10J of the Act.

Recommendation 6 (page 46)

The *Family Law Act 1975* should be amended to provide for courts exercising family law jurisdiction to have jurisdiction in relation to enforcement of collaborative contracts concerning family law disputes.

Recommendation 7 (page 48)

Courts exercising jurisdiction under the *Family Law Act 1975* should manage those cases where proceedings have been commenced and the parties wish to undertake a collaborative process, so that priority in the allocation of a hearing date is not lost if a complete resolution of the dispute is not achieved.

Recommendation 8 (page 54)

National Legal Aid should monitor developments in collaborative practice.

Executive summary

(i) Collaborative practice¹ is a unique method of dispute resolution which has the potential to deliver ongoing benefits to the general public and Australian professionals working in the family law area. The advantages of using collaborative practice to resolve family disputes have been tested over 15 years of practice in the United States of America and Canada. In particular, the collaborative process:

- provides a formal structure in which positive child-focused communications are modelled by the advisers
- provides legal advocacy support during collaboration
- removes the immediate threat of litigation
- encourages parties to develop a trusting alliance for their future parenting
- directly involves the parties in negotiations based on interests and not positions
- aims to achieve results that meet the needs of each of the parties and their children
- minimises the time that lawyers must spend in correspondence with each other, and
- utilises the expertise of independent experts including child specialists and financial advisers outside of the adversarial system.

(ii) Collaborative practice has been principally applied to family law disputes. The potential benefits of this practice model are not limited to family law, although they do seem especially suited to disputes in this area. In the United States, collaborative practice is currently being used to resolve medical, employment and other civil disputes.

(iii) The collaborative process complements the Commonwealth Government's new family law system. The Government's 2006 reforms aim to ensure that separating couples have a range of options available to resolve disputes outside of the court system and encourage parents to reach agreements that ensure the ongoing involvement of both father and mother in their children's lives. Collaborative practice supports these objectives by offering separating couples an effective alternative to litigation and requiring the parties to take an active role in negotiating creative and practical solutions which address each of the parties' needs and focus on encouraging the best possible arrangements for children.

(iv) In particular, the establishment of Family Relationship Centres in a number of locations around Australia is a key initiative of the 2006 family law reforms. The Family Law Council (Council) believes that collaborative practice should be offered as an option

¹ In this report, Council has, wherever possible, adopted the term collaborative practice rather than collaborative law. This reflects the fact that a principle feature of the process is the involvement of experts who are not lawyers.

to clients attending Family Relationship Centres. This could be achieved by training staff in the referral of clients to collaborative lawyers and providing information about collaborative practice at Family Relationship Centres.

(v) Australia's legislative regime and court processes do not present any significant impediments to collaborative practice. The Government and the courts are supportive of all methods of dispute resolution that present a realistic alternative to litigation. The highest concentration of Australian collaborative lawyers is in the family law area and for this reason Council believes that the courts exercising family law jurisdiction have an important role to play in supporting and developing collaborative practice.

(vi) Australian legal aid commissions are already focusing on non-court dispute resolution and collaborative practice could present practical problems in the legal aid context. This is largely because of the requirement that collaborative lawyers cease to act for a client whose case proceeds to trial. In most cases, it would be difficult for a legal aid commission to provide both a collaborative lawyer and a litigation lawyer in the event that the collaboration fails. The requirement for a new lawyer would double the costs to the commissions in those cases where the collaboration does not resolve the dispute. Furthermore, the relevant commission will need to refer the client to a private lawyer because under the terms of the collaborative contract the commission which provided the collaborative lawyer could not continue to act for the client. This presents practical difficulties because the pool of private practitioners willing to accept legal aid work is not large. In the smaller centres and regional areas the pool is often restricted to one or two firms. For these reasons the expansion of collaborative practice into the legal aid context does not seem warranted at present. Council has recommended that National Legal Aid (NLA) should monitor developments.²

(vii) This report considers some of the common criticisms of collaborative practice in family law; in particular, the suitability of collaborative practice in high-conflict cases, the costs associated with collaborative practice, potential ethical concerns and the likelihood that the process can overcome discrepancies in parties' relative bargaining power. Council's view is that, despite these potential problems, collaborative practice is an effective dispute resolution process in many cases.

(viii) In addition to the formal recommendations, Council has identified two other issues which are likely to affect the ongoing success of collaborative law. Referral mechanisms for collaborative practice and the accreditation of collaborative professionals are not discussed in depth in the report. However, Council believes that, as the Government's family law reforms begin to take effect and the number of collaborative professionals in Australia grows, these issues will become increasingly important and will need to be examined.

(ix) The manner in which staff at Family Relationship Centres and other family dispute resolution organisations assess and refer cases is likely to have a strong impact on the growth of collaborative practice in Australia. An important part of developing

² National Legal Aid is an organisation that represents the Directors of each of the eight State and Territory legal aid commissions in Australia. There are eight independent legal aid commissions, one in each of the States and Territories. One of the Directors is elected as Chair on an annual rotation basis. The current chair of NLA is Suzan Cox, Director of Northern Territory Legal Aid. Further information is available at <<http://www.nla.aust.net.au/>>.

collaborative practice will be educating family dispute resolution organisations about the collaborative process. Brochures and other written materials should be made available to clients so that they can make an informed decision based on all available methods of dispute resolution.

(x) Draft guidelines for collaborative practice in family law have been attached to this report at Appendix A. These draft guidelines are intended to form the focus for further discussions about the conduct of family law matters using a collaborative model.

1. Introduction

Background

1.1 This report considers the nature and extent of collaborative practice in Australia and overseas.³ It also makes recommendations to the Government aimed at promoting the practice of collaborative law in Australia.

1.2 Collaborative law is a non-adversarial approach to resolving disputes, whereby the parties, their lawyers and other experts enter into a formal agreement to focus on settlement rather than litigation. If the dispute is not resolved and proceeds to litigation, the lawyers engaged in the collaborative process must withdraw. This is set out in the agreement. Collaborative law has been practised in the United States and Canada for about 15 years. It is now being practised in the United Kingdom and some countries in Europe.

1.3 In November 2005, the Council considered the practice of collaborative law in Australia in a meeting with the National Centre of Collaborative Law (NCCL) in Canberra.⁴

Terms of reference

1.4 On 31 January 2006, the Attorney-General gave Council a reference on collaborative law. The terms of reference are as follows:

I request that the Family Law Council, in consultation with the Family Law Section of the Law Council of Australia and the National Centre of Collaborative Law, advise how the Government, in partnership with the legal profession, can assist in promoting collaborative law in Australia. In particular, consideration should be given to the following:

- 1) what, if any, legislative changes need to be made to support the practice of collaborative law
- 2) what, if any, changes to court processes need to be made to assist collaborative law
- 3) what, if any, changes need to be made to the legal aid system to promote collaborative law, and
- 4) whether it is desirable to have national guidelines for the practice of collaborative law and, if so, how would these best be developed?

³ Overseas information comes primarily from the USA and Canada, where the practice of collaborative law is well established.

⁴ NCCL was set up in July 2005 to promote a consistent framework, core rules and principles of collaborative law in Australia, but it remains uncertain whether it will become a national representative body.

1.5 Council appointed a committee to consider the terms of reference and coordinate the collaborative law project. The Collaborative Law Committee included representatives from the Family Law Section of the Law Council of Australia, NCCL, the judiciary and the legal profession. The National Alternative Dispute Resolution Advisory Council was also invited to participate in the committee because of its expertise in the area of alternative dispute resolution.

Outline of this report

1.6 Chapter 2 explains what collaborative law is and the key principles and models of collaborative law.

1.7 Chapter 3 deals with the growth of collaborative practice in overseas jurisdictions. The focus is on Canada and the United States of America, where the practice of collaborative law is well established. However, developments in the United Kingdom and Europe are also discussed briefly. Finally, this chapter considers the role that the International Academy of Collaborative Professionals (IACP) plays in promoting collaborative law.⁵

1.8 The nature and extent of collaborative practice in Australia is considered in chapter 4. The Australian Capital Territory, Queensland, Victoria and New South Wales already have a number of law firms undertaking collaborative practice in family law. Practice groups are emerging and training courses have been run to establish collaborative practice in these States.

1.9 Chapter 5 explains how the Commonwealth Government's new family law system operates and will impact on collaborative practice. In particular, this chapter considers the interrelationship between lawyers who use collaborative practice, Family Relationship Centres and other dispute resolution providers. It also considers how collaborative practice might fit with compulsory dispute resolution which is being phased in over the next two years.

1.10 Chapter 6 considers the need for legislative change to facilitate the practice of collaborative law in Australia. This chapter also comments on cultural and attitudinal changes that may be necessary to support collaborative practice.

1.11 The relationship between court processes and collaborative practice is outlined in chapter 7. In particular, this chapter looks at the nature and degree of involvement of the courts in collaborative law matters.

1.12 Chapter 8 looks at whether Australian legal aid commissions could accommodate collaborative practice. Potential problems in relation to legal aid processes are examined, including problems that arise when the collaborative process fails. Trials of collaborative practice in a legal aid context have been undertaken in Canada and the United Kingdom. These trials are also described in chapter 8.

⁵ IACP is the peak international organisation representing the interests of collaborative professionals worldwide. IACP is discussed in more detail in chapter 3.

1.13 Chapter 9 outlines some of the common criticisms of collaborative practice in family law. In particular, this chapter discusses the suitability of collaborative practice in high-conflict cases, the costs associated with collaborative practice, potential ethical concerns and whether the process can overcome differences in the parties' relative bargaining power.

1.14 Council's overall conclusion that the collaborative practice of law is a unique method of dispute resolution which has the potential to deliver ongoing benefits to the general public and the Australian legal profession is set out in Chapter 10.

1.15 Paragraph four of the terms of reference asks Council to consider whether it is desirable to have national guidelines for the practice of collaborative law. The Collaborative Law Committee concluded early in the project that national guidelines were desirable and that there should be a coordinated response to the development of the practice of collaborative law consistent with the requirements of a national family law profession.

1.16 A Collaborative Law Working Group was set up by Council to address paragraph four of the terms of reference. The Working Group of the Collaborative Law Committee comprises three members of Council, one representative from the Family Law Section of the Law Council of Australia and four representatives from NCCL.

1.17 The Working Group has formulated draft *Guidelines for Collaborative Practice in Family Law* (draft Guidelines). The draft Guidelines set out the principles of collaborative practice, the roles and responsibilities of collaborative lawyers and suggestions for the conduct of collaborative law matters. On 2 June 2006, over 200 Government agencies and non-government stakeholders were sent a copy of the first version of the draft Guidelines and invited to provide feedback and comments by 30 June 2006.

1.18 A total of 28 submissions were received on the draft Guidelines. Most submissions indicate support for the practice of collaborative law in Australia. Council wishes to thank those individuals and organisations who took the time to provide feedback.

1.19 The amended draft Guidelines are attached to this report at Appendix A.

2. What is collaborative law?

2.1 Collaborative law is a method of dispute resolution whereby the parties and their lawyers contract to settle a matter without involving the court. Parties wishing to engage in the collaborative process must each retain a lawyer to represent their respective interests. The parties must also be prepared to participate actively in a process of open negotiations, aimed exclusively at settlement. According to Pauline Tesler, a Californian-based collaborative lawyer, collaborative law ‘combines the positive problem solving focus of mediation with the built-in lawyer advocacy and counsel of traditional settlement-oriented representation ... giving rise to potentialities not generally found in other dispute-resolution models’.⁶

Distinguishing features of collaborative law

2.2 Collaborative practice has three key features which set it apart from other methods of dispute resolution. First, the parties and their lawyers sign a contract not to litigate. Second, the collaborative process proceeds by way of face-to-face discussions between the parties and their lawyers and, where appropriate, other professionals. Third, the parties and their lawyers focus on the parties’ respective interests rather than what a court might order if the matter proceeded to litigation.

Collaborative contract

2.3 A defining principle of collaborative practice is that the parties agree to resolve their dispute without resorting to litigation.⁷ The parties and their lawyers commit to this principle at the start of the process by signing a collaborative contract. The contract not only rules out immediate litigation, but it also sets out the basis on which the parties and their lawyers will negotiate and the consequences of any breach of the contract.

2.4 An essential part of every collaborative contract is the disqualification clause. This clause prohibits the parties from threatening or commencing litigation during the collaborative process, and provides that the lawyers named in the agreement must cease to act if the collaborative process fails and the parties seek to litigate the dispute.⁸ In other words, the disqualification clause does not remove the parties’ right to engage in litigation. If the collaborative process fails the parties may still decide to litigate, but they must retain new lawyers to represent them in court.

⁶ Tesler has been a key proponent of collaborative law for more than a decade. She runs a collaborative law practice in San Francisco and provides training in collaborative law both in America and overseas. Tesler is also the author of the first academic model of collaborative law. See P Tesler, *Collaborative law: achieving effective resolution in divorce without litigation*, 2001; and P Tesler and P Thompson, *Collaborative divorce: the revolutionary new way to restructure your family, resolve legal issues, and move on with your life*, 2006.

⁷ D T Sholar, ‘Collaborative law: a method for the madness’ (1993) 23 *Memphis State Law Review* 667, 669.

⁸ *ibid*, p, 675.

2.5 Collaborative practice is often compared to mediation. However, mediation does not preclude parallel court proceedings and, as a result, it operates quite differently to the collaborative process.

2.6 A typical collaborative contract will contain a number of other provisions in addition to the disqualification clause. Parties will usually agree to:

- engage in the collaborative process in good faith
- provide full and honest disclosure of all relevant information
- focus on the future wellbeing of themselves and their children
- make every attempt to minimise the negative emotional, social and financial consequences of the dispute, and
- actively participate in developing practical and mutually beneficial options.

2.7 The collaborative contract will usually impose obligations on lawyers to withdraw from the collaborative process if they become aware that their client has acted contrary to the agreement. It may also require that the negotiations take place within a particular time and in a certain way.

2.8 The collaborative contract serves a number of important purposes. It sets out in clear and binding terms the parties' intention to engage in good faith negotiations aimed at achieving a settlement. It also gives the parties a degree of control over and responsibility for the outcome of their dispute which may not be achieved if the matter is litigated.⁹ The contract ensures that parties can negotiate openly and usually prohibits the parties from using information that is disclosed during the collaborative process in any subsequent litigation.¹⁰ The disqualification clause acts as a strong disincentive for parties to terminate the collaborative process, because instructing new lawyers to litigate the matter is likely to be costly and time consuming.¹¹ It also assists to reduce legal costs by eliminating the need for lawyers to undertake preparations for a trial that may never eventuate.

Four-way meetings

2.9 Collaborative law matters are dealt with through a series of face-to-face discussions known as 'four-way meetings'. As the name suggests, these meetings are attended by both the parties and their lawyers. The purpose of the meetings is to address every issue in the dispute in a way that focuses on resolving the matter to the parties' mutual satisfaction. The direct communication between the parties and lawyers assists in achieving this outcome.¹² During the negotiations, the parties and lawyers do not have a parallel litigation strategy.

⁹ S M Gutterman, *Collaborative law: a new model for dispute resolution*, 2004, p. 16.

¹⁰ S M Gutterman, 'Collaborative family law: part 1' (2001) 30 *Colorado Lawyer* 57 notes that the collaborative law agreement causes a shift away from '... the threat or expectation of a courtroom battle to a mandate that the parties, assisted by a professional collaborative team, resolve the complex trade-offs to meet their reasonable objectives and, thus, maximise their autonomy and priorities in crafting their own compromised resolutions'.

¹¹ Gutterman, *Collaborative law*, p. 16.

¹² *ibid.*, p. 78.

2.10 Tesler describes the four-way meetings as ‘the heart of the collaborative practice’.¹³ This is because the four-way meetings create a forum in which the parties can exchange information openly and communicate their respective interests. The parties also play a central role in formulating and putting into practice options to resolve their dispute.

2.11 In the course of a collaborative law matter, most lawyers will still conduct one-to-one interviews with their clients. The lawyers may also meet independently of the parties to discuss technical issues and to prepare for the four-way meetings. What makes collaborative law unique is that the majority of the work necessary to resolve a dispute is undertaken during the four-way meetings and requires direct input by the parties themselves. This is fundamentally different from a traditional litigation approach to dispute resolution and settlement negotiations, where most issues are addressed in correspondence between the parties’ lawyers.

2.12 Collaborative practice encourages and sometimes requires parties to involve non-legal professionals in the four-way meetings. For instance, where an impasse is reached by the parties due to emotional issues, they might agree to appoint a psychologist to provide advice and support during the four-way meetings. In some cases non-legal professionals will be involved in the process from the beginning, playing a number of different roles such as counsellor, communication coach, child specialist, financial expert or mediator. Most collaborative contracts provide for the joint appointment of experts and non-legal professionals. This approach is designed to ensure that the skills of the expert are utilised in the most constructive way possible.

Interest-based negotiations

2.13 The four-way meetings are characterised by interest-based negotiations between the parties and their lawyers. Interest-based negotiating requires that the parties focus on their needs and interests rather than positions or grievances. Negotiating on this basis helps parties to separate incidental or ancillary problems from the substantive issues in dispute. It also encourages parties to develop realistic expectations of the negotiation process.¹⁴ During interest-based negotiations, lawyers assist the parties to identify the issues in dispute, evaluate all their options and negotiate towards an agreement.¹⁵

2.14 In traditional settlement negotiations it is common for parties to use positional bargaining to negotiate settlements. Parties engaged in positional bargaining often take strong positions which overestimate their needs and interests or they use what a court would be likely to order as a basis for negotiations. This differs from interest-based negotiating, which looks at the underlying interests of each party and encourages both parties and lawyers to devise creative solutions aimed at satisfying the needs of both parties.

2.15 Settlement conferences and interest-based negotiations are familiar concepts to most Australian lawyers. What sets collaborative practice apart is the number of four-way meetings that may take place during the collaborative process, as well as the pivotal role

¹³ Tesler, *Collaborative law: achieving effective resolution*, p. 10.

¹⁴ The Hon Alan Cadman MP drew Council’s attention to the importance of conveying a ‘realistic assessment of likely outcomes’ in his submission of 14 July 2006 on the Draft Guidelines.

¹⁵ R Fisher, B Patton and W Ury, *Getting to yes: negotiating an agreement without giving in*, 3rd edn, 1992, pp. 40–41.

that these meetings play in the resolution of a dispute. In collaborative practice, the issues in dispute are worked through and resolved during the four-way meetings. These meetings require active participation by the parties themselves, and if the parties cannot reach agreement on all of the issues in the first meeting, additional meetings will be held until the parties are satisfied with the outcome. In contrast, specialist litigation lawyers are likely to engage in considerable correspondence prior to a single settlement conference which may or may not be attended by the parties.

Collaborative law models

2.16 The international experience has been that collaborative law groups emerge in response to community needs. Variations of collaborative practice have occurred as a result. The common denominator, however, is the rule that parties cannot go to court unless they change lawyers. Whilst the principles of collaboration are relatively constant, the major differences appear to be the stage at which other professionals may become involved and the degree of their involvement.

2.17 Pauline Tesler has developed and teaches a model of collaborative law which has been used by many collaborative practice groups.¹⁶ In this model, collaborative lawyers are the first point of contact for parties to a dispute but independent experts may be engaged at any time thereafter. For example, the parties may require advice from a property valuer, child psychologist, mediator or counsellor and they agree to retain these experts at the commencement of the collaborative process. In appropriate cases the parties may adopt a multidisciplinary team approach which may involve a number of experts for the duration of the collaborative process or as and when required throughout the process. Known as a collaborative team, this group of experts provides advice which may relate to legal, psychological, emotional and/or financial issues.¹⁷

2.18 Other multidisciplinary models can involve the parties in first seeking advice from an accountant, family therapist and/or other expert who is familiar with the process. This practice was described to Council by Dr Christina Sinclair, a psychologist and mediator who practises in Canada and who specialises in relationship counselling, effective communication and conflict management.¹⁸ In appropriate cases, Sinclair recommends collaborative dispute resolution to her clients. If the clients agree, Sinclair takes on the role of collaborative coach, providing counselling services as well as assisting the parties to appoint collaborative lawyers and other independent experts whose advice may be necessary to resolve their dispute.¹⁹ Some of the four-way meetings may occur only between the lawyers and the parties, and these meetings will primarily involve legal issues. Other meetings will involve the coaches and parties and will focus on any psychological, relationship or communication problems that the parties are experiencing. Each member of the collaborative team will limit their advice and support to the particular issues in which they have expertise. As with legal professionals, all members of the team withdraw from the matter if the collaboration fails and the matter proceeds to court. According to Sinclair,

¹⁶ Tesler's model is based on the approach used by Stu Webb, founder of collaborative law.

¹⁷ S Gamache, 'Collaborative practice: a new opportunity to address children's best interest in divorce' (2005) 65 *Louisiana Law Review* 1455.

¹⁸ Dr Sinclair is originally from Australia, but has lived overseas since 1974.

¹⁹ International Academy of Collaborative Professionals, *International Academy of Collaborative Professionals*, California, 2005, viewed 24 July 2006, <<http://www.collaborativepractice.com>>.

the multidisciplinary approach is particularly effective in dealing with high-conflict or complex cases.²⁰

Collaborative practice provides another settlement option

2.19 Which dispute resolution process is most appropriate ultimately depends on the circumstances of each family. In some circumstances it may be appropriate for the parties to attend mediation and/or counselling. Other families will need a court's help to resolve their particular issues. Since July 2006, families have also been able to use the services offered at Family Relationships Centres for information about and for assistance in selecting the most appropriate dispute resolution option. Collaborative practice provides another settlement option. An advantage of the collaborative process is that it precludes a parallel litigation strategy, thus enabling the parties to explore settlement options without the immediate threat of court adjudication.

²⁰ Dr Sinclair, in direct communications with Council, 7 March 2006.

3. Growth of collaborative practice

3.1 Collaborative practice originated in the United States of America in 1990. It is also practised widely in Canada and in the past three years has spread to the United Kingdom, Australia, Italy, France, Austria, Switzerland and New Zealand. The International Academy of Collaborative Professionals (IACP) is the peak international body promoting the practice of collaborative law internationally. It has 2,458 members drawn from nine countries.²¹

3.2 Collaborative practice has developed largely through the establishment of practice groups, comprising individual lawyers or law firms as well as other professionals such as counsellors, child specialists and financial analysts. IACP lists 170 collaborative practice groups worldwide. Whilst the highest concentration of collaborative lawyers is in family law, the collaborative process is also used in other areas of law. For example, in Massachusetts it is used in resolving commercial disputes. Similarly, Texas is considering extending the practice of collaborative law into other areas of civil law.²²

United States of America

3.3 The practice of collaborative family law was developed in 1990 by American lawyer Stu Webb. Webb had been practising family law in Minnesota for more than 20 years. He had become discouraged by the financial and emotional costs of the traditional litigation-based approach to resolving family law matters. As an alternative to litigation, Webb developed a dispute resolution model that had settlement as its focus. If settlement could not be reached Webb would withdraw. Webb persuaded other lawyers to join him. Within two years he had handled almost 100 cases on a collaborative basis.²³

3.4 Collaborative law is now widespread in the United States. Associations that represent the interests of collaborative practitioners have been formed in more than half of the States of America.²⁴ The following paragraphs will focus on Minnesota, California, Ohio, Texas and North Carolina where the growth of collaborative law has been particularly rapid.

²¹ IACP members come from the USA (2,304 members), Canada (91 members), England (25 members), Ireland (six members), Scotland (six members), Australia (21 members), New Zealand (one member), Austria (three members) and Switzerland (one member). International Academy of Collaborative Professionals, *International Academy of Collaborative Professionals*, viewed 24 July 2006, <<http://www.collaborativepractice.com>>.

²² J Pirrie, 'Collaborative divorce' (2006) 156 *New Law Journal* 898, 899.

²³ W Schwab, 'Collaborative lawyering: a closer look at an emerging practice' (2004) 4 *Pepperdine Dispute Resolution Law Journal* 351, 355.

²⁴ A list of the American States with collaborative law practice groups appears at Appendix B.

Minnesota

3.5 In 1990, Webb established the first collaborative law practice group, consisting of a small number of Stu Webb's family law colleagues. The Collaborative Law Institute of Minnesota provided a useful forum for those lawyers to share their experiences and develop new ideas. Currently the Institute has 150 members, including lawyers, child psychologists, mental health professionals, mediators and financial advisers. The stated objective of the Institute is to 'attract, support and train members to advance the practice and values of collaborative law'.²⁵ The Institute provides collaborative law training for members, practice protocols, model contracts and other documents to assist lawyers in handling collaborative law cases in a consistent way. In addition, the Institute publishes marketing brochures and a regular newsletter on recent developments in collaborative law, training sessions and profiling of member lawyers and other professionals.

California

3.6 Collaborative law services have been available in California since 1993.²⁶ There are a number of dedicated collaborative law firms²⁷ and more than 30 practice groups have been established to promote collaborative law and further the interests of member professionals. These practice groups include the Coalition for Collaborative Divorce (11 lawyer-members),²⁸ the Los Angeles County Collaborative Family Law Association (58 lawyer-members),²⁹ the Collaborative Family Law Group of San Diego (22 members)³⁰ and Collaborative Divorce Solutions (16 members, all of whom are lawyers).³¹

3.7 In March 2000, the Honourable Donna Hitchens, presiding family law judge of the San Francisco Superior Court, established the Collaborative Law Department of the Superior Court. In her view, collaborative law 'empowers people to resolve their own disputes, and to do it in a more creative and more lasting manner than has ever been achieved by a court order'.³² After consulting with collaborative lawyers in San Francisco, Judge Hitchens felt that the best way for the Superior Court to demonstrate its support for collaborative law was to establish a department within the court to encourage and support the process.³³

²⁵ Collaborative Practice, *The Collaborative Institute of Minnesota*, Minnesota, 2004, viewed 24 November 2006, <<http://www.collaborativelaw.org/index.cfm/hurl/obj=aboutUs/aboutUs.cfm>>.

²⁶ Schwab, *Pepperdine Dispute*, 351, 355.

²⁷ See, for example, Collaborative Lawyers of Northern California, *Collaborative Lawyers of Northern California*, Northern California, 2003, viewed 24 November 2006 at <<http://collaborativeattorneys.com/>> or the Collaborative Divorce Training Institute, *Welcome to Collaborative Divorce*, California, 2005, viewed 24 November 2006, <<http://www.collaborativedivorce.com/choose.html>>.

²⁸ The Coalition for Collaborative Divorce, *CCD professional: mediators/attorney*, Los Angeles and Ventura, 2006, viewed 24 November 2006, <http://www.nocourtdivorce.com/members_info.phtml?PID=mediator>.

²⁹ Los Angeles Collaborative Family Law Association, *Los Angeles Collaborative Law Association*, Los Angeles, 2006, viewed 24 November 2006, <http://www.lacfla.com/member_search/fullcat.php?catid=1&cattype=ATTORNEYS&vall=1>.

³⁰ Collaborative Family Law Group of San Diego, *Collaborative Family Law Group of San Diego*, San Diego, 2006, viewed 24 November 2006, <<http://www.collaborativefamilylawsandiego.com/bios.php>>.

³¹ Collaborative Divorce Solutions, *Find a collaborative divorce attorney*, North Carolina, viewed 24 November 2006, <<http://www.collabdivorcesolutions.net/5.html>>.

³² Judge Hitchens, quoted in P Tesler, 'Donna J Hitchens: family law judge for the twenty-first century' (2000) 2(2) *The Collaborative Quarterly* 1, 3.

³³ *ibid.*, pp. 2-3.

3.8 All collaborative law cases in San Francisco are now assigned to the department, a process which serves three main purposes. First, collaborative lawyers can go to the department to file routine documents such as collaborative contracts. Second, the department is staffed by judges who are well informed about the collaborative process and can assist lawyers and their clients to resolve difficult issues without having to join the queue of ordinary cases needing the court's attention. Third, the department plays an enforcement role with respect to the collaborative contracts by encouraging the parties to abide by the terms of their contract and handling any applications arising from an alleged breach of the contract.³⁴

3.9 The department is now discussing the possibility of introducing a rewards system for parties who use collaborative law to resolve their family disputes. In an interview with Tesler, Judge Hitchens explained that the system will enable parties who reach a collaborative settlement to lodge their documents without having to pay a court filing fee. The system is designed to acknowledge and support those parties who use collaborative law thereby helping to reduce the pressures on court resources.³⁵

Ohio

3.10 The first collaborative law practice groups emerged in Ohio in 1997. The principal aim of the Cincinnati Academy of Collaborative Professionals is to 'ensure that collaborative law is practised ethically and effectively'.³⁶ To that end, the Academy maintains a list of lawyers with at least five years' experience in family law, who have attended a minimum number of practice group meetings and undertaken at least two days' training in collaborative law. Lawyers listed must also commit to undertake continuing legal education in collaborative law. The list contains the names and contact details of 47 qualified collaborative lawyers.³⁷

3.11 The Collaborative Law Center maintains a similar list of lawyers who have completed formal training in collaborative law. In addition, the Center provides biannual training sessions in collaborative law, 'studies the collaborative law experience [and] advertises the advantages and availability of collaborative law'.³⁸ In Ohio, the practice of collaborative law has begun to expand beyond the family law area. For example, the Collaborative Law Center maintains three separate lists—for collaborative lawyers with specialist experience in family law, medical law and employment law. A fourth category of lawyers with experience in other civil law disputes has been set up but there are no listings as yet.³⁹

3.12 Collaborative law practices in Ohio are lawyer oriented rather than multidisciplinary. The practice groups accept the involvement of independent professionals in appropriate cases. However, they do not maintain lists of, nor impose specific training requirements on, collaborative professionals other than lawyers.

³⁴ E J Da Costa, 'Divorce with dignity' (2005) 35 *Family Law Journal* 478, 481.

³⁵ P Tesler, *The Collaborative Quarterly* 2, 4.

³⁶ Cincinnati Academy of Collaborative Professionals, *Collaborative practice*, Cincinnati, 2006, viewed 20 July 2006, <<http://www.collaborativelaw.com>>.

³⁷ *ibid.*

³⁸ Collaborative Law Center, *The Collaborative Law Center*, 2002, viewed 20 July 2006 <<http://www.collaborativelaw.com>>.

³⁹ *ibid.*

3.13 Sherri Goren Slovin is one of Ohio's most active proponents of collaborative law. She has more than 25 years of experience in family law and has practised collaborative law since 1997.

Texas

3.14 Collaborative law was introduced to Texan legal practitioners in 2000, at a seminar conducted by Stu Webb and Pauline Tesler. It was quickly embraced as an effective alternative to litigation.

3.15 In 2001, Texas became the first US State to enact legislative provisions recognising the use of collaborative law in family disputes. These provisions are contained in the *Texas Family Code* at sections 6.603⁴⁰ and 153.0072⁴¹ and are consistent with the Tesler model of collaborative law. Legislative change was necessary in Texas because, once a family dispute is filed with the court, judicial time limits begin to run. In other words, before the amendments were made, parties who filed a family dispute in court and then decided to attempt collaboration could be prevented from proceeding to trial because certain time limits had passed. The effect of the amendments to the *Texas Family Code* is to stay court time limits that may otherwise apply, until the collaborative process is concluded.

3.16 The *Texas Family Code* also requires that certain information be contained in every collaborative agreement. For instance, collaborative agreements must make provision for the full and honest exchange of information between parties and their lawyers, and for the appointment of jointly agreed experts, other than legal representatives.

3.17 The Collaborative Law Institute of Texas, which has 370 members, was established to promote collaborative law as the primary means of resolving family law disputes. The institute works to achieve this objective by expanding the existing community of collaborative professionals in Texas, providing its members with ongoing training opportunities and disseminating information about collaborative law to the general public. Most members are legal practitioners but membership is also open to family counsellors and financial advisers.⁴²

3.18 In October 2004, a second organisation representing the interests of collaborative professionals was established in Texas. The purpose of the Texas Collaborative Law Council is to extend the practice of collaborative law to disputes in areas other than family law. According to the council's website: 'the same [collaborative law] principles that have

⁴⁰ Texas Legislative Council, *Texas Statutes: Family Code*, Texas, 2006, viewed 24 November 2006, <<http://tlo2.tlc.state.tx.us/statutes/fa.toc.htm>>. Section 6.603 provides that '[o]n a written agreement of the parties and their attorneys, dissolution of marriage proceeding may be conducted under collaborative law procedures'. Collaborative law is defined in subsection (b) as a procedure in which parties to a family law dispute and their legal representatives enter a written agreement to 'make a good faith attempt' to resolve their issues without judicial intervention. If the collaborative process is unsuccessful, parties must retain new lawyers to represent them in any subsequent court proceedings.

⁴¹ *ibid.* Section 153.0072 is expressed in similar terms as section 6.603, but it deals specifically with collaboration in cases involving parent-child relationships.

⁴² Collaborative Law Institute of Texas, *Current members*, Texas, 2003, viewed 26 June 2006, <http://www.collablawtexas.com/3_current_members.cfm>.

preserved the integrity and dignity of families can also bring relief to individuals or entities having legal disputes in other areas of the law'.⁴³

North Carolina

3.19 Collaborative law was established in North Carolina in 2000. The Family Law Section of the North Carolina Bar Association observed a growing interest amongst legal practitioners and set up a dedicated Collaborative Law Committee. The purpose of the Committee is to:

... study collaborative divorce models and make recommendations about what model might best work in North Carolina. The committee's ultimate aim is to develop model forms and training for attorneys who would like to participate in collaborative divorce as part of their family law practice.⁴⁴

3.20 Since 2000, practice groups have been established in several counties to support the expansion of collaborative law in North Carolina and to represent the interests of member practitioners. These groups include the Collaborative Law Association of Western North Carolina, the Lake Norman Collaborative Divorce Group and the Carolina Collaborative Law Group.

3.21 Legislative provisions recognising collaborative law as a means of resolving family law matters were enacted in North Carolina in 2003. Article 4, Chapter 50 of the *General Statute of North Carolina 2004* is expressed in similar terms to sections 6.603 and 153.0072 of the Texas Family Code. The principal difference is that Article 4 is more detailed than its Texan counterpart.⁴⁵ Under section 50-71 of Article 4, parties engaging in the collaborative process and their legal representatives must sign a collaborative law agreement which provides for the withdrawal of the legal representatives if the dispute cannot be resolved collaboratively and the parties decide to litigate. Provided that the agreement is validly executed, all legal time limits will then be halted for the duration of the collaboration.⁴⁶ This allows cases to proceed on a collaborative basis and at a pace that suits the parties involved.⁴⁷

⁴³ Texas Collaborative Law Council, *Collaborative resolution of civil disputes*, Texas, 2004, viewed 26 June 2006, <<http://www.collaborativelaw.us/about.html>>.

⁴⁴ J Meyer, 'The Chair's comments ...', (2000) 21(1) *Family Forum* 1–2, North Carolina Bar Association, , North Carolina, accessed 20 July 2006, <http://family.ncbar.org/Newsletters/Newsletters/Downloads_GetFile.aspx?id=3261>.

⁴⁵ Article 4 sets out in some detail the legal requirements for parties seeking to resolve a divorce dispute on a collaborative basis, as well as a list of definitions relating to collaborative law.

⁴⁶ §§ 50–76, Article 4, Chapter 50, *North Carolina General Statute* (2004). If the collaborative process is successful, parties are 'entitled to an entry of judgment or order to give legal effect to the terms of a collaborative law settlement agreement'. If the parties are unable to reach an agreement, they may immediately resume or commence a civil action provided that the collaborative agreement does not stipulate that alternative means of dispute resolution be attempted first.

⁴⁷ In Australia, the parties have 12 months from the date of the decree absolute of dissolution of their marriage to make an application to the court for property settlement. Applications for property settlement can be made prior to dissolving the marriage but in some cases parties may need to file an application for property settlement in order to preserve their right to do so should the collaboration fail.

Canada

Alberta

3.22 In Medicine Hat, the first collaborative practices emerged in 1999. By 2001, a large majority of the family lawyers in Medicine Hat had been persuaded to adopt a collaborative approach to resolving their cases.⁴⁸ Since the introduction of collaborative law, almost all custody disputes have been resolved collaboratively and the remainder have all settled prior to the scheduled hearing. The courts in Medicine Hat have reported an 85% reduction in the number of family law matters awaiting trial.⁴⁹

3.23 Dr Christina Sinclair has provided Council with some background about the practice of collaborative law in Calgary.⁵⁰ Sinclair reported that, in Calgary, training has largely been conducted by Chip Rose and Pauline Tesler. Most collaborative lawyers in Calgary use a multidisciplinary approach and as a result prefer the term ‘collaborative practice’ rather than ‘collaborative law’. Calgary also has a collaborative practice group called the Association of Collaborative Family Lawyers (Calgary).⁵¹ The Association provides information for collaborative clients and lawyers in Calgary and other parts of Canada.

British Columbia

3.24 The first collaborative practice group in Vancouver was established in 1999. Collaborative Divorce Vancouver promotes a multidisciplinary approach to collaborative law, involving divorce coaches, lawyers and, if appropriate, financial advisers or child specialists.⁵² Dr Julie Macfarlane has suggested that the multidisciplinary approach is popular in Vancouver because a large number of clients in Vancouver can afford to retain a team of collaborative professionals to assist them to resolve disputes.⁵³

Ontario, Nova Scotia, New Brunswick and Saskatchewan

3.25 The IACP has 97 members from Ontario.⁵⁴ Most of these are collaborative lawyers, but there are also mediators, mental health professionals, psychologists and financial advisers. There are 33 practising collaborative family law lawyers in Nova Scotia and in New Brunswick, 94 lawyers trained in the initial two-day collaborative law course and 16

⁴⁸ J Macfarlane, *The emerging phenomenon of collaborative family law (CFL): a qualitative study of CFL cases*, research report presented to the Family, Children and Youth Section, Department of Justice, Canada, 2005, p. 3. In 2002, Divorce Magazine reported that 20 out of the city’s 21 family lawyers practice collaborative law; see Divorce Magazine, *We can work it out*, USA and Canada, 2006, viewed 7 September 2006, <<http://www.divorcemag.com/news/collaborative.html>>.

⁴⁹ R Lueck, ‘The collaborative law revolution: an idea whose time has come in Nevada’ (2004) April *Nevada Lawyer* 1; Quinte Collaborative Law Association, *A brief history of collaborative law*, Ontario, 2003, viewed 7 September 2006, <http://www.quintecollaborativelaw.org/QCLA_History.html>.

⁵⁰ A detailed discussion of Sinclair’s approach to collaborative law is contained in Chapter 2.

⁵¹ Association of Collaborative Lawyers of Alberta, *Collaborative Practice in Alberta*, Alberta, viewed 27 July 2006, <<http://www.collaborativelaw.ca/links.php>>.

⁵² Collaborative Divorce Vancouver, *Collaborative Divorce Vancouver*, Vancouver, 2003, viewed 27 July 2006, <<http://www.collaborativedivorcebc.org/vangroup.html>>.

⁵³ Macfarlane, Research Report, p. 23.

⁵⁴ International Academy of Collaborative Professionals, <<http://www.collaborativepractice.com>>.

trained in the two-day advanced collaborative law course.⁵⁵ Brad Hunter has engaged in collaborative practice in Saskatchewan since 1991.

3.26 Marion Korn is a founding member and former Chair of Collaborative Practice Ontario and a senior family law and mediator from Toronto. In August 2005, Korn was, along with Stu Webb, the first collaborative lawyer to offer collaborative law training in Australia.

United Kingdom

3.27 Collaborative law was introduced to the United Kingdom in February 2003, when Jane Craig, then Chairperson of Resolution,⁵⁶ organised a seminar by Stu Webb.⁵⁷ In September 2003, Pauline Tesler was asked to conduct a training session in London. Following the launch of a collaborative law website in December 2004, interest in collaborative law has grown steadily. Tesler conducted two further training sessions in March 2004.

3.28 There are now 550 collaborative lawyers practising in England, Northern Ireland and Wales. The highest concentrations of trained practitioners are in Cambridge, Bath, Exeter and Guildford.⁵⁸

3.29 Resolution continues to promote the practice of collaborative law in England and Wales. According to the standards set by Resolution, collaborative law training is available to family law specialists who have held their accreditation for at least three years. Training generally takes two days and lawyers who undergo the training are entitled to practice collaborative law as soon as they join Resolution's Collaborative Practice Group. The Collaborative Practice Group has formulated a set of rules to ensure a consistent standard of practice amongst collaborative lawyers in England and Wales.

Ireland

3.30 Tesler has provided collaborative law training to practitioners in Ireland. More than 60 family law practitioners participated in the first training program which was held in Dublin in April 2004. A second, equally popular, training session was run in February 2005 at the Glucksman Gallery in University College, Cork.⁵⁹ After the second training session, a Documents Committee was set up to draft model documents (including a collaborative agreement) and to develop practice protocols. The Documents Committee has since become a practice group called the Association of Collaborative Practitioners. This association provides ongoing training to members and a forum in which to discuss

⁵⁵ Jennifer Howard (CLE Program Coordinator, Canadian Bar Association) and Patrick Casey (Barrister, Casey Rodgers Chisholm Penny Barristers & Solicitors) in direct communication with Council.

⁵⁶ Resolution is a non-profit organisation that aims to build support for constructive, non-confrontational approaches to family law matters. Resolution has over 5,000 members, most of whom are lawyers and other family justice professionals. Resolution, *Resolution: First for Family Law*, Kent, 2006, viewed 19 June 2006, <<http://www.resolution.org.uk>>.

⁵⁷ Pirrie, *New Law Journal* 365, 365.

⁵⁸ James Pirrie, personal communication to Council, 31 March 2006.

⁵⁹ R Horgan, 'Let's work together' (2005) 99(5) *Gazette of the Law Society Ireland* 24, 25.

difficulties in implementing collaborative law processes. It also helps to ‘maintain standards and to distribute the core documents necessary to collaborate’.⁶⁰

Europe

Austria

3.31 Training in collaborative law has been available in Austria for several years. The training sessions are generally run jointly by Austrian and German collaborative practice groups. There are fewer than 100 collaborative lawyers in Austria, but in view of the small size of the country this represents quite a high proportion of all family lawyers in Austria. The Austrian Lawyers Mediation Association is one of the leading organisations with an interest in promoting and developing collaborative law in Austria.⁶¹

Switzerland, France, Germany and Italy

3.32 Council understands that there are collaborative lawyers practising in Switzerland, France, Austria and Italy.⁶² However, information about the nature and extent of collaborative law practices in these European countries is not readily available.

International Academy of Collaborative Professionals

3.33 IACP is a non-profit organisation dedicated to promoting and expanding the practice of collaborative law around the world.⁶³ IACP was established in 1997 by family law specialists Pauline Tesler, Peggy Thompson, Nancy Ross, David Green and Karen Russell. The IACP now has 2,458 members and is considered the peak collaborative law body. Membership of the IACP is not limited to lawyers. Any professional who has involvement in collaborative dispute resolution may join the organisation.

3.34 According to the IACP website, its principle aim is to ‘... foster professional excellence in conflict resolution through Collaborative Practice’.⁶⁴ This is to be achieved by developing international standards of collaborative law practice, providing a central forum for training, networking, protecting and promoting the fundamental principles of collaborative law.

⁶⁰ A O’Neill, ‘Pulling together’ (2006) 100(6) *Gazette of the Law Society of Ireland* 24, 24.

⁶¹ Dr Diana Schopper-Brigel, personal communication with Council secretariat, 27 August 2006.

⁶² IACP has two members from Austria (Dr Schopper-Brigel and the AVM Collaborative Law Branch) and one from Switzerland (Swiss Collaborative Law Professionals).

See International Academy of Collaborative Professionals, <<http://www.collaborativepractice.com>>.

⁶³ *ibid.*

⁶⁴ *ibid.*

3.35 The IACP Standards Committee is responsible for developing standards and principles to assist practitioners to engage in effective collaboration. The Committee has published the following works:

- *Principles of collaborative practice*⁶⁵
- *Minimum standards for collaborative practitioners*⁶⁶
- *Ethical standards for collaborative practitioners*⁶⁷
- *Minimum standards for a collaborative basic training*,⁶⁸ and
- *Minimum standards for collaborative trainers*.⁶⁹

3.36 The IACP also has a committee responsible for providing information about collaborative law to the general public. The main task of the International Public Education Committee is 'to create an international public education strategy that complements and builds upon regional and local efforts to expand the use of the collaborative process'.⁷⁰ The work of this Committee includes distributing brochures to legal practice groups and maintaining a list of frequently asked questions on the IACP website so that individuals can make an informed decision about collaborative law

Empirical research

3.37 In 2005, Dr Julie Macfarlane published the results of a three-year, qualitative study of collaborative family law cases in Canada and the United States of America.⁷¹ Macfarlane's research was funded by the Social Sciences and Humanities Research Council of Canada and the Department of Justice, Canada. Its primary objective was to 'explore the differences that CFL [collaborative family law] makes to the process and outcome of divorce disputes, and in particular to assess its impact on the clients of family legal services'.⁷²

⁶⁵ International Academy of Collaborative Professionals, *Principles of collaborative practice*, California, 2006, viewed 7 December 2006, <<http://www.collaborativepractice.com/articles/principles.pdf>>.

⁶⁶ International Academy of Collaborative Professionals, *Minimum standards for collaborative practitioners*, California, 2004, viewed 7 December 2006, <http://www.collaborativepractice.com/articles/IACP_Practitioner_Standards.pdf>.

⁶⁷ International Academy of Collaborative Professionals, *Ethical standards for collaborative practitioners*, California, 2006, viewed 7 December 2006, <<http://www.collaborativepractice.com/articles/EthicsStandardsfinal.pdf>>.

⁶⁸ International Academy of Collaborative Professionals, *Minimum standards for a collaborative basic training*, California, 2004, viewed 7 December 2006, <http://www.collaborativepractice.com/articles/IACP_Training_Standards.pdf>.

⁶⁹ International Academy of Collaborative Professionals, *Minimum standards for collaborative trainers*, California, 2004, viewed 7 December 2006, <http://www.collaborativepractice.com/articles/IACP_Trainer_Standards.pdf>.

⁷⁰ *ibid.*

⁷¹ Macfarlane, Research Report.

⁷² *ibid.*, p. vii.

3.38 Dr Macfarlane's research is the most comprehensive analysis of collaborative law to date.⁷³ In 2003, she conducted 66 initial interviews with collaborative lawyers, clients and independent experts in nine locations across America and Canada. The following year, she narrowed the focus of her research to 16 recently contracted cases in Medicine Hat, Vancouver, Minneapolis and San Francisco. These cities were selected because each has established communities of collaborative lawyers, who represent the range of collaborative law 'practices and philosophies'. A total of 150 standard-form interviews were conducted with the lawyers, clients and independent experts involved in the 16 cases. The interviews sought reflective data about interviewees' attitudes towards and practical experiences of collaborative law.⁷⁴

3.39 Dr Macfarlane observed that 'the exponential growth of collaborative family lawyering is one of the most significant developments in the provision of family legal services in the last 25 years'. She noted that each collaborative law group studied had 'one or more significant leaders, often experienced litigators with wide credibility in their professional community'. Further, all collaborative groups had a strong commitment to establishing uniformity of practice within their groups and each had created local rules of membership which varied only slightly.⁷⁵

3.40 Dr Macfarlane drew the following conclusions about collaborative law:

- Lawyers and clients engage in collaborative law for different reasons. Most lawyers who offer collaborative services do so because the principles of collaborative law match their personal values and ideals more closely than litigation. Clients, on the other hand, are generally attracted by the prospect that collaborative law is a faster and less costly method of dispute resolution. Other motivations include the ability to take responsibility for role modelling, especially if children are involved, and the ability to engage in face-to-face negotiations.⁷⁶
- Collaborative law reduces the posturing and gamesmanship that characterises traditional lawyer-to-lawyer negotiations, as well as the tendency to make highly inflated or unrealistically low opening proposals.⁷⁷
- Collaborative law maintains a 'strong ideological commitment to cooperative negotiation', which encourages open communication and information sharing between the parties and which has a 'significant impact on the bargaining environment'. Like other consensus-building processes, it requires lawyers to pay attention to meeting the interests of all parties.⁷⁸

⁷³ Council is aware of only two other studies on collaborative law. In 2004, William Schwab surveyed approximately 100 collaborative lawyers and clients. His research results are in Schwab, *Pepperdine Dispute Resolution*, 351. In May 2006, Canadian researchers Professor Michaela Keet, Professor Wanda Wieggers, Dr Melanie Morrison and Delanie Coad released the preliminary results of their study into the emergence of collaborative law in Saskatchewan. The conclusions of both of these studies were generally favourable to the practice of collaborative family law. However, details of the studies have not been included in the body of this report because the statistical basis of their conclusions is not reliable.

⁷⁴ Macfarlane, Research Report, p. vii.

⁷⁵ *ibid.*

⁷⁶ *ibid.*, p. viii.

⁷⁷ *ibid.*, p. ix.

⁷⁸ *ibid.*

- Collaborative law clients ‘are expected to take on more responsibility for solving their own problems, by planning and participating in face-to-face negotiations. Those clients who recognised a change in control regarded it as a positive characteristic.’⁷⁹
- The four-way meetings generally:
 - (a) avoid the reactive-defensive bargaining dynamics of traditional adversarial negotiations
 - (b) engender and sustain a climate of cooperative negotiation, and
 - (c) produce results that are both fair within a legal standard and satisfactory to the parties.⁸⁰
- There is a high likelihood that collaborative negotiations will deliver creative and durable solutions to a range of legal, financial and emotional issues. It is rare for parties who engage in collaborative negotiations to make unrealistic demands on each other and their lawyers.⁸¹
- Of the matters that settled during the study, the results matched or exceeded legal entitlements in most respects. Many outcomes included value-added components.⁸²
- There is no clear evidence that collaborative law cases are less expensive than traditional litigation or negotiated family law files, although ‘common sense suggests that they often will be’.⁸³
- Some collaborative lawyers fail to anticipate and/or deal effectively with negotiations in which the parties express strong emotions. It may be that collaborative lawyers require additional training to manage high-conflict and emotionally charged cases.⁸⁴
- The lack of court-imposed time limits exposes collaborative law matters to the risk of unreasonable delays by one or other party. Collaborative lawyers and their clients need to be aware of this issue, and devise alternative mechanisms to ensure that the dispute is resolved in a timely manner.⁸⁵
- Discrepancies exist in the approach to lawyer-client privilege. Most collaborative contracts impose a duty upon the parties to reveal all relevant information. There is a need for greater consistency in the degree to which parties to a collaborative contract must disclose information. Clients considering collaborative law need to be made aware of the limits of client confidentiality.⁸⁶
- Collaborative law raises ethical questions which lawyers accustomed to litigating matters are unlikely to have encountered before. For instance, when should lawyers advise a client to withdraw from the collaborative process? Also, how can lawyers

⁷⁹ *ibid.*, p. x.

⁸⁰ *ibid.*, p. ix.

⁸¹ *ibid.*

⁸² *ibid.*, p. xii.

⁸³ *ibid.*

⁸⁴ *ibid.*, p. ix.

⁸⁵ *ibid.*, p. xii.

⁸⁶ *ibid.*, p. x.

make sure that a client has given his/her informed consent to participate in collaborative law? Ethical concerns that are particular to collaborative law need to be acknowledged and addressed in the guidelines and protocols developed by collaborative practice groups.⁸⁷

- Screening, mentoring and accreditation are issues that law societies may need to address.⁸⁸

3.41 Dr Macfarlane concluded that, whilst there are challenges in the areas of ensuring clients understand the process and in managing client expectations of the time and costs involved, collaborative law ‘offers a chance for separating spouses to negotiate a solution that they deem “fair”. It creates a forum for frank and dignified closure. Family lawyers who are embracing collaborative law see it as a dispute resolution process that has integrity, empowers clients and helps families move through difficult transitions.’⁸⁹

⁸⁷ *ibid.*, p. xii.

⁸⁸ *ibid.*, pp. xiii–xiv.

⁸⁹ *ibid.*, p. xiv.

4. Collaborative law in Australia

4.1 Collaborative law is a relatively new concept in Australia. The development of collaborative law in Australia remains fluid, with initiatives taking place on a number of fronts. Australian family lawyers are seeking training overseas and increasing numbers are availing themselves of training opportunities in Australia. Collaborative law services are now being offered to family law clients in Victoria, the Australian Capital Territory, New South Wales and Queensland.

4.2 Lawyers other than family law specialists are showing an interest in the collaborative process. New South Wales has established a working group to look at the use of collaborative law in areas of legal dispute other than family law, and the law societies of both New South Wales and Victoria have expressed an interest in developing collaborative practice.

4.3 Training, accreditation and the possible expansion of collaborative law to areas other than family law are currently being discussed. The Law Council of Australia supports a coordinated response to these issues, in the interests of the effective promotion of collaborative law in Australia.⁹¹

Current practice of collaborative law

Australian Capital Territory

4.4 Collaborative law services have been available in the Australian Capital Territory for longer than in any other State or Territory. More than 10 law firms in the ACT are now trained in collaborative family law. This is largely due to the efforts of two local law firms.⁹² These specialist family law firms have taken a proactive role in establishing, coordinating and promoting collaborative law in the ACT and nationally.

4.5 In March 2005, the two firms launched a pilot program to educate legal practitioners in the Canberra region about collaborative law. The program drew on extensive research into collaborative law practices in the United States, Canada and the United Kingdom.⁹³ It culminated in a two-day training program in August 2005, conducted by Stu Webb and attended by approximately 23 lawyers practising in the Canberra region.

4.6 Following this training, a group of local lawyers established the Canberra Collaborative Law Practice Group (the Canberra Practice Group). The Canberra Practice Group has approximately 20 active members and meets fortnightly to discuss the development of collaborative practice in the Canberra region. Since August 2005, members of the Canberra Practice Group have used the collaborative process to resolve

⁹¹ Family Law Section of the Law Council of Australia, in personal communications with Council, April 2006.

⁹² Farrar Gesini & Dunn and Dobinson Davey Lawyers.

⁹³ M R Liverani, 'Canberra law firms set the pace on collaborative law' (2005) 43 *Law Society Journal* 20, 20.

a number of family law matters. Several other matters are currently being dealt with on a collaborative basis.

4.7 A further training program was organised in November 2005, the purpose of which was to equip collaborative lawyers with interest-based negotiation skills. The training was conducted by Dr Tom Altobelli, Associate Professor of Law at the University of Western Sydney as he then was. The Canberra Practice Group also organised an advanced training session which was conducted on 11 and 12 August 2006 by two experienced IACP collaborative law trainers from the United States of America and Canada.

4.8 In June 2006, the ACT Law Society established a Collaborative Law Committee. Greg Walker, President of the Law Society, explained that the purpose of the Committee is to further the practice of collaborative law in the ACT.⁹⁴

Victoria

4.9 In 2005, the Law Institute of Victoria conducted a survey of the Victorian legal profession to gauge the level of interest in collaborative practice. As a result of the survey, the Institute hosted a meeting in November 2005. The meeting was attended by approximately 40 practitioners.⁹⁵ Collaborative lawyer and trainer Sherri Goren Slovin gave a presentation to attendees via video link-up. Since then, interest in collaborative law has grown rapidly in Victoria.

4.10 In 2006, the President of the Law Institute of Victoria made the support and promotion of collaborative law a priority.⁹⁶ A working group was formed to provide information on collaborative law and to consider its growth in other jurisdictions. The working group has also developed a model agreement and *Protocols of practice for collaborative family lawyers*.

4.11 In March 2006, the working group held a collaborative law training program for practitioners representing more than 20 Victorian law firms. The training was facilitated by the Law Institute of Victoria and conducted by accredited IACP trainer Sherri Goren Slovin and Professor Tania Sourdin from La Trobe University, Victoria.

4.12 The Law Institute of Victoria has since established a collaborative law practice group called the Collaborative Family Lawyers of Victoria to assist firms to further develop their expertise in collaborative law.

Queensland

4.13 In 2003, a group of family law practitioners from Brisbane, the Gold Coast and Cairns formed a pilot group to discuss collaborative law and its potential benefits for family law clients. Regular meetings were held and information accessed from overseas. The pilot group concluded that the collaborative process provides separating couples with another valuable non-court dispute resolution option.

⁹⁴ Greg Walker in a letter to Council, 12 June 2006.

⁹⁵ J Silverii, 'Re Gale: new LIV president' (2006) 80 *Law Institute Journal* 23, 24.

⁹⁶ *ibid.*

4.14 In September 2003, Susan Purdon⁹⁷ and Professor John Wade⁹⁸ delivered a joint paper on collaborative law at the Family Law Practitioners Association of Queensland Annual Conference. The presentation elicited a positive response from attendees and recognition of the need for training.

4.15 In August 2005, three family lawyers from Brisbane, the Gold Coast and Cairns attended the Marion Korn and Stu Webb training course on collaborative law in Sydney. In December 2005, family lawyers from three Gold Coast law firms attended a Tesler training course in Seattle. A practice group called Queensland Collaborative Law (QCL) was formed by three Gold Coast law firms offering collaborative law services. According to the organisation's website, 'Queensland Collaborative Law has been established to promote collaborative law and to support and train lawyers in its practice'.⁹⁹ QCL is a member of NCCL and attended the NCCL meeting in Canberra in May 2006 which called for a coordinated national approach to the development of collaborative law.

4.16 In July 2006, 24 Brisbane family lawyers and one accountant attended a Marion Korn training course in Brisbane at the Queensland Law Society offices.

New South Wales

4.17 Interest in collaborative law amongst the legal profession in NSW has been driven by the Law Society of NSW. A former President of the Law Society of NSW, Justice Robert Benjamin of the Family Court of Australia, became interested in collaborative law after he attended a conference held by the American Bar Association in 2003. The Law Society of NSW subsequently set up a collaborative law sub-committee, chaired by Marilyn Scott of the University of Technology Sydney (UTS), to consider different models of collaborative law. In May 2006 the Collaborative Professionals (NSW) Inc was established.

4.18 UTS now offers short courses in collaborative practice. According to the course outline, this training is designed for any professional whose practice 'requires them to exercise collaborative practice, negotiation and mediation skills'. Participants can choose between an introductory (two-day) and an advanced (three-day) course. These courses are coordinated by Marilyn Scott and Maria Korn.

Other States and Territories

4.19 As far as Council is aware, there are no collaborative lawyers or practice groups in Western Australia, South Australia, Tasmania or the Northern Territory.

4.20 The Law Society of Western Australia has expressed some interest in informing members about collaborative law. Also, the Family Law Practitioners Association of Western Australia has a Dispute Resolution Subcommittee which is following the developments in collaborative law in the other States and Territories. Its convenor, Rhonda

⁹⁷ Hopgood Gamin Lawyers.

⁹⁸ Bond University.

⁹⁹ Queensland Collaborative Law, *About Queensland Collaborative Law*, Queensland, 2006, viewed 13 June 2006, <<http://www.qldcollablaw.com.au/about-us.html>>.

Griffiths, recently presented a paper on collaborative law that elicited positive interest and a number of enquiries from lawyers about training in collaborative law.¹⁰⁰

4.21 No lawyers offer collaborative services in South Australia at present.¹⁰¹ However, in October 2006, the South Australian Chapter of LEADR, the professional association of dispute resolution, presented an information seminar for those interested in finding out more about collaborative law. Also, an article about collaborative law appeared in the July 2006 South Australian Law Society Bulletin.

National developments

National Centre of Collaborative Law

4.22 In July 2005, a group of Canberra-based lawyers established the National Centre of Collaborative Law (NCCL). NCCL has published the *Practice of collaborative law handbook* to assist Australian lawyers to practise collaborative law. Juliette Ford is one of the founding members of NCCL. In a recent article she explained that ‘the purpose of the Handbook is to guide and assist practitioners in the conduct of collaborative law matters. The Handbook comprises a step by step guide which will be continually reviewed as the practice of Collaborative Law evolves.’¹⁰²

Family dispute resolution organisations

4.23 A number of family dispute resolution organisations have expressed interest in the collaborative law process. In particular, Family Services Australia (FSA) and Relationships Australia (RA) contacted Council about its work on collaborative law. FSA and RA are national organisations which provide family relationship and other family services. In 2005, the FSA National Conference featured a collaborative law presentation, role play and workshop by Lisa Matthews, President of the Collaborative Professionals Group of Southeast Louisiana. A joint meeting was held on 19 May 2006, attended by members of the Council’s Collaborative Law Committee, as well as representatives from FSA, RA and Centacare. Discussions at the meeting focused on the possible interaction between collaborative law and the new Family Relationship Centres. It was suggested by these organisations that referral lists of collaborative lawyers be distributed to Family Relationship Centres to ensure that Family Relationship Centre staff have a complete resource list of alternative dispute resolution processes. Family dispute resolution organisations held a collaborative law conference in October 2006.

Concluding Comments

4.24 To date, the promotion and development of collaborative practice in Australia has been driven largely by individual lawyers and local collaborative practice groups—and to a lesser extent by organisations such as State and Territory law societies and universities. This has proven to be an effective way of generating interest in the collaborative process.

¹⁰⁰ Rhonda Griffiths in direct correspondence with Council, 24 July 2006.

¹⁰¹ Stephen Hodder, Acting Executive Director of the Law Society of South Australia, in a letter to Council, 28 August 2006.

¹⁰² J Ford, ‘Collaborative law: family lawyering in the 21st century’ (2006) 18(4) *Australian Family Lawyer* 20, 25.

However, it is Council's view that, to further promote collaborative practice in Australia, a national approach is desirable.

4.25 A national approach will promote excellence in practice and allow the legal profession proper input into the further development of collaborative practice. It will assist Family Relationship Centres and other community service providers to be informed about the collaborative process, to ensure that separating couples have a wide range of options to assist them to resolve their disputes. Information about collaborative practice should be easily accessible by the Australian public and the legal profession to ensure nation-wide access to collaborative services.

4.26 Council's view is that the Law Council of Australia is the most appropriate organisation to oversee and facilitate the continued promotion and development of collaborative practice in Australia. The Law Council of Australia is the peak organisation representing the interests of the legal profession at a national level.¹⁰³ It has a long history of advocating and securing improvements in the provision of legal services in Australia. In addition, Council enjoys a close relationship with the Law Council of Australia and the two organisations could work cooperatively to meet the objectives outlined above.

4.27 The draft *Guidelines for Collaborative Practice in Family Law* at Attachment A presents one view of how collaborative practice might be undertaken. It was clear to Council from comments received during public consultation that the principal stakeholders need more time to consider the draft Guidelines. It is for this reason that Council recommends further dissemination and discussion of the draft Guidelines.

4.28 During consultation on the draft Guidelines, community-based service providers involved in the new family law system showed an active interest in collaborative practice. FSA and RA in particular expressed an interest in joining Council's Collaborative Law Committee and also provided thoughtful submissions on the draft Guidelines. Council's view is that strengthening cross-sector professional relationships may facilitate collaborative practice and for this reason Council recommends that a collaborative practice working group be established by Council and the Law Council of Australia and that the working group explore how cross-sector professional relationships might be strengthened to facilitate collaborative practice.

4.29 At present, lawyers do not have to satisfy any particular requirements to practise collaborative law in Australia. Most collaborative practice groups ask their members to attend a two-day training program and commit to regular training to maintain and build on their collaborative skills. However, there is nothing to stop a lawyer who is not a member of a practice group from offering collaborative services without undertaking any specific training.

4.30 A similar issue arises in relation to the skills and experience expected of collaborative professionals other than lawyers. IACP recommends that independent experts be subject to the same initial and ongoing training requirements as lawyers. However, in Australia, familiarity with the collaborative process is not a prerequisite for professionals like counsellors, child specialists, accountants and financial advisers.

¹⁰³ Law Council of Australia, *History, role and membership*, Canberra, 2006, viewed 27 November 2006, <<http://www.lawcouncil.asn.au/history.html#role>>.

4.31 Council believes that a process of accreditation may be needed to ensure a consistent standard of collaborative practice in Australia and that this should be considered by the working party referred to in Recommendation 1. Lawyers who have successfully completed a course in collaborative practice would be entitled to advertise themselves as specialist settlement lawyers. In this regard, one option would be for State and Territory law societies to determine the training requirements for collaborative professionals in their area and to maintain a list of qualified lawyers and independent experts. Another option would be to identify tertiary institutions that offer introductory courses in collaborative law and/or postgraduate qualifications that equip those attending with the skills necessary to practise collaborative law. Council's view is that a national approach is desirable. Also, the process should be sufficiently flexible to allow people currently practising collaborative law to continue to do so while undergoing accreditation.

Recommendation 1

The Family Law Council and the Law Council of Australia should establish a working group to develop national guidelines for collaborative practice in family law. The working group should comprise members and observers of the Family Law Council and nominees of the Law Council of Australia, who will in turn consult with representatives of each State and Territory together with community-based service providers involved in the new family law system. In undertaking this task, the working group should:

- (a) further disseminate for discussion the draft Guidelines attached in Appendix A to this report
- (b) explore how cross-sector professional relationships may be strengthened to facilitate collaborative practice, and
- (c) consider how best to develop specialist accreditation to ensure a consistent standard of collaborative practice in Australia.

4.32 There should be a national focus for collaborative practice in family law in Australia. It is appropriate that family lawyers across Australia adopt a consistent approach to collaborative practice as is the case with family law practice in general. All stakeholders should be given the opportunity to contribute to the continued development of collaborative practice in Australia. Lawyers whose home State or Territory does not have a collaborative practice group will benefit from the establishment of a national coordinating body. In addition, the experiences of other countries suggest that collaborative practice is an effective method of dispute resolution in areas other than family law.¹⁰⁴

4.33 The Law Council of Australia as the peak national body representing Australian lawyers could perform the coordinating role suggested by Council very effectively. Therefore, Council recommends that the Law Council of Australia establish a committee to promote consistency in the development of collaborative practice in Australia. The committee's membership could include lawyers practising in family law and other areas.

¹⁰⁴ See chapter 3.

Recommendation 2

The Law Council of Australia should establish a Collaborative Practice Committee to be constituted by lawyers practising in family law and other areas of practice.

5. Collaborative practice and the new family law system

5.1 The purpose of this chapter is twofold. First, it explains the 2006 family law reforms and the extent to which collaborative practice is consistent with the aims of the Government's reforms. Second, the chapter explains how collaborative law fits with some of the new processes being implemented by the Government: namely, Family Relationship Centres and compulsory dispute resolution.

Background

5.2 In December 2003, the House of Representatives Standing Committee on Family and Community Affairs reported on its inquiry into child custody arrangements in the event of family separation. The report, titled *Every Picture Tells a Story*, made 29 wide-ranging recommendations about different aspects of the family law system, including child support, changes to the Family Law Act and improving processes for separating families. The *Every Picture Tells a Story* report briefly touched on collaborative law. The committee noted:

Whilst this approach (collaborative law) has a lot of appeal, it is still based on some agreement between the parties and common commitment to the collaborative process. It does not provide any way to prevent a vindictive party from dragging the process out and still proceeding to litigation at more cost to themselves and, more importantly, to the other party. The committee's preference is to keep separating families away from lawyers as much as possible but it would encourage the development of such practices by family lawyers as an option.¹⁰⁵

5.3 In mid 2005 the Government responded to the *Every Picture Tells a Story* report, announcing the 2006 family law reforms. There are four main prongs to the reforms.

- The establishment of 65 Family Relationship Centres and increased funding for other services for separating families. In May 2005, as part of the 2005–06 Budget, the Government announced it they will provide almost \$400 million over four years for this purpose.¹⁰⁶ The first 15 centres opened in early July 2006.
- Amendments to the Family Law Act, contained in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (SPR Act) which commenced on 1 July 2006.¹⁰⁷
- Changes to the child support scheme arising from the recommendations made by the Ministerial Taskforce on Child Support which reported in June 2005.¹⁰⁸

¹⁰⁵ House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story: report on the inquiry into child custody arrangements in the event of family separation*, 2005, p. 79.

¹⁰⁶ Family Relationships Online, *Welcome*, Canberra, 2006, viewed 27 November 2006, <<http://www.familyrelationships.gov.au/index.html>>.

¹⁰⁷ Attorney-General's Department, *Families*, Canberra, 2006, viewed 27 November 2006, <<http://www.ag.gov.au/family>>.

- A combined registry for the Family Court of Australia and Federal Magistrates Court of Australia to ‘simplify the path into the family court system’.¹⁰⁹

Aims of the new family law system

5.4 The Attorney-General, the Hon Philip Ruddock MP, has on many occasions described the reforms to the family law system as seeking to generate a cultural change in how family breakdown is dealt with.

5.5 The legislation underpins the package of measures announced in the 2005 Budget. These initiatives represent a generational change in family law and aim to bring about a cultural shift in how family separation is managed: away from litigation and towards cooperative parenting.¹¹⁰

5.6 The two primary aims (away from litigation and towards cooperative parenting) are designed to:

- (a) encourage parents to reach agreements about parenting arrangements for their children that ensure both parents have a meaningful involvement in their children’s lives, and
- (b) give parents greater options for reaching those agreements outside the court system; for example, at a Family Relationship Centre or with the help of another dispute resolution service.

5.7 A number of provisions in the SPR Act encourage parents to reach agreements, particularly those relating to the use of parenting plans. The SPR Act contains new provisions on what might be included in a parenting plan¹¹¹ and imposes obligations on advisers assisting people making parenting plans.¹¹²

5.8 The status of parenting plans is also elevated by section 64D, such that they may render existing court orders unenforceable. The explanatory memorandum spells out that:

... the default provision has the effect that those parenting orders will be subject to any subsequent parenting plan. This will only be the case where the parenting plan is agreed to in writing by any (sic) other person to whom the parenting order applies. There is discretion for the court not to include the default provision in the parenting order in ‘exceptional circumstances’.¹¹³

¹⁰⁸ Department of Families, Community Services and Indigenous Affairs, *Child Support*, Canberra, 2006, viewed 27 November 2006, <<http://www.facsia.gov.au/internet/facsinternet.nsf/family/childsupport.htm>>.

¹⁰⁹ Family Court of Australia, *Family Court of Australia*, Canberra, 2006, viewed 27 November 2006, <<http://www.familycourt.gov.au>>.

¹¹⁰ Family Law Amendment (Shared Parental Responsibility) Bill 2005, Revised Explanatory Memorandum (2006) 1.

¹¹¹ SPR Act 2006, s 63C(2).

¹¹² SPR Act 2006, s 63DA.

¹¹³ Family Law Amendment (Shared Parental Responsibility) Bill 2005, Revised Explanatory Memorandum (2006), p. 36.

5.9 It is arguable that elevating the status of parenting plans will mean that parents are more likely to use them, as they provide a flexible alternative to seeking a variation of orders in court. Parenting plans may also help parents keep pace with the changing circumstances of the family.

Compulsory dispute resolution

5.10 In the longer term, another way the SPR Act encourages agreement is by the phasing in of compulsory dispute resolution, pursuant to new Subdivision E of Division 1 of Part VII of the Family Law Act. This process will be fully implemented by the middle of 2008. Section 60I provides for compulsory attendance at family dispute resolution in a range of circumstances, prior to lodging an application with the court. The explanatory memorandum notes that ‘this is a key change to encourage a culture of agreement making and avoidance of an adversarial court system’.¹¹⁴

5.11 Compulsory dispute resolution is being phased in to allow time for the establishment of Family Relationship Centres and expansion of other services. Section 60I explains the phases, which are:

- Phase 1: From 1 July 2006–30 June 2007, parties will need to comply with the pre-action procedures which include attempting to resolve the dispute using dispute resolution methods.
- Phase 2: For applications made on or after 1 July 2007 and before the date fixed by Proclamation, new applicants will have to show that they have attempted dispute resolution before filing an application in court.
- Phase 3: The third phase will commence by Proclamation and from the proclaimed date all applicants will have to show they have attempted dispute resolution before filing an application in court. This is expected to apply from mid 2008.

5.12 From the date on which phase 3 comes into effect, subsections 60I (7) and (8) will apply to all Part VII matters. These subsections provide that, subject to a number of exceptions,¹¹⁵ a court cannot hear an application under Part VII unless the applicant also files a certificate from a family dispute resolution practitioner.¹¹⁶

¹¹⁴ *ibid.*, p. 20.

¹¹⁵ The exceptions are contained in subsection 60I(9).

¹¹⁶ Running parallel to the introduction of compulsory dispute resolution is the introduction of competency-based accreditation standards for family counsellors, family dispute resolution practitioners and workers in children’s contact services. This is provided for in Schedule 4 to the SPR Act. The standards are currently being developed by the Community Services and Health Industry Skills Council. Accreditation will ensure consistent standards apply to all professionals, particularly those issuing certificates.

Family Law Act 1975 – Section 60I

Attending family dispute resolution before applying for Part VII order

(7) Subject to subsection (9), a court exercising jurisdiction under this Act must not hear an application for a Part VII order in relation to a child unless the applicant files in the court a certificate given to the applicant by a family dispute resolution practitioner under subsection (8). The certificate must be filed with the application for the Part VII order.

(8) A family dispute resolution practitioner may give one of these kinds of certificates to a person:

(a) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but the person's failure to do so was due to the refusal, or the failure, of the other party or parties to the proceedings to attend;

(aa) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, because the practitioner considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be appropriate to conduct the proposed family dispute resolution;

(b) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, and that all attendees made a genuine effort to resolve the issue or issues;

(c) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the person, the other party or another of the parties did not make a genuine effort to resolve the issue or issues.

5.13 A question arises as to whether the collaborative process is, or should be, a relevant consideration when parties seek the issue of a certificate after their collaboration has broken down. Council's view is that the requirement of a certificate from a family dispute resolution practitioner should be retained even if the parties have engaged in a collaborative process, in order to ensure that professionals with training and experience in family counselling and dispute resolution are involved in trying to resolve the dispute before an application is filed in court. Nonetheless, attempting the collaborative process constitutes a genuine attempt at dispute resolution and should be a relevant consideration for family dispute resolution practitioners when they consider whether to issue a certificate for the purposes of section 60I(8) of the Family Law Act. In some cases, and particularly where non-legal experts have already been involved in the dispute resolution process, it may be appropriate for the family dispute resolution practitioner to issue a certificate under subsection 60I(8)(aa) of the Family Law Act. For example, Council anticipates that a certificate under this section may be issued in a dispute involving children where experts such as counsellors and mediators have been involved as part of the collaborative process. Even in such cases it would of course be open to the family dispute resolution practitioner to refuse to issue a certificate and refer the parties to counselling or mediation if the family dispute resolution practitioner formed the view that the parties may be able to resolve the

dispute with such assistance. Accordingly, Council recommends that the regulations referred to in section 60I(8)(aa) include participation in a collaborative process as a factor to which a family dispute resolution practitioner may have regard when considering whether to issue a certificate under that section.

Recommendation 3

The regulations referred to in section 60I(8)(aa) of the *Family Law Act 1975* should include a provision that when deciding whether to grant a certificate for the purposes of the section, a family dispute resolution practitioner may have regard to a person's participation in a collaborative process.

How is collaborative practice consistent with the reforms?

5.14 The collaborative process discourages litigation and maintains a cooperative settlement focus. It 'provides parties with control over the process of resolving their dispute, control over the cost of the process and control over the outcome of their dispute'.¹¹⁷ The collaborative contract also creates a strong incentive to reach an agreement and at the same time provides a disincentive to litigate because if the matter does proceed to court the parties will have to engage new legal representatives and may need new experts to give evidence. These features of collaborative practice are entirely consistent with the aims of the Government's family law reforms—discussed in detail in paragraphs 5.2–5.12.

5.15 There is a range of non-court family dispute resolution processes currently being offered in Australia including mediation, arbitration, conciliation and a variety of counselling services. The range of processes available allows people to select from a large number of options the process that is most appropriate to resolve their particular family dispute. Whilst there will be separating families who for reasons of cost or preference do not use legal representation, others will choose to seek legal advocacy and the support that offers in the settlement of their disputes. Collaborative practice provides a further option for separating couples who seek not only advocacy support but legal advocacy with a non-litigious settlement focus. Therefore, collaborative law is one more out-of-court option for separating families that is consistent with the new family law system.

5.16 Collaborative practice is an important addition to the current methods of resolving family law disputes. This is because specialist collaborative lawyers adopt a significantly different approach to specialist litigation lawyers. Although many of the discrete processes employed in the collaborative process are also employed by specialist litigation lawyers, the collaborative contract generally, and the disqualification clause in particular, affects a fundamental paradigm shift in the resolution of family disputes. The complaint that there is no incentive for lawyers to settle a matter cannot apply, and the process assists parties to reach agreements they are likely to be satisfied with as they tailor the agreement to their own needs. Generally lawyers will offer both collaborative and litigation services. The client will select which service they need with the proviso that once a lawyer has acted in

¹¹⁷ C Rose, *Why collaborative law?* Mediation Center of Santa Cruz, California, viewed 9 June 2006, <<http://www.mediate.com/crose/pg2.cfm>>.

a collaborative process for a client she or he will not be able to provide litigation services to that client.

Family Relationship Centres

5.17 The changes to the Family Law Act are only part of the Government's strategy to provide parents with greater options for reaching agreements outside the court system. The legislative changes are underpinned by increased funding for services announced in the 2005–06 Budget. The centrepiece of the expansion of services is the establishment of 65 Family Relationship Centres nationally. One of the objectives of the Centres is to 'give separating families help to achieve workable parenting arrangements (outside the court system) through information, support, referral and dispute resolution services'.¹¹⁸ The 2005–06 Budget also included funding to expand dispute resolution services and increase the number of post-separation parenting services.

5.18 The first 15 Family Relationship Centres opened their doors in July 2006. The centres will play a key role in referring people to appropriate services within their local area. The staff at the Centres do not give legal advice. Rather, they refer people to legal practitioners where they think legal advice is required.

5.19 The Government's information sheet on Family Relationship Centres and the legal profession sets out how the Government expects this referral to be carried out:

The Government expects Family Relationship Centres to develop cooperative mutual referral arrangements with all legal practitioners, in order to ensure clients have access to relevant and timely legal advice and information. As well as the local legal aid offices and community legal centres, Family Relationship Centres will be able to provide clients with information about how to contact a range of private lawyers, or refer clients to the State or Territory law society for that information ... Family Relationship Centres would need to ensure that referrals to lawyers are impartial. One way of doing so would be to develop a list of lawyers and allow the client to choose which lawyer to contact.¹¹⁹

5.20 At a meeting in April 2006 convened by FSA in Canberra and attended by Council, RA and Centacare, FSA suggested that other connections could be forged between Family Relationship Centres and collaborative lawyers. For example, collaborative lawyers could provide information sessions at the Centres, for staff members and/or members of the public who might be curious about the collaborative law process. These sessions could include role plays, such as are used at formal collaborative law training sessions. Brochures could also be made available at the Centres explaining what collaborative law is, and in particular outlining how the collaborative process can assist legally represented people to reach an agreement without going to court. Council's view is that these strategies would assist to promote and develop collaborative law in Australia.

¹¹⁸ Attorney-General's Department, *Family Relationship Centres: information paper*, Canberra, 22 December 2005, 2,

<<http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWP5E0559BC1AD1587BCA25713E001E3660>>.

¹¹⁹ Attorney-General's Department, Family Relationships Online, *Family Relationship Centres, the Family relationship advice line and the legal profession information sheet*, viewed 8 September 2006,

<<http://www.familyrelationships.gov.au/Family+Relationship+Centres+and+the+Legal+Profession+Discussion+paper+for+web.doc>>.

5.21 The suggestions made by FSA would provide consumer education about collaborative practice so that if parties decide to undertake the process they would have realistic expectations of the process, the time and the cost involved.

5.22 The Law Council of Australia is the national representative body for lawyers, as such it is in an excellent position to develop informative material of a general nature and region specific lists of lawyers who offer collaborative practice.

5.23 Family Relationship Centres should be a source of information about all forms of dispute resolution including collaborative family law practice. For this reason Council recommends that the Law Council of Australia should develop and disseminate to Family Relationship Centres information about collaborative practice and in particular maintain lists of legal practitioners who are willing to offer collaborative practice in local areas. Having these location-specific lists will not only remind Centre staff that the collaborative process is a viable option for people involved in family disputes, but also enable staff to refer clients to specific lawyers who they know offer collaborative services.

Recommendation 4

The Law Council of Australia should consider developing and disseminating information about collaborative practice and lists of collaborative practitioners to Family Relationship Centres and community-based service providers of family dispute resolution.

6. Collaborative law and legislative change

6.1 There are no obvious legislative impediments to the practice of collaborative law in Australia. Thus, family lawyers in a number of States and Territories have set up collaborative law practices.¹²⁰ However, Council has identified two areas where legislative amendments may facilitate collaborative practice in Australia. The following paragraphs look at the advantages and disadvantages of enacting legislative provisions to make communications in the collaborative process confidential and to assist in the enforcement of collaborative contracts.

Communications in collaborative process

6.2 The empirical research conducted by Dr Macfarlane suggests that a large proportion of collaborative law cases settle.¹²¹ This finding is supported by the anecdotal experience of lawyers using collaborative practice in Australia.¹²² However, as with all dispute resolution models, some cases do proceed to court. In the event that the collaborative process fails and the parties seek to litigate, the collaborative contract provides that information disclosed during the collaborative process cannot be used in court. This includes oral communications, documents produced during the process and expert reports.

6.3 Parties involved in a collaborative process are required by the contract to disclose all relevant information regardless of whether disclosure would be required by a court. The confidentiality provisions act as a powerful incentive for the parties to reach an agreement, since they know that if they do proceed to court they will have the expense of hiring new experts. If information shared during the collaborative process were admissible in subsequent proceedings, some people may engage in the collaborative process for the sole purpose of gaining access to information that could be used against the other party in litigation.

6.4 The issue of whether communications in the collaborative process should be confidential is complicated by the involvement of independent experts. Tesler has observed that experts—in particular, child specialists—are better able to assist parties to reach settlement when there is no possibility that the expert's reports and/or oral opinions can be used in court. According to Tesler, '[t]he ability of the child specialist to serve [his/her] function effectively is ... linked with the knowledge on the part of the parents that this person is *never* going to appear in court proceedings and that no part of the work with the child specialist can ever be used against either of the parents'.¹²³ Some experts will only agree to participate in collaborative matters if it can be guaranteed that they will not have to go to court.

¹²⁰ Discussed in more detail in chapter 4.

¹²¹ A more detailed discussion of Dr Macfarlane's research is provided in Chapter 3.

¹²² O Gesini and C Gale, *Solving it together*, a paper presented at the National Access to Justice and Pro Bono Conference, 11–12 August 2006, Melbourne.

¹²³ P Tesler e-mail to Sue Purdon (Family Law Council) et al, 9 June 2006.

6.5 The major difficulty in relation to confidentiality arises in matters involving children's issues. The confidentiality of the collaborative process may have a negative impact on children if it prevents relevant information being put before the court in those cases which do not settle. The 2006 family law reforms impose an obligation on the court to consider the potential impact that legal proceedings may have on any children involved.¹²⁴ The Government has also made it clear that in family law proceedings the needs of children must be given priority. In collaborative matters involving children, the evidence produced during the collaborative process will relate to the welfare of the children. This is particularly true if a child specialist has been involved and/or has provided reports to assist the collaborative process. If information about the children is inadmissible in subsequent legal proceedings, the court will not have the benefit of the information when it makes a decision relating to the children. Also, the children may have to undergo interviews by new experts.

6.6 The disadvantages are mitigated by the anecdotal evidence that the overwhelming majority of matters involving children will settle during the collaborative process. Tesler has indicated that 'not one of my collaborative cases with child specialist participation has ever failed to reach a parenting plan that both parents felt positive about'.¹²⁵

6.7 In addition, there are certain advantages that flow from preserving the confidentiality provisions in children's matters. There is a great deal of anecdotal evidence that the available pool of experts willing to participate in family law disputes is increased if there is no risk that they will have to give formal evidence in court. On balance, therefore, Council's view is that the advantages of making the collaborative process confidential outweigh the potential drawbacks.

6.8 The present legal position is that the confidentiality of information and reports in the collaborative process relies on the confidentiality provisions of the contract itself and on the impact of section 131 of the *Evidence Act 1995* (Cth).

Section 131 of the *Evidence Act 1995* (Cth) provides that:

- (1) Evidence is not to be adduced of:
 - (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
 - (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

The protection provided by sub-section 131(1) is subject to a list of exceptions contained in subsections 131(2)(a) to (k):

- (2) Subsection (1) does not apply if:
 - (a) the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another Australian or overseas proceeding, all the other persons so consent; or

¹²⁴ This requirement is contained in section 69ZN of the new Division 12A of the Family Law Act.

¹²⁵ P Tesler, personal communication with Council.

- (b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or
- (c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced; or
- (d) the communication or document included a statement to the effect that it was not to be treated as confidential; or
- (e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or
- (f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or
- (g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or
- (h) the communication or document is relevant to determining liability for costs; or
- (i) making the communication, or preparing the document, affects a right of a person; or
- (j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
- (k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.

6.9 Council agrees that the collaborative process should be confidential, but there is concern that, on their own, the confidentiality provisions of the contract do not afford sufficient protection against disclosure. This is because the collaborative contract only provides contractual remedies. A party may sue on the contract and the court could provide contractual remedies, but such remedies could not extend to excluding evidence from consideration by courts exercising family law jurisdiction. Thus, the party bringing the contractual suit may prevail in the contractual issue but still lose the essential benefit of the confidentiality provisions in courts exercising family law jurisdiction. Well-financed parties may decide that it is worth the time and expense of going through a collaborative process to obtain information which would not otherwise be available to them. Council believes that parties should not be able to weigh up the benefits of using information obtained during the collaborative process in court against the potential costs of breaching the collaborative contract.

6.10 Section 131 of the Evidence Act also does not provide an appropriate level of protection for the confidentiality of communications and material produced during the collaborative process because of the number and range of exceptions to its provisions.

6.11 It is appropriate for the confidentiality of the collaborative process to be reinforced in the Family Law Act. More specifically, the collaborative process should enjoy the same level of confidentiality as is provided by sections 10H and 10J of the Family Law Act. The collaborative process provides effective dispute resolution outside the litigation pathway

and as such should not be disadvantaged with respect to other dispute resolution mechanisms which enjoy the protection of sections 10H and 10J.

Family Law Act 1975—Section 10H

Confidentiality of communications in family dispute resolution

(1) A family dispute resolution practitioner must not disclose a communication made to the practitioner while the practitioner is conducting family dispute resolution, unless the disclosure is required or authorised by this section.

(2) A family dispute resolution practitioner must disclose a communication if the practitioner reasonably believes the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory.

(3) A family dispute resolution practitioner may disclose a communication if consent to the disclosure is given by:

(a) if the person who made the communication is 18 or over—that person; or

(b) if the person who made the communication is a child under 18:

(i) each person who has parental responsibility (within the meaning of Part VII) for the child; or

(ii) a court.

(4) A family dispute resolution practitioner may disclose a communication if the practitioner reasonably believes that the disclosure is necessary for the purpose of:

(a) protecting a child from the risk of harm (whether physical or psychological); or

(b) preventing or lessening a serious and imminent threat to the life or health of a person; or

(c) reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person; or

(d) preventing or lessening a serious and imminent threat to the property of a person; or

(e) reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property; or

(f) if a lawyer independently represents a child's interests under an order under section 68L—assisting the lawyer to do so properly.

(5) A family dispute resolution practitioner may disclose a communication in order to provide information (other than personal information within the meaning of section 6 of the Privacy Act 1988) for research relevant to families.

(6) A family dispute resolution practitioner may disclose information necessary for the practitioner to give a certificate under subsection 60I(8).

(7) Evidence that would be inadmissible because of section 10J is not admissible merely because this section requires or authorises its disclosure.

Note: This means that the practitioner's evidence is inadmissible in court, even if subsection (2), (3), (4), (5) or (6) allows the practitioner to disclose it in other circumstances.

(8) In this section:
“communication” includes admission.

Family Law Act 1975—Section 10J

Admissibility of communications in family dispute resolution and in referrals from family dispute resolution

- (1) Evidence of anything said, or any admission made, by or in the company of:
- (a) a family dispute resolution practitioner conducting family dispute resolution; or
 - (b) a person (the professional) to whom a family dispute resolution practitioner refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person;
is not admissible:
 - (c) in any court (whether or not exercising federal jurisdiction); or
 - (d) in any proceedings before a person authorised to hear evidence (whether the person is authorised by a law of the Commonwealth, a State or a Territory, or by the consent of the parties).
- (2) Subsection (1) does not apply to:
- (a) an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse; or
 - (b) a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse;
- unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.
- (3) Subsection (1) does not apply to information necessary for the practitioner to give a certificate under subsection 60I(8).
- (4) A family dispute resolution practitioner who refers a person to a professional (within the meaning of paragraph (1)(b)) must inform the professional of the effect of this section.

6.12 To facilitate entry into the collaborative process, the Family Law Act should be amended so that information disclosed during, and reports or other documents produced as part of, the collaborative process cannot be used in any subsequent litigation. The level of protection offered to the collaborative process should be the same as that offered to family dispute resolution practitioners under sections 10H and 10J of the Family Law Act.

Recommendation 5

The *Family Law Act 1975* should be amended to provide confidentiality of communications in the collaborative process similar to the protections provided to communications made in family dispute resolution by sections 10H and 10J of the Act.

Collaborative contracts

Voluntariness of collaborative process

6.13 In Australia, the collaborative process begins when the parties and their lawyers voluntarily enter into a collaborative contract. Legal aid in Australia does not presently extend to participation in the collaborative process. Although there have been some trials of collaborative law in a legal aid context, no results are available to evaluate the feasibility of legally aid clients undertaking the collaborative law process. Given that there are costs associated with participating in collaborative practice and the importance of maintaining the voluntariness of the contract, Council's view is that there should be no compulsion to engage in collaborative practice.

Enforcement of collaborative contracts

6.14 Council is not aware of any attempts to enforce the provisions of a collaborative contract. It is not clear where a dispute arising from a collaborative contract might be litigated in the Australian context. Judicial officers exercising jurisdiction under the Family Law Act will have a better understanding of how the collaborative process works in family law, as well as the nature of the issues in dispute. Naturally, such disputes will arise in the context of family law litigation and will normally relate to whether certain evidence is admissible. It is appropriate that these issues based on enforcing the collaborative contract should be heard in the same court where the substantive issue is being heard.

Recommendation 6

The *Family Law Act 1975* should be amended to provide for courts exercising family law jurisdiction to have jurisdiction in relation to the enforcement of collaborative practice contracts concerning family law disputes.

7. Collaborative law and court processes

7.1 Once the compulsory dispute resolution provisions of the 2006 family law reforms have been completely phased in, all applicants seeking orders under Part VII of the FLA will be required to provide a certificate to the court to show that they have attempted family dispute resolution or that they fall within one of the exceptions. While it is preferable for parties to participate in the collaborative process before their matter goes to court, it is possible that some people who file an application in the court will not have heard about collaborative law and may be interested in it as an alternative to a judicial determination. Also, some people may decide after commencing proceedings that collaborative law is a more appropriate means of dispute resolution.

7.2 Council has therefore considered at what point in the existing court processes collaborative law should be presented as an option. It is important that the option be offered before the parties have incurred significant costs and before the adversarial approach becomes entrenched. The Family Court could suggest collaborative law as an option during the case assessment conference and the Federal Magistrates Court could do so at the first court date. This would allow time for the parties to attempt collaboration prior to them incurring significant legal costs in connection with the litigation.

7.3 In some matters, although parties may wish to collaborate, it may be necessary for proceedings to be initiated prior to the commencement of the collaborative process. This may be because of time limits imposed by the Family Law Act or because parties may need interim orders or for other reasons such as to protect the rights of the estate in the event of a party's death. Parties may also commence litigation prior to becoming aware of collaborative law and may wish to halt the litigation to attempt resolution through collaborative law. Council's view is that it would be appropriate for these matters to be managed so that, if the collaboration does not resolve the dispute, the parties do not lose priority in the court process.

7.4 More important than any changes to the existing process is that judges are openly supportive of collaborative law as an option, because members of the public and the legal profession will be influenced by their lead. This is a point made by the Hon Justice Ross Foote, a judge in Louisiana. His view is that parties need to hear from a judge that they should not be in court and that they should try to settle their dispute outside court instead.¹²⁶ Justice Foote established a collaborative law group in Louisiana and has been very active in promoting the process. In an interview, he suggests that there are a number of things judges can do to support the development of collaborative law practices:¹²⁷

- publicly validate the process
- persuade professionals to be agents for social change
- enforce the collaborative principles and provide protection to professionals, and

¹²⁶ J Jackson, 'Interview with the Hon W Ross Foote: collaboration from the bench' (2005) Special Judges Edition *The Collaborative Review: Journal of International Academy of Collaborative Professionals* 1, 2.

¹²⁷ *ibid.*

- provide preferential treatment for collaborative cases by reducing fees and including collaborative law in local court rules.

Recommendation 7

Courts exercising jurisdiction under the *Family Law Act 1975* should manage those cases where proceedings have been commenced and the parties wish to undertake a collaborative process, so that priority in the allocation of a hearing date is not lost if a complete resolution of the dispute is not achieved.

8. Collaborative law and the legal aid system

8.1 In the terms of reference, the Attorney-General has asked Council to give particular consideration to what, if any, changes need to be made to the legal aid system to promote collaborative law.

Legal aid in Australia

8.2 Broadly speaking, legal aid in Australia is delivered by State and Territory legal aid commissions. Each State and Territory has one legal aid commission, which functions more or less as a large legal firm and services a particular clientele from offices in a variety of locations. The individual State and Territory commissions are collectively represented by National Legal Aid (NLA). Funding for Commonwealth law matters, including family law, is provided by the Commonwealth Government. This arrangement is regulated by agreements between the Commonwealth and the States and Territories. When considering applications for legal aid, the commissions apply a test known colloquially as the ‘means and merits test’. This test is set out in the Legal Aid Guidelines of each State and Territory. The test looks at an applicant’s income and assets, as well as the details of the applicant’s legal problem. On the basis of that examination the commissions decide whether it is reasonable in the circumstances to provide funding.

8.3 The legal aid commissions are already focused on non-adversarial means of dispute resolution. Guideline 2 of the Commonwealth Legal Aid Priorities states that commissions ‘must give consideration to resolving disputes in family law matters that are within this Part 2¹²⁸ through the use of Primary Dispute Resolution Services’.¹²⁹ These services include conferencing programs which have been set up in most legal aid commissions around Australia. These are discussed at paragraph 8.17.

8.4 Collaborative practice in family law also offers a non-adversarial approach to family dispute resolution focused exclusively on settlement. Because of this, the collaborative process would fit well with the requirement set out in Guideline 2 and could be another option offered to legal aid clients. NLA has said that it ‘welcomes the concept of collaborative law as a contribution to the range of non-adversarial family law services including mediation, conciliation and arbitration’.¹³⁰

8.5 However, NLA has also identified a number of potential problems with integrating collaborative practice into Australia’s legal aid system. These difficulties are outlined in the following paragraphs.

¹²⁸ Part 2 describes the appropriateness of participation in PDR services.

¹²⁹ Attorney-General’s Department, *Legal aid*, Canberra, 2006, viewed 27 November 2006, <http://www.ag.gov.au/www/agd/agd.nsf/Page/Legal_aid>.

¹³⁰ National Legal Aid, *Collaborative law and the legal aid system*, submission to the Family Law Council, 7 July 2006, p. 7.

The exclusion clause

8.6 Collaborative law raises conflicts of interest issues that are difficult to overcome in a legal aid context. This is primarily because the lawyers named in a collaborative contract are excluded from representing their clients if the collaborative process fails and the matter proceeds to court. If the parties are legally aided, this exclusion will apply to all of the lawyers in the relevant legal aid commission. In the normal course of events, the commission would contract a private lawyer to represent the parties in litigation. However, in Australia, the pool of private practitioners who are willing to take on cases at legal aid rates is limited.¹³¹

8.7 If the parties are from a rural or remote area it may not be possible to find new representation. This problem does not arise in the conferencing program which is currently used in most legal aid commissions. The conferencing program is discussed below.

8.8 In a pilot program run in Manitoba, Canada,¹³² this problem seems to have been overcome because the province has more than one legal aid office to which clients can be referred in the event that the collaborative process breaks down. Australia also has multiple legal aid offices, but within each State or Territory there is only one commission and the various regional offices are not administratively separate. The Manitoba solution is not, therefore, available in the Australian context.

8.9 Another possibility for collaborative practice in legal aid is to look at adapting the cooperative law model¹³³ which is used in some commercial disputes particularly those involving in house counsel. This model uses the same principles as collaborative law but does not include the disqualification clause.

8.10 Alternatively, in situations of conflict, Chinese walls could be established within commissions. Whilst this is avoided in private firms, it may work in legal aid commissions.

Costs

8.11 Collaborative practice also presents funding issues for legal aid commissions. The requirement that parties retain new legal representatives and experts if the collaborative process breaks down could add significantly to the costs of legal aid commission programs.¹³⁴ In addition, parties who participate in the collaborative process but cannot reach a settlement may find that the funding cap for their matter has already been reached and they are unable to seek further assistance from legal aid.

8.12 The disqualification clause in collaborative contracts is designed to act as a disincentive for parties to withdraw from the collaborative process. Some collaborative contracts also state that a party who terminates the collaborative process is liable to pay the legal costs of the other party. However, if one or both parties are legally aided, the financial incentive to resolve the issues in the four-way meetings is lost because the

¹³¹ *ibid.*, p. 6.

¹³² Discussed in detail at paragraph 8.22.

¹³³ John Lande and Gregg Herman, 'Fitting the forum to the family fuss: choosing mediation, collaborative law or cooperative law for negotiating divorce cases' (April 2004) 42(2) *Family Court Review* 284.

¹³⁴ National Legal Aid, p. 7.

lawyers' and experts' costs are paid by the relevant legal aid commission. Also, NLA has indicated that:

... if only one party was legally aided, and the aided client withdrew from collaboration, the Commissions would not be in a position to pay the costs of the non-legally aided party. A client who has been in receipt of legal aid will have passed the means test and is therefore extremely unlikely to have the capacity to pay costs.¹³⁵

However, it should be noted that not all collaborative contracts contain penalty costs provisions and this issue could be dealt with in the contract.

8.13 The penalty costs issue could be addressed to some extent by denying parties, whose withdrawal from the collaborative process is unreasonable, the right to seek legal aid for subsequent litigation.¹³⁶ However, this suggestion raises issues of equity which cannot be ignored.¹³⁷ Also, if the withdrawal is considered reasonable the Commission will have to incur the additional costs associated with assessing a new application and provide funding for new lawyers and experts. Commonwealth funding may need to be increased to cover the cost of collaborative cases that proceed to court. It is also possible that the high settlement rate in collaborative law matters would offset any increase in costs to legal aid commissions, making it cost neutral.

Difficult cases

8.14 A high proportion of legal aid cases involve allegations of family violence. Other issues frequently experienced by legal aid clients include poor literacy, disabilities and substance abuse. Often more than one of these issues arises in a single matter. In these cases, one advantage of collaborative law is that appropriate professionals may be utilised to assist the parties to actively participate in decision making. Further, the parties may benefit from the positive role modelling in communication provided by lawyers and other experts during the collaborative process.

8.15 NLA recognises that collaborative practice may be an effective method of dispute resolution even in difficult cases. However, it has expressed concern that collaborative lawyers may not be equipped to deal with the issues that commonly face legally-aided clients. NLA has also observed that the draft *Guidelines for Collaborative Practice in Family Law*¹³⁸ do not provide specific information to lawyers about how to screen clients for their suitability for the collaborative process.¹³⁹

8.16 It may be possible to address the screening issue by providing more detailed information on assessing and managing difficult cases in the draft Guidelines.¹⁴⁰ Collaborative practice groups could also encourage members to undertake additional

¹³⁵ *ibid.*, p. 5.

¹³⁶ This is how legal aid commissions currently deal with the problem of unreasonable withdrawals from PDR services.

¹³⁷ National Legal Aid, p. 7.

¹³⁸ See Appendix A.

¹³⁹ In contrast, the Legal Aid Guidelines state specifically that participation in PDR Services is usually inappropriate where (a) there are allegations that a child of the parties is or was a victim of child, (b) the safety of one of the parties is in question, and/or (c) the behaviour of one party means that it is unlikely that the other party will be able to negotiate effectively.

¹⁴⁰ National Legal Aid, p. 4.

training to develop the skills necessary to deal with high-conflict cases and cases where the parties have a range of problems that extend beyond their family law dispute.

Legal aid primary dispute resolution conferencing

8.17 Primary dispute resolution (PDR) conferences conducted by legal aid commissions share many of the positive characteristics of four-way meetings in collaborative practice, including ‘identifying interests, generating options, encouraging clients to see the situation from the other party’s point of view and reality-testing a range of possible outcomes’.¹⁴¹ In most cases, each of the parties is represented by a lawyer and a neutral chairperson is appointed to oversee the negotiations. If the parties cannot reach agreement, the chairperson must report to the commission on whether the parties made a genuine attempt to resolve their dispute, and this report will determine whether parties can receive any additional funding from legal aid. This creates the sort of financial imperative for legally-aided clients to resolve their dispute during negotiations that is not dissimilar to that imposed if a collaborative process is used.¹⁴² PDR conferences are less costly than collaborative practice. This is largely because the legal aid programs involve one preparatory interview with a client followed by a single PDR conference, whereas the collaborative process can involve multiple interviews and four-way meetings.

8.18 NLA has expressed some doubts that a collaborative process with its expense and conflict problems could be easily adopted in the legal aid context.

Entering into the collaborative contract

8.19 Nicola Davies from Legal Aid Queensland has commented that ‘there is also an issue as to whether solicitors employed by Legal Aid, as public servants, are able to enter into a collaborative law contract’.¹⁴³ It may be possible for the particular lawyer to enter into the contract as an agent of the relevant commission. This issue may be addressed by the working group suggested in Recommendation 1 and monitored by NLA as suggested in Recommendation 8 below.

Overseas pilot programs

8.20 Council is aware of two pilot schemes in which collaborative law has been trialled in a legal aid setting. The first trial was being conducted by the legal aid authorities in the Canadian province of Manitoba and the second by the United Kingdom Legal Services Commission.

¹⁴¹ *ibid.*, p. 3.

¹⁴² National Legal Aid, p. 7.

¹⁴³ Nicola Davies, in a letter to Council, 2 August 2006.

Manitoba

8.21 Legal Aid Manitoba began its trial of collaborative law in April 2004. The project ran for a period of two years, using funding provided by the Canadian Federal Government. The pilot included cases where both parties were legally aided and cases where only one party was legally aided. In the latter cases, the consent of both parties was required. If both parties were in receipt of legal aid funding, they were referred to two separate legal aid offices. Council understands from Heidi Yates that Mr Loney from Legal Aid Manitoba has said of the program that:

[p]ersonally, I have heard from our judiciary and litigation counsel that our program alone has freed up court dates. Our program takes approximately 28% of all legal aid domestic cases out of the courts ... And we are doing that with only four full-time collaborative lawyers and approximately four private bar lawyers who accept Legal aid files.¹⁴⁴

United Kingdom

8.22 The Legal Services Commission coordinates the legal aid services for England and Wales. The commission commenced a small pilot in September 2005 to establish a delivery model of collaborative law for legally-aided clients. The pilot was run in Nottingham and Mansfield for six months.¹⁴⁵

8.23 The pilot had links with mediation and all clients were able to access publicly funded mediation if there was an impasse in the negotiations. The commission asked mediators to consider if they would also like to be 'family consultants' (equivalent of divorce coaches as they are known in the USA). The family consultant helps the individuals with practical issues, such as finances.¹⁴⁶

8.24 Council has been unable to ascertain the outcome of these trials. However, if the trials prove successful they may provide a guide for the use of collaborative practice in the Australian legal aid system.

Concluding comments

8.25 The problems outlined above suggest that, at present, the PDR conferencing method is more appropriate than the collaborative practice model, which cannot be easily incorporated into Australia's legal aid system. The major problems identified are the difficulty in locating alternative legal representatives and experts in the event that collaboration fails, and the increased costs to legal aid commissions for matters which do not settle under the collaborative process. Submissions to Council on the draft *Guidelines for Collaborative Practice in Family Law* indicate that, if the collaborative process is to be used by legal aid commissions, there would need to be an increase in Commonwealth funding. This would address the second problem.

¹⁴⁴Heidi Yates (Manager, Legal Aid Commission (ACT)), personal communication with Council, 10 May 2006.

¹⁴⁵Fiona Dagenais, 'Mediation and collaborative law: impact on family mediators', *Focus 48*, 2005, 15 available at Legal Services Commission, *Focus Newsletter*, London, 2004, viewed 27 November 2004, <http://www.legalservices.gov.uk/civil/focus/focus_newsletter.asp>.

¹⁴⁶ *ibid.*

8.26 In addition, some modification of the collaborative practice model would need to be made to accommodate the structure of the Australian legal aid commissions. After the UK and Manitoba legal aid trials have been concluded, it may be useful to carry out an assessment of dispute resolution methods used by Australia's legal aid commissions. This could be conducted by the working group proposed in Recommendation 1. These developments should also be monitored by NLA as proposed in Recommendation 8 below, with a view to adapting the collaborative practice model to the Australian legal aid context. One model which could be further examined is the cooperative law model referred to in paragraph 8.9.

Recommendation 8

National Legal Aid should monitor developments in collaborative practice.

9. Limitations of collaborative practice

High-conflict cases

9.1 Collaborative law may not be suitable for all family law disputes.¹⁴⁷ In particular, parties who feel extreme hostility towards one another or have particularly poor communication skills are unlikely to collaborate successfully. Similarly, collaborative law is generally considered inappropriate in cases that involve incidents of family violence, mental illness, extreme power imbalances or substance abuse.¹⁴⁸ However, some anecdotal evidence suggests that collaborative practice can work even in high-conflict cases.¹⁴⁹

9.2 Collaborative practice is only one of many dispute resolution options available to separating couples in Australia. It is important that lawyers, counsellors, Family Relationship Centres and other community service providers assess parties to a family dispute before recommending collaborative law or referring them to a collaborative lawyer. Provided that an effective screening process is put in place, collaborative practice may be a valuable addition to the range of extrajudicial options currently available. In addition, Gamache suggests that lawyers consider a multidisciplinary approach if they have clients whose emotional, communication or relationship issues would otherwise impede their ability to participate constructively in the collaborative process.¹⁵⁰

Cost of collaborative practice

9.3 There is no empirical evidence that collaborative practice is less costly or time consuming than litigation. Collaborative law requires each party to retain a lawyer, who will meet with their client on a one-to-one basis, as well as arrange and attend as many four-way meetings as are necessary to resolve the dispute. There will also be costs associated with preparations and correspondence that the lawyers must engage in, although the amount of correspondence is significantly reduced by the four-way meeting structure. At this stage in the development of collaborative practice in Australia, legal aid is not available for collaboration.

9.4 However, a great deal of anecdotal evidence suggests that collaborative practice is both quicker and cheaper than litigation. Collaborative lawyers in the United States of America have estimated that litigation costs parties to a family dispute approximately two or three times as much as collaborative practice. In addition, the time spent collaborating has been estimated at between three and six months, in contrast to the nine to twelve months that it takes to finalise a family dispute in an American court.

¹⁴⁷ Gamache, *Louisiana Law Review* 1455, 1480.

¹⁴⁸ *ibid.*

¹⁴⁹ Gesini and Gale, *Solving it together*.

¹⁵⁰ Gamache, *Louisiana Law Review* 1455, 1480.

Lack of enforceable time limits

9.5 The collaborative process is not subject to normal judicial time limits since it is based on the collaborative contract between the parties. The Macfarlane study found that the lack of court-imposed time limits means that collaborative lawyers and their clients must devise alternative mechanisms to avoid the risk of unreasonable delays by one or other party.¹⁵¹ There is also a risk that a person may engage in the collaborative process simply to increase the financial burden of the dispute resolution process on the other party.¹⁵²

9.6 The issue of delay can be addressed through the collaborative contract. Prudent drafters of such contracts will include time limits which apply to each stage of the process with appropriate penalties if the time limits are not respected.

9.7 The problem of abuse of the collaborative process has costs implications for both parties, so it is unlikely that the situation will arise often. Also, most collaborative contracts require each party to engage in the process in good faith, and provide that a failure to do so will make that party liable for the other party's legal costs. This too is a matter which can be addressed by careful drafting of the collaborative contract.

Ethical concerns

Conflicts of interest

9.8 In Australia, lawyers have a general duty to represent their clients 'free of the influence of any interest which may conflict with their client's best interests'.¹⁵³ The literature on this issue indicates that an ethical concern may arise as a result of the requirement to withdraw from representing the client placed on a collaborative lawyer under most collaborative contracts.¹⁵⁴ That is, the structure and objectives of the collaborative law process may in itself restrain a lawyer from exploring litigation as an option for resolving a client's dispute and while the client will have consented to the process, the ethical issue will arise where a settlement may not necessarily achieve an outcome that is in the best interests of the client and if the settlement is not accepted the collaborative lawyer will be required to cease representing the client. This may create a divergence of interests which does not arise in other settlement oriented options.

¹⁵¹ Macfarlane, Research Report, p. xiv.

¹⁵² House of Representatives Standing Committee, p. 79.

¹⁵³ *Professional Conduct Rules 2006 (ACT)*, preamble. A similar rule can be found in the professional rules for each State and Territory.

¹⁵⁴ J Isaacs, 'A new way to avoid the courtroom: the ethical implications surrounding collaborative law' (2005) *Georgetown Journal of Legal Ethics*, accessed 10 October 2006 at FindArticles, 2006, <http://www.findarticles.com/p/articles/mi_qa3975/is_200507/ai_n14684169>; K Poole, 'Collaborative law changing traditional divorce process: new method a non-adversarial adventure', (2004) *Michigan Lawyers Weekly*, accessed 10 October 2006, <<http://www.lawyersweeklyusa.com/reprints/cli.htm>>.

9.9 Although the signing of a collaborative contract is a good indication that the parties are well informed of the collaborative process and consent to the limitations of their lawyer's representation, if, however, a dispute arises between the client and their lawyer, the lawyer will need to demonstrate that a party whose consent is in question gave that consent based on an understanding of all the relevant considerations. In other words, it might be wise for collaborative lawyers to prepare a separate document in order to obtain the consent of collaborative law clients.

9.10 Even if collaborative lawyers take additional steps to ensure that their clients give informed consent to the collaborative process, it could still prove problematic if a client has a different understanding of what each person's role is within the collaborative process. This and other problems raised in this section are matters which will need to be teased out in discussions within the profession. Recommendation 2 will provide a forum for those discussions.

Bargaining power in the collaborative process

9.11 Proponents of collaborative practice argue that the collaborative process addresses the problem of differences in bargaining power because each party retains a collaborative lawyer. However, even with the technical advice and moral support offered by a lawyer, a particularly domineering or manipulative party may still be able to exert influence over their former spouse during four-way meetings.

Training and experience

9.12 In Australia, collaborative practice is still new and lawyers are not required to meet any particular accreditation standards before they can promote collaborative services. As a result, it is possible that one party could inadvertently put him/herself at a disadvantage simply by retaining a lawyer with limited (or no) training or experience in collaborative practice. The development of guidelines for collaborative practice and accreditation should serve to address this issue.

Gender bias

9.13 According to Penelope Bryan, 'the standards of living of many women and their dependent children decline precipitously at divorce'.¹⁵⁵ Women experience difficulty securing favourable outcomes in divorce disputes for a number of reasons. These include limited access to competent legal representation and a tendency to accept an unattractive settlement option in order to preserve the relationship with their former spouse, secure custody of their children and/or to reduce the negative impacts that the divorce process is having on the children.¹⁵⁶

¹⁵⁵ P E Bryan, 'Collaborative divorce: meaningful reform or another quick fix?' (1999) 5(4) *Psychology, Public Policy, and Law* 1001, 1003.

¹⁵⁶ *ibid.*

9.14 Bryan argues that collaborative law focuses on the dispute resolution process, while failing to address the problem of inequities in the substantive outcomes of family disputes.¹⁵⁷ Collaborative law is promoted as a means of resolving family disputes in a cooperative and conciliatory manner that places emphasis on the preservation of relationships. It also allows parties to take an active role in negotiations and to devise settlement options without limiting negotiations to what a court might order. According to Bryan, this is problematic because it reinforces in the minds of women the idea that their financial interests must take a back seat to other, emotional and relationship considerations.

Collaborative contract

9.15 The disqualification clause in a collaborative contract exerts pressure on parties not to withdraw from the process. This is a positive attribute in the sense that parties cannot use the threat of litigation to improve their negotiating position. However, there is a risk that parties may be persuaded to continue the collaborative process even if their interests are being unreasonably compromised or ignored.¹⁵⁸ They may not be in a financial position to retain a new lawyer to represent them in court. In addition, they may be presented with strong arguments against withdrawal from their collaborative lawyer, whose aim is to achieve settlement.¹⁵⁹

Practical barriers to collaborative law

Physical distance between the parties

9.16 Collaborative practice poses problems for parties who do not live near one another. Parties who must travel some distance in order to meet face-to-face may have trouble arranging a convenient time and place to hold four-way meetings. This is particularly likely given that the two lawyers as well as the two parties must be able to attend each meeting. The time it takes to travel to and from the four-way meetings will also add to the cost of engaging in the collaborative process.

Limited pool of lawyers in regional areas

9.17 The collaborative process also presents difficulties for people who live in areas where the pool of lawyers with expertise in family disputes is limited. In remote parts of Australia it is unlikely that both parties would be able to find collaborative lawyers. However, even if they are able to access the collaborative process, they must consider what might happen if it breaks down and their lawyers have to withdraw from the case. If this situation arises it may be impossible for the parties to find alternative lawyers who are available to litigate the matter.

Concluding comments

9.18 The issues raised in this chapter are all matters which need further careful consideration. Council's view is that the collaborative committee proposed in Recommendation 1 is the appropriate forum for these issues to be addressed.

¹⁵⁷ *ibid.*

¹⁵⁸ Lande and Herman, *Family Court Review* 280, 283.

¹⁵⁹ *ibid.*

10. Conclusions

10.1 Notwithstanding matters raised in the previous chapter, Council believes collaborative practice to be a valuable addition to the range of dispute resolution options available, particularly in relation to property matters.

10.2 Collaborative practitioners have been practising in the United States and Canada for at least 15 years and there seems to be an acceptance of the practice in the judiciaries of those countries. In Australia there is a growing body of enthusiastic practitioners, together with anecdotal reports of high client satisfaction. More research should be done to evaluate collaborative law as a dispute resolution option.

10.3 In the legal aid context, aspects of the collaborative model are already in place in the legal aid conferencing program although this program has developed independently of collaborative law. At present it does not appear to Council that a fully articulated collaborative model can be applied in the Australian legal aid context. However, there may be models such as co operative law which can be adapted to the Australian legal aid environment. Recent trials in Canada and the United Kingdom may also provide a suitable model. For these reasons Council has recommended that NLA monitor developments in collaborative practice.

10.4 The collaborative practice model can be adapted to the individual requirements of parties in dispute. Independent experts including financial, relationship and child experts can be brought into the process in accordance with parties' requirements and means. This aspect of collaborative practice will make it an attractive option in many cases where parties have the means to engage such experts. Where parties have been able to access such services it is appropriate in Council's view that this be taken into consideration in the event that collaboration fails and parties wish to commence litigation. Recommendation 3 is aimed at avoiding the need for parties to engage for a second time with relationship or child experts. However, Council has left open the possibility that in an individual case a family dispute resolution practitioner may consider that parties would benefit from engaging further with relationship-based processes.

10.5 In cases where the collaborative process works well it provides significant advantages to litigation. In common with other dispute resolution models such as mediation, it offers parties the opportunity to manage both the process and outcome of dispute resolution. It also offers parties the support of traditional legal advocacy, with the difference that legal advisers focus exclusively on a negotiated outcome.

10.6 Collaborative practice fits well with the new direction in family law marked by the 2006 family law reforms. In common with those reforms it focuses on parties reaching their own solutions in an atmosphere which avoids the negative consequences of the adversarial court system. There could be some synergy between the Family Relationship Centres and lawyers who practise collaboratively, and Council anticipates that there will be cross-referrals from and to Family Relationship Centres. The legislative changes proposed in recommendations 3, 5, 6 and 7 are aimed at placing collaborative practice on an equal footing with other non-litigious dispute resolution processes.

10.7 Council considers that, in some cases, collaborative practice will provide parties in dispute with a more satisfying and cost-effective method of resolving their dispute than is provided by litigation.

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Australian legislation

Evidence Act 1995 (Cth)

Family Law Act 1975 (Cth)

Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)

United States statutes

North Carolina General Statute

Texas Statutes: Family Code

Appendix A: Draft guidelines for collaborative practice in family law

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Introduction

The draft Guidelines are based on a model of collaborative law which may be described as the Tesler Model. This is the model broadly adopted by the National Centre of Collaborative Law (NCCL), Queensland Collaborative Law and the Law Institute of Victoria's Collaborative Law Committee. NCCL has published a handbook titled *The Practice of Collaborative Law*. The materials of that handbook were adapted with permission from materials produced by Palliser Conflict Resolution Inc, a collaborative law training group based in Medicine Hat, Alberta, Canada. The Law Institute of Victoria has published *Protocols of practice for collaborative family lawyers*, which is adapted from *Protocols of practice for lawyers*¹⁶⁰ published by the Texas Collaborative Law Council. The Family Law Council's Collaborative Law Working Group (Working Group) obtained materials published by Sherri Goren Slovin JD, a collaborative law practitioner from Cincinnati, USA. The Working Group has also considered the *Minimum standards for a collaborative basic training*¹⁶¹ published by the International Academy of Collaborative Professionals (IACP) and *Ethical standards for collaborative practitioners*¹⁶² published by the International Academy of Collaborative Professionals (IACP). Finally, the Working Group reviewed guidelines¹⁶³ published by the Collaborative Law Institute of Georgia, USA and the *Code of practice for Resolution members*¹⁶⁴ published by Resolution, which is a dispute resolution organisation based in the United Kingdom.

Part 1 of the draft Guidelines is a guide to the principles of collaborative practice. Part 2 outlines the role and responsibilities of the collaborative lawyer and Part 3 provides suggestions for the conduct of a case using the collaborative process. The draft Guidelines are intended to form the focus of discussion on collaborative practice with a view to developing agreed collaborative practice standards for family lawyers.

Lawyers and other interested groups were consulted in producing these draft Guidelines. The consultation version of the draft Guidelines was distributed to more than 200 Government and non-Government agencies and organisations for comment. Council received 28 submissions. Although almost all the submissions expressed a positive view of collaborative practice in family law it was clear from the responses generally that the development of collaborative practice is at a point where best practice is not yet agreed. Council's view is that there should be further discussion on the draft Guidelines. Recommendation 1 of this report seeks to provide a forum for this discussion.

Some submissions were very detailed. The Working Group has considered all of the submissions. Some of the comments made on the preliminary version of the draft Guidelines such as those provided by the Family Law Section of the Law Council of

¹⁶⁰ Texas Collaborative Law Council Inc, *Protocols of practice for collaborative lawyers*, Texas, 2005, viewed 7 December 2006, <http://www.collaborativelaw.us/articles/TCLC_Protocols.pdf>.

¹⁶¹ International Academy of Collaborative Professionals, *Minimum standards for a collaborative basic training*, <http://www.collaborativepractice.com/articles/IACP_Training_Standards.pdf>.

¹⁶² International Academy of Collaborative Professionals, *Ethical standards for collaborative practitioners*, <<http://www.collaborativepractice.com/articles/EthicsStandardsfinal.pdf>>.

¹⁶³ Collaborative Law Institute of Georgia, *Guidelines for participation*, Georgia, viewed 7 December 2006, <<http://www.collaborativepracticega.com/guidelines.html>>.

¹⁶⁴ Resolution, *Code of practice for Resolution members*, Kent, 2006, viewed 7 December 2006, <<http://www.resolution.org.uk/index.php?id=12>>.

Australia in particular have been incorporated into the current draft guidelines. Other submissions such as such as comments made by the Department of Families, Community Services and Indigenous Affairs (FaCSIA) suggesting guidance on how to focus clients on their children's needs and how client and children's interests should be balanced¹⁶⁵ require more discussion and have been left to the working party referred to in Recommendation 1. The Working Group would like to express its appreciation for the time and effort devoted to developing valuable commentaries and suggestions on the draft.

¹⁶⁵ FaCSIA submission 3 July 2006.

Acknowledgments

The draft Guidelines were written by the following people:

Members of the Family Law Council Collaborative Law Working Group

- Ms Susan Purdon, *Convenor*
- Ms Nicola Davies
- Mr Kym Duggan
- Federal Magistrate Christine Mead
- Justice Garry Watts

Family Law Council Consultants

- Mr Stephen Bourke, National Centre of Collaborative Law
- Mr Phil Davey, National Centre of Collaborative Law
- Ms Julie Dobinson, National Centre of Collaborative Law
- Ms Juliette Ford, National Centre of Collaborative Law
- Federal Magistrate Norah Hartnett, National Alternative Dispute Resolution Advisory Council
- Ms Kathryn Heuer, National Centre of Collaborative Law
- Professor Tania Sourdin, National Alternative Dispute Resolution Advisory Council

Members of the Family Law Council Secretariat

- Ms Anita Mackay
- Ms Rosa Saladino
- Ms Roweena Singh
- Ms Ingrid Fusting
- Ms Jessica Mackay
- Ms Dianne Bramich
- Mr Luke Allard

Terms of Reference

These draft Guidelines have been prepared in response to paragraph 4 of the Attorney-General's request:

That the Family Law Council, in consultation with the Family Law Section of the Law Council of Australia and the National Centre of Collaborative Law, advise how the Government, in partnership with the legal profession, can assist in promoting collaborative law in Australia. In particular consideration should be given to the following:

1. What, if any, legislative changes need to be made to support the practice of collaborative law;
2. What, if any, changes to Court processes need to be made to assist collaborative law;

3. What, if any, changes need to be made to the Legal aid system to promote collaborative law; and
4. Whether it is desirable to have national guidelines for the practice of collaborative law and, if so, how would these best be developed?

Part 1: Principles for collaborative practice in family law

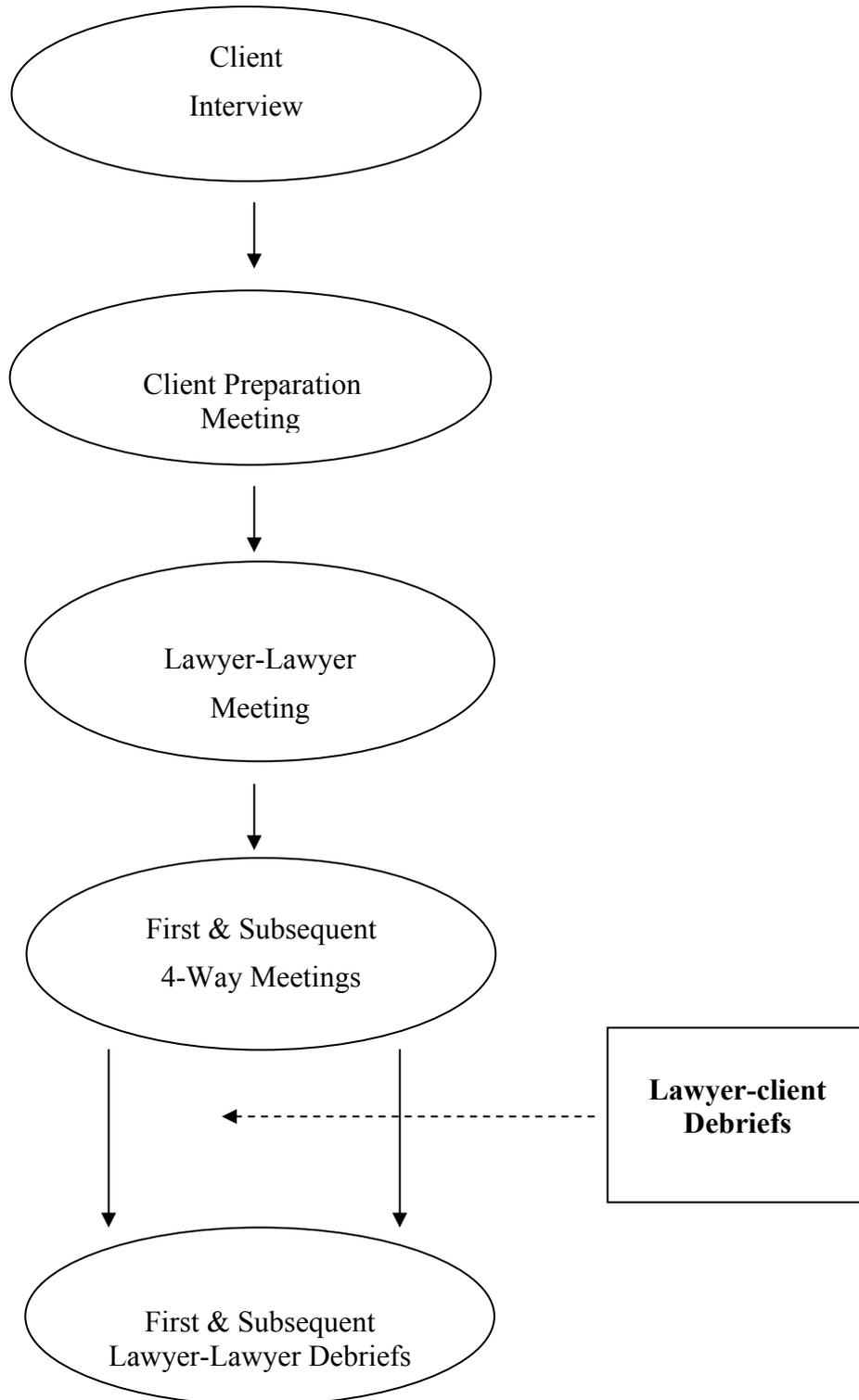
Collaborative practice is a non-adversarial process in which clients, lawyers and advisers work cooperatively to negotiate a fair settlement without court intervention. The lawyers assist the clients in a process of shared problem solving on the basis of clients' interests and goals rather than positions (legal or otherwise). Whilst the clients, rather than the lawyers, are ultimately responsible for the outcome of the collaboration, the lawyers have an overriding duty to ensure and maintain the integrity of the collaborative process, including the requirements of honesty, disclosure and good faith.

Collaborative practice in family law is characterised by the following features:

1. An interest-based negotiation approach to the resolution of family disputes where the parties and their lawyers have signed a contract agreeing that the dispute shall be resolved without the commencement of litigation or the threat of litigation. In the event that the matter is not resolved the parties' lawyers and their firms cannot act for their client in any subsequent litigation.
2. A recognition by family lawyers that litigation may be an option of last resort and of all the options available to separating couples can be a costly way, both financially and emotionally, to resolve disputes.
3. A recognition by family lawyers that advice provided to clients setting out the different options for resolving a dispute should be directed towards a fair process and just outcomes for both parties and in certain cases the process will be of equal importance to the outcome.
4. The paramount importance of promoting and encouraging a communication model for the separating couple which is constructive, having regard to long-term family relationships.
5. The narrowing of the issues in dispute founded upon interest-based negotiation and the effective and timely resolution of the dispute.
6. Ensuring that costs are not unreasonably incurred.

1.1 Steps in the collaborative process

The steps in collaboration may be summarised in the following diagram.



1.2 Providing information to clients

In collaborative practice the provision of advice in relation to the various processes available for the resolution of disputes is as important as advice on the substantive issues. The provision of advice about process should enable the client to evaluate each of the options in terms of:

- the process
- the role of the lawyer
- the role of experts
- time
- the effect on children and family relationships
- control over the decision making process, and
- relative costs.

This information should be provided to the client at the time of the initial consultation.

If the client expresses an interest in a collaborative process as an option to resolve their matter, the lawyer should explain to the client in greater detail how the collaborative process works, including the difference between interest-based negotiations and positional bargaining (see Section 1.11). The use of published materials, in print or electronic form, is recommended.

1.3 Assessing the suitability of a matter for collaborative law

Whilst collaborative law is suitable for a wide range of matters, it may not be appropriate for some matters. It is not possible or indeed desirable to be prescriptive about suitability of matters for collaborative practice. However, the following factors should be taken into account when the lawyer is assessing the suitability of each matter:

- whether a client's objectives are consistent with the principles of collaborative practice
- the bona fides of the client; for example, whether the client is seeking to use collaborative practice to gain an advantage, however slight, in anticipated litigation
- problematic factors, including mental health issues, substance abuse and family violence
- the lawyers' ability and preparedness to handle the matter, and
- the availability of outside resources, including experts and allied professionals, to supplement the lawyers' skills in resolving the dispute.

Some clients will struggle with any process. The lawyer should consider whether the collaborative process can be modified so that it is safe and meets the client's concerns, giving the collaborative process the best likelihood of success. It may be necessary for lawyers to undertake further training and to put in place specific processes to assess at-risk clients.

1.4 Relationship with client

In collaborative practice as in more traditional practice the relationship between the lawyer and the client is a relationship of trust. To establish and maintain this trust the lawyer should:

- be open, honest and transparent in all dealings with the client
- commit the time and resources necessary to gain a clear understanding of the client's interests and goals, and
- focus on the client's needs in advising about substance and process.

In representing and advising the client in pursuance of the client's stated interests and goals the lawyer should, as in general practice:

- inform the client about the law and its application to the client's matter
- preserve confidential communications
- assist the client in the communications and negotiations with the other participants in the collaborative process
- encourage the client to see the advantages of a constructive and non-adversarial approach as a way of resolving differences
- encourage the search for solutions which meet each party's interests, and
- encourage the client to be open and honest in all aspects of their matter.

1.5 A lawyer's obligation to collaborative practice

A lawyer must only continue to represent a client so long as the lawyer believes that the client is acting in a manner consistent with the principles and objectives of collaborative practice. The lawyer in collaborative practice recognises that the other participants in the collaborative process are relying on the lawyer in this respect. Recognising that it is not always possible, with absolute certainty, to determine whether a client is acting in a manner inconsistent with the principles and objectives of the collaborative process, the lawyer nonetheless has an obligation to terminate the collaborative process if he or she believes on reasonable grounds that the client is acting in bad faith.

Honesty and full disclosure of relevant information is critical to the successful outcome of the collaborative process. The lawyer should ensure, so far as possible, that the client complies with the requirement of providing full and frank disclosure of all relevant or requested documents and information to the appropriate participants in the collaborative process.

1.6 Correction of mistakes

The parties to the collaborative process must not take advantage of mistakes, errors of fact or of law, miscalculations, or other inconsistencies. The lawyer is obliged to disclose such errors as soon as they become known and must seek to have them corrected.

1.7 Maintaining the collaborative process

It is critical to maintaining the collaborative process that the lawyers work collaboratively with each other, in particular:

- Deal respectfully with each participant in the collaborative process.
- Share problem solving using interest-based negotiations rather than positional bargaining.
- Engage in open and direct communication between the parties.
- Communicate directly about any perceived non-collaborative behaviour with the other participants and attempt to remedy problems in a constructive manner.
- Exercise patience at all times.
- Avoid the use of pressure, threats or deadlines.
- Avoid offensive or provocative conduct, such as cross-examination, and promptly remind each other that such behaviour is destructive to the process.
- Avoid apportionment of blame and use of inflammatory and judgmental language.
- Avoid surprises.
- Adhere to agendas.
- Avoid unilateral actions.
- Avoid unsolicited legal opinions in joint meetings.
- Model for their clients the ability to hear and understand (active listening) what is important to the other party so that the interests of both parties are promoted.
- Represent their client's interests whilst acknowledging the other party's interests
- Bring stability and reason to emotionally charged situations.
- Use conciliatory language in speaking and writing while advocating the client's interests.

1.8 Preparation

The lawyer should strive at all times to be courteous, punctual and prepared for meetings. Sufficient time should be allocated to each meeting, and meetings should be conducted free from outside distraction or interference. These qualities are important in all legal practice.

1.9 Communications

The lawyer should encourage efficient communications between the parties, lawyers and other participants to schedule meetings, share documents and relay procedural information.

1.10 Professional fees

The agenda for the first meeting should address each lawyers' fees and, in particular, any imbalance between the parties in their capacity to pay professional fees. So far as practical, the lawyer for each party should ensure that one party is not at a disadvantage in relation to the other regarding the payment of professional fees.

When a decision is made to engage an expert, the payment of their fees should be addressed. The status of fees is a legitimate agenda item at any meeting.

1.11 Interest-based negotiations

Overview

Fundamental to collaborative practice is the use of interest-based negotiations. This is about cooperation, not confrontation. Interest-based negotiations encourage shared problem solving by lawyers and their clients where each party tries to understand and accommodate the goals and interests of the other. Each party is responsible for information gathering, development of settlement options, evaluation of the options and negotiating settlement.

Interest-based negotiations

Interest-based negotiation, also called ‘principled bargaining’ or ‘negotiating on the merits’, seeks to ‘meet the legitimate interests of each side to the extent possible, resolves conflicting interests fairly, is durable, and takes community interests into account’.¹⁶⁶ The defining features of the interest-based negotiation model are set out below:

- People issues should be dealt with separately from substantive issues.
- Parties in negotiation should focus not on their positions but on the needs and interests which underlie those positions. While a position is the outcome which a party wants, or thinks they want, an interest is the reason why that outcome is desired.
- Parties in negotiation should consider a wide range of options before coming to a settlement and should attempt to select those settlement options which satisfy their mutual interests.
- Negotiations should occur independently of the subjective wills of the parties and, wherever possible, in terms of objective criteria.¹⁶⁷

The lawyer prepares the client for each stage of the process, helps the client communicate effectively with the other party throughout the process and promotes fairness during the process by requiring the parties to adhere to the principles and agreed procedures in the collaborative process.

Determining client’s goals and interests

Collaborative practice is a client-centred and client-controlled process that begins with an assessment of the individual needs of each client and mutually identifying issues as well as all areas of agreement. The lawyers assist the parties to identify the issues by:

- assisting their client to communicate their goals, needs and interests by reframing them in a positive, constructive, non-positional manner
- ensuring that the other party knows that they are heard and understood by active listening
- reinforcing and recording all areas of agreement, and
- noting issues to be addressed and normalising the existence of such issues.

¹⁶⁶ Fisher, Patton and Ury, pp.40–41.

¹⁶⁷ Laurence Boulle, *Mediation principles process practice*, Butterworths, 1996.

Collecting, collating and exchanging information

The collection, collation and exchange of all relevant information are essential to collaborative practice. The lawyer assists the clients in these tasks by:

- providing advice to their client and assisting them to identify all relevant information
- organising, collating and exchanging the information once it has been collected, and
- analysing the information and engaging appropriate experts and other relevant professionals to facilitate the collection, collation and analysis of relevant information.

Generating options

Once all relevant information has been exchanged, including valuations and other experts' reports (where applicable), the parties should be encouraged and assisted to generate as many settlement options as possible to resolve the issues between them. The lawyer should assist the clients to generate these options by:

- analysing the information which has been collected together with the other parties to the collaboration to identify and quantify the maximum value available for exchange and the widest range of options
- refraining from pre-judging possible options prematurely
- reviewing the law, candidly and openly, as to the range of outcomes on the facts as each party in turn perceives them, as one source of an objective, reasonable range of outcomes
- identifying limiting factors beyond the control of the parties, and
- encouraging and reviewing the parties' own creative options.

In developing options, the lawyer recognises and understands that any settlement option proffered for consideration is ultimately the client's responsibility. The lawyer must not participate in developing a settlement option that is false, misleading, or contrary to public policy.

Evaluation of options

Once the options have been generated, the lawyers should assist the clients in evaluating them by reference to the clients' goals. The lawyers should also assist the clients to determine whether a particular option is capable of being achieved.

Negotiating towards settlement

The ultimate goal of the collaborative process is to achieve a settlement which the parties perceive as being the best possible outcome for them and their children.

The lawyer should support the outcome which best meets the needs of both parties and is acceptable to each of them by:

- avoiding simple compromise, unless limited by time or where limited resources necessitate it

- evaluating possible solutions that best meet the identified needs and goals of the parties and evaluating how best to divide the benefits using criteria meaningful to the parties, and
- assisting the clients to develop a comprehensive settlement which addresses and accommodates each party's interests to a sufficient degree to be acceptable to both parties.

Once a settlement has been achieved, the lawyers should draft all necessary documents to implement the settlement including, where appropriate, initiating court proceedings on a consent basis.

Part 2: The role and responsibilities of the collaborative lawyer

2.1 Overview

The comments made in this part are based on the general duty of lawyers to observe proper practice standards. They will in part apply equally to all legal practitioners. The collaborative lawyer should exhibit high practice standards in their conduct and in their communication. The lawyer should be familiar with and observe the standards and guidelines of their Law Society and the *Best Practice Guidelines for Lawyers doing Family Law Work*.¹⁶⁸

2.2 Conduct

The collaborative lawyer should show courtesy and professionalism in all conduct and dealings, whether the dealings are with their own clients, the clients of the other lawyer or their professional colleagues. A high standard of practice in terms of conduct in collaborative law is characterised by:

- a constructive and conciliatory approach to the achievement of outcomes being sought by the clients
- open and honest discussion in the process of achieving the outcomes being sought by clients
- clear definition of the issues to be resolved aiming for effective and timely outcomes, and
- ensuring costs are not unreasonably incurred.

The manner in which collaborative lawyers conduct themselves is an integral part of collaborative practice. The collaborative lawyer should conduct him or herself with professionalism and propriety and promote a process that is fair to both parties.

Professional objectivity and respect for others is integral to the conduct of a collaborative matter. Respect and understanding should be shown towards clients with the knowledge that both your own client and the client of the other lawyer are at a critical and stressful time in their lives. They have come to the collaborative lawyer for advice and assistance to achieve an outcome so that they are able to move on with their lives.

Respect for professional colleagues of the collaborative lawyer also shows clients that the collaborative process is designed to achieve an outcome for both clients in a manner where the utmost skill and discipline is applied to the process.

¹⁶⁸ Family Law Council and Family Law Section of the Law Council of Australia, *Best practice for lawyers doing family law work*, 2004.

2.3 Professional rules

Legal practitioners are bound by the rules of their State or Territory Law Society as well as by court rules. Collaborative lawyers should observe the professional rules of their professional body in both spirit and terms.

Collaborative professionals who may be called upon to assist in a collaborative process will include:¹⁶⁹

- other lawyers
- valuers
- counsellors
- mediators
- psychologists
- medical practitioners
- accountants, and
- financial planners.

Non-legal professionals will also have professional bodies with professional rules governing their conduct. Professionals from these bodies who participate in a collaborative process are expected to adopt a non-partisan and non-adversarial manner in their participation in the collaborative process.

Collaborative lawyers who engage the services of other professionals will ensure that the other professionals are selected on the basis of their ability to adopt a non-partisan and non-adversarial approach to their participation in the collaborative process.

The collaborative process will be of greatest benefit to clients in circumstances where all professionals involved in the collaborative process exhibit the highest standards of adherence to the professional rules of their relevant professional body.

2.4 Communication

The manner in which the collaborative lawyer communicates with others will be integral to the success of the collaborative process.

The lawyer will be required to communicate with:

- the lawyer representing the other client
- their client
- the other client, and
- other professionals.

¹⁶⁹ The inclusion of such non-legal professionals may also strengthen cross-sector professional relationships.

Communication between lawyers

Lawyers participating in a collaborative process should communicate with each other in a respectful and courteous manner. Where communication between lawyers becomes strained and disrespectful, it threatens the basis for the collaboration.

Lawyers should bear in mind that the negotiation during collaboration is interest based and priority should be given to presenting the highest of professional standards in terms of communication so that clients will have confidence in resolution of their matter through the collaborative process rather than through a court-based approach.

Communication between lawyers should also be:

- non-aggressive
- clear
- concise, and
- understanding.

There will be occasions where lawyers will need to communicate between themselves in the absence of their clients. Where a lawyer-lawyer meeting is to occur, clients should be informed that the meeting is going to occur, the purpose of the meeting and the matters that are to be discussed in the meeting. The outcome of the lawyer-lawyer meeting should be discussed with both clients at the next four-way meeting.

Communications between lawyer and client

The lawyer should be aware of, and take account of, the fact that their client may be undergoing a stressful and emotionally trying time in their lives. Communication between a lawyer and their client should be conducted with respect and courtesy and the requisite degree of sensitivity and understanding.

Lawyers engaged in a collaborative process will be relying on the good faith of their clients. The legal practitioner should explain the fundamental principles of the collaborative process to their client and that the success of the collaborative process relies on the client conducting him or herself in conformity with the collaborative principles. Clients may need to be reminded of this from time to time.

An important consideration in communication between the lawyer and client is that of client legal privilege. Client legal privilege is a privilege owned by the client. The basis for it as a principle of law is to enable full and frank discussions between clients and their lawyers about their situation and their legal options.

The waiver of client legal privilege should be carefully explained to the client at the outset and again as the need arises.

The involvement of children is another important consideration for lawyers. This requires communication between the lawyer and client to be focused on including the views, concerns and fears of children in the collaborative process without placing them in decision-making roles or forcing them to make difficult choices to resolve disputes. Legal practitioners should engage their clients in negotiations and decision making in the best

interest of all children involved. For specific guidance on dealing with family law matters involving children, lawyers should refer to the *Best Practice Guidelines for Lawyers doing Family Law Work*.¹⁷⁰

Communications between lawyer and the other party

The nature of the collaborative process means that there will be occasions when the lawyer communicates directly with the other party. The same respect and courtesy should be extended to the other party. Communications should be conducted in a sensitive and understanding manner.

Communications with the other party will also need to be conducted in a manner that recognises that the other party is not your client. Clients need to have the security and comfort that they have a lawyer who represents their interests. When discussing matters with the other party, it should be borne in mind that the other lawyer is representing their interests. This requires a level of skill in communication techniques so that the interest-based negotiations proceed in a manner that results in a successful outcome.

Lawyers should not use the opportunity of communicating directly with the other party to ask cross-examining type questions.

Communications between lawyers and other professionals

Communication with other professionals should be conducted in a similar manner to the communication with other lawyers. However, other professionals play more of a joint advisory role than do the lawyers.

Instructions to other professionals should be jointly settled so that the purpose of the engagement is clear to both the other professional and to the clients. The other professional should be advised that their involvement will be as part of a collaborative process and that the process is being conducted as interest-based discussions and negotiations and that it is non-adversarial. The other professional is not retained to give advice on a partisan basis. If a relevant matter is not addressed by either party, the other professional should be free to include reference to other matters to give the clients the best information and advice possible to achieve their outcome.

2.5 Ethical considerations

Collaborative processes are not adversarial proceedings. The following considerations apply to collaborative practice:

- Lawyers should adhere to the ethical standards of their respective professional body.
- Clients should be provided with information about the collaborative process so that they can make an informed decision about whether to participate in a collaborative process.
- Clients should be given sufficient time to consider the option of collaborative law.

¹⁷⁰ Family Law Council and Family Law Section of the Law Council of Australia, *Best practice for lawyers doing family law work*, 2004, p. 28.

- Clients should be provided with information about the alternatives to the collaborative process in reaching a resolution of the matters to be decided.
- Clients should be advised that they have the right to seek a second opinion on the Collaborative Law Contract before signing the Contract.
- Clients should be fully informed at all times about the collaborative process and its confidentiality.
- Confidentiality of the collaborative process should be observed at all times both as required by the rules of the professional body and the Collaborative Agreement.
- The disclosure of information, advice and opinion should be in accordance with the terms of the Collaborative Agreement.

2.6 Specialist settlement lawyers

The collaborative lawyer is retained as a specialist settlement lawyer. The collaborative lawyer brings a unique set of settlement skills to the discussions and negotiations. Those skills include skills in interest-based negotiation coupled with a degree of sensitivity and understanding to assist the clients to achieve an outcome.

In representing clients for the purpose of reaching a settlement, the collaborative lawyer will:

- work primarily through the four-way meetings
- advise their client in relation to the law and provide legal advice throughout the process
- inform the client that the traditional concept of client legal privilege is waived during the collaborative law process
- focus on settlement from the moment they commence acting for their client
- represent their client's interests but also listen to the other party's interests
- assist their client in communicating effectively their concerns and what is important to them (their interests)
- communicate with the other party and the other party's lawyer in a manner that is respectful
- conduct and guide the collaborative law meeting in a team environment
- assist their client in communicating effectively in relation to the other party's concerns and questions needing to be answered (their issues)
- cooperate and assist in the gathering and sharing of relevant information to enable the clients to make informed decisions
- assist the clients in creating the maximum number of options that they can explore
- assist the clients in modifying and refining their options and exploring the possible consequences of each option
- use clear language when speaking and writing
- manage emotional situations
- point out unreasonable expectations
- work hard to help the parties reach an agreement
- not go to court for their client unless it is to formalise their agreement, and
- help the parties to formalise their agreements appropriately.

2.7 Who do you collaborate with?

Collaborative lawyers will develop and establish professional links with other lawyers. When considering whether to collaborate with another lawyer, the following considerations may be relevant:

- the experience of the lawyer
- whether the lawyer has attended a collaborative law training course
- whether the lawyer has completed a mediation course
- whether the lawyer is an accredited family law specialist, and
- whether the lawyer has a commitment to observing the relevant guidelines including the *Best Practice Guidelines for Lawyers doing Family Law Work*.

Part 3: Suggestions for the conduct of collaborative law matters

3.1 First client interview

Following the initial telephone contact and prior to the first client interview, every endeavour should be made to provide the client with a general letter which explains the different process options for resolving the matter.

At the first interview:

- The client explains to the lawyer some background on what problems they cannot resolve and or what issues they wish to address. The lawyer should:
 - (a) obtain information to clarify the issues
 - (b) ask about history leading to separation
 - (c) obtain a history of dispute resolution, and
 - (d) listen to the client's story.
- The lawyer should provide an overview of what will be discussed at the initial consultation, assuring the client that the questions they have brought with them will be answered.
- The lawyer should explain to the client the different process options open to them to resolve their matter, including:
 - (a) direct negotiation
 - (b) counselling
 - (c) mediation
 - (d) collaborative law
 - (e) lawyer negotiation
 - (f) early neutral evaluation
 - (g) arbitration, and
 - (h) litigation.

In essence, the lawyer will explain the distinction between process and outcome and the importance of process in reaching the desired outcome.

- If the client indicates an interest in collaborative law then the lawyer should explain to the client in greater detail how the collaborative law process works, including:
 - (a) how it is different to the court process
 - (b) how the process compares to and can be used with other processes
 - (c) differences between interest-based negotiations and positional bargaining
 - (d) the estimated likely timing and costs
 - (e) how the process provides control over outcome, and
 - (f) how the process:

- (i) allows for much more continuity
 - (ii) allows for direct communication
 - (iii) provides a time for both participants to become aware of the issues
 - (iv) provides a safe place to work through the issues
 - (v) does not rely on a court schedule, and
 - (vi) makes use of other collaborative professionals.
- The lawyer should discuss how the other party might be engaged in the collaborative law process either by:
 - (a) the client discussing the process options directly with the other party, or
 - (b) the lawyer sending a letter to the other party outlining the process choices.
- The lawyer should discuss the collaborative law contract in general terms (see Collaborative Law Contract).
- The lawyer should explain to the client the importance of not taking one-sided actions which will undermine the process.
- The lawyer should obtain enough information to identify:
 - (a) the client's immediate needs
 - (b) what the client anticipates the other party's immediate needs are
 - (c) the client's needs and concerns in relation to the collaborative process
 - (d) the client's concerns, goals, priorities and fears, and
 - (e) the substantive issues.
- The lawyer should:
 - (a) answer the client's questions regarding their case, including general legal advice and information, and
 - (b) remind the client that the application of the law is one of a number of possible options, but not specifically apply it to the client's situation.
- Before the client chooses the collaborative law process the lawyer should ensure that:
 - (a) the matter is suited to the collaborative process
 - (b) the lawyer understands why the client wants this process
 - (c) the client understands the lawyer's role
 - (d) the client understands their role, and
 - (e) the client understands their obligations in relation to disclosure, and
 - (f) what happens in the event of an impasse.

3.2 Client preparation meeting

At the client preparation meeting the lawyer should attend to the following matters:

- Review the contract with the client in the event this has not already been done.

- Reiterate that most advice and information gathering takes place through the four-way meetings.
- Prepare with the client the agenda for the first four-way meeting including identifying any immediate or urgent issues.
- Clarify to the client the lawyer's role.
- Clarify the client's role, for example:
 - (a) avoid taking positions and look for interests
 - (b) keep promises and agreements
 - (c) work towards a common solution
 - (d) look forward not back, and
 - (e) assume responsibility for choices made.
- Clarify with the client the timing or use of experts (child specialist, financial specialist, valuers).
- Explain the timing and availability of other processes that may assist the client.
- Discuss with the client the circumstances in which the collaborative process may succeed and also the circumstances in which the collaborative law process may fail and what may be done if that were to occur.
- Explain to the client that separation and any dispute resolution process is difficult, and that this is normal and usual.
- Discuss the client's psychological, procedural and substantive needs.

3.3 Collaborative law contract

In discussing the collaborative law contract with the client at the client preparation meeting the following matters should be highlighted:

- The collaborative contract formalises the agreement between the four parties involved in the collaborative process, being each party's legal representative and the separating couple.
- The contract formalises how the collaborative process takes place, the terms upon which the parties have agreed to participate in the collaborative process, their obligations and responsibilities.
- The contract in particular provides as follows:
 - (a) the principles underpinning the agreement
 - (b) the commitment of the parties not to go to court
 - (c) the commitment of the lawyers that in the event an agreement is not reached they will not represent their client in any subsequent litigation

- (d) that neither the lawyers or the parties will use threats of court as a way to force settlement
 - (e) that all parties will act with integrity, and
 - (f) arrangements in relation to engaging experts/arbitrators to provide further information if necessary to facilitate the collaborative process.
- If the collaborative process breaks down then the lawyers for the parties:
 - (a) can continue to represent their clients in subsequent settlement negotiations, but
 - (b) cannot represent their client in any litigation which ensues, and must then cease to act.
- Examples of when the collaborative process may be terminated include:
 - (a) disposing of property without the consent of the other person
 - (b) failing to follow an agreement made during the collaborative process
 - (c) withholding or misrepresenting information
 - (d) failing properly to disclose assets or liabilities
 - (e) taking one-sided actions
 - (f) threatening to go to court.
- An example of withholding information may include a client advising a lawyer of a relevant fact and then instructing their lawyer not to disclose that fact at the next four-way meeting.
- Facts and information relevant to the conduct of the four-way meetings and the provision of that information is not privileged as between the solicitor and their client and must be disclosed for the integrity of the process to be maintained.
- The collaborative lawyer is bound by lawyer-client legal privilege and confidentiality and cannot disclose a client confidence without the client's express instructions. However, the collaborative lawyer must withdraw if the information (or advice) is in the lawyer's opinion relevant to the collaboration.
- In the event the collaborative process fails, client legal privilege is no longer waived.

3.4 First lawyer-lawyer meeting

This meeting is a meeting by telephone or face to face to arrange the first four-way meeting and an agenda. At this meeting the lawyers should attend to the following matters:

- Address process issues, including:
 - (a) agree on the version of the contract to be used
 - (b) determine the location and time for first meeting
 - (c) determine who will be responsible for introductions, leading review of contract and covering communication guidelines

- (d) agree upon information to be brought to first meeting to resolve immediate issues
 - (e) discuss how information is to be gathered
 - (f) identify what has been discussed with each client about the legal model and the most effective way to jointly deal with the legal model with the clients, and
 - (g) agree on an agenda (which one lawyer should volunteer to prepare and circulate prior to first meeting).
- Address substantive issues (information, concerns, immediate and long term issues), including:
 - (a) identify issues for resolution for each client
 - (b) identify ‘hot’ issues and brainstorm strategies to recognise and accommodate them
 - (c) review scope of information to be gathered, and
 - (d) discuss immediate and long-term issues.

3.5 First four-way meeting

The meeting should deal with the following matters:

- The lawyers and the parties should review and commit to the collaborative law process. During this process clients should be asked why they wish to use the collaborative law process.
- The four parties should review the collaborative law contract in detail and then sign the collaborative law contract at the first four way meeting.
- Identify and agree on the expectations of both clients and lawyers.
- Identify each client’s concerns and priorities and what is important to each of them. When identifying what is important to each of the clients it helps to divide the categories into headings such as children, money, finances, assets, debts and the future.
- Identify mutual interests in protecting children, retaining control over outcome, preserving relationships, etc.
- Identify anything that clients have agreed on.
- Identify any pressing issues and address the pressing issues with a temporary agreement, such agreement to be without prejudice to either client during future discussions.
- Usually, unless otherwise agreed, the temporary agreement only applies until the next four-way meeting, where the clients may review, refine, alter or confirm the temporary agreement.

- In relation to immediate or pressing issues it is helpful to:
 - (a) identify the issues as narrowly as possible
 - (b) identify the underlying interests
 - (c) obtain all readily available facts
 - (d) generate the most options in the time available
 - (e) choose the best option
 - (f) keep the clients focused on the fact that it is just a temporary answer until the next four-way meeting
 - (g) if appropriate, formalise these agreements by way of interim orders, and
 - (h) identify what will need to be talked about in subsequent four-way meetings, again dividing the headings—children, money, finances, assets, debts and the future.

3.6 Last part of four-way meeting

The last part of the four-way meeting should:

- review effective communications skills; for example, active listening
- start building rapport with clients to help clients develop trust in the collaborative law process
- identify with the other lawyer the things that the clients are doing that are working for them
- be sensitive to timing needs of clients; each client has a different emotional timeline in which they are able to engage in the process
- attempt to normalise the difficulties and tensions which confront a separating couple by recognising that separation is an important family transition
- discuss a partial agenda for the next four-way meeting and confirm the date, time and place of next meeting, and
- identify action items.

3.7 Preparation of minutes

The preparation of minutes is a responsibility shared by each lawyer on an alternate meeting basis. At the conclusion of each meeting a lawyer should arrange for the minutes to be typed and provided to the parties and the lawyer for the other party. If it is agreed, the minutes should be sent directly to the other party and to their lawyer simultaneously. The minutes should be settled between four-way meetings and, once agreed, signed by the two clients.

3.8 Lawyer-client debrief

Following the four-way meeting the lawyer should meet with her or his client. During these discussions, the lawyer should invite the client to:

- discuss any concerns arising out of the first four-way meeting; for example, how the meeting was conducted, their emotional psychological needs
- raise any new concerns or issues they want added to the next agenda
- review the minutes of the first four-way meeting, and
- ensure that the things to be done at the next meeting are commenced.

It is the role of the lawyer to address the client's concerns and also to provide constructive feedback to the client about what they may do better themselves to meet their own needs in the next four-way meeting. The lawyer should request the client's permission to let the other lawyer know about any concerns and issues raised at this meeting. If facts are raised or new information is raised by the client which the client does not wish to be disclosed at the next four-way meeting then the lawyer must review whether it is possible for the collaborative law process to continue. The client should allow the lawyer to provide information in relation to how the client felt about the four-way meeting, particularly in relation to the other party's behaviour or the other party's lawyer, so that the lawyers may work on a structure in relation to the next four-way meeting which addresses these concerns.

3.9 Providing legal advice

The lawyer, as part of their role, provides legal advice to their client. It is recommended that in the collaborative law process the provision of advice be delayed until such time as both lawyers and their clients are satisfied that all of the relevant facts have been disclosed and all of the relevant information gathered. However, the fact that a lawyer has provided a client with legal advice early in the process or even prior to the client deciding to enter into the collaborative process does not preclude the client participating in the collaborative process. The issue in relation to the provision of legal advice is more about encouraging clients to think in terms of joint interests rather than in terms of rights. Delaying the advice recognises that when a lawyer sees a client early in the process the only information with which they have been provided is one side's view of what occurred during a relationship. Early advice will therefore be based on a one-sided view of the asset pool, contributions, future needs and children's issues and may encourage positional thinking.

If a client wishes to have preliminary advice in relation to likely outcomes then the lawyer is not prohibited from doing so in the collaborative process. However, part of the collaborative law process is to encourage clients not to adopt positions or skip to solutions and outcomes before identifying the interests and concerns of the parties, and the gathering of information.

A collaborative negotiation discourages clients jumping to solutions before their interests and goals are addressed. When all information has been collected, all options open to the parties should then be brainstormed. At this stage it is appropriate for the parties to receive legal advice in relation to their entitlements. Although this advice may have been given in an environment which is privileged; for example, by letter, it is very likely that the advice and the other party's advice will form one of the criteria for determining how they reach an agreement. At some stage, in order for the collaborative law process to operate with integrity it will be incumbent upon both lawyers to disclose their legal advice at a four-way meeting. How the lawyers disclose this advice is a matter which should be discussed by the lawyers between four-way meetings as one of the discussion points about how to structure the next meeting.

3.10 Lawyer-client communications between meetings

The purpose of these communications is to debrief after the four-way meeting and to enable the lawyers to:

- evaluate the previous four-way meeting
- discuss any ongoing concerns each client raises and any additional agenda items the client wants to talk about, and
- brainstorm possible techniques to break any impasse, and discuss techniques to assist clients in the development of options.

3.11 Subsequent four-way meetings

- Address action items and any matters arising out of the previous meeting.
- Identify the concerns and needs behind the issues raised for both clients.
- Assist the clients to understand the concerns, needs and priorities of the other party.
- Begin the process of exchanging information.
- Identify what further information needs to be obtained and from where that information should be obtained; for example, mutual experts.
- Once all the relevant information has been obtained, generate as many options as possible to respond to each client's concerns and goals. During this process:
 - (a) refrain from rejecting possible options prematurely
 - (b) review the law as a source of an objective, reasonable range of outcomes
 - (c) recognise the law has limited scope and flexibility, represents only one of many possible outcomes and may not generate the best outcome for the client
 - (d) identify limiting factors beyond the control of the client
 - (e) review the clients' and lawyers' creative options
 - (f) examine possible consequences of each choice for each client
 - (g) encourage the client to select the outcome that best meets the needs of both clients and is acceptable to both clients
 - (h) generate a to-do list for the next four-way meeting, and
 - (i) discuss partial agenda for next four-way meeting and confirm date, time and place.
- Closure agenda for final four-way meeting:
 - (a) assign tasks to lawyers for preparing documents to formalise agreement reached, and
 - (b) discuss and decide how final documents are to be signed.

3.12 Role of experts and other collaborative lawyers in the collaborative process

Child specialist experts, financial advisers, accountants, valuers and collaborative practitioners who may be able to assist the clients to reach an agreement through the collaborative process may be retained at any time during the process. For some clients it may be appropriate for the expert to be engaged at the beginning and continue to be involved adopting what is called an ‘interdisciplinary model’. This is referred to below. For others, the expert becomes involved at certain points along the process. In some cases it may be appropriate for each client to engage a ‘communication coach’ either within the interdisciplinary model or separate from it.

In the United States, Canada and the United Kingdom an interdisciplinary model of collaborative practice has developed. This model involves the introduction of collaborative practitioners other than lawyers who assist the parties in managing conflict, resolving emotional issues and improving communications between the parties. The collaborative practitioners can be engaged either before the parties enter into the collaborative contract, at the commencement of or during the collaborative process. The collaborative practitioners work with the parties individually, and also in four-way meetings which are conducted prior to or in parallel with the collaborative law four-way meetings. The collaborative practitioners work in concert with the lawyers.

Joint engagement of experts

Unless the clients otherwise agree, an expert should be retained jointly and in writing. The reports and related work papers including all documents submitted to the retained expert should be made equally available to the parties and their lawyers.

Neutrality

The lawyers should inform the expert that they are being engaged jointly and should use care to avoid even the appearance of bias. The expert should be instructed to disclose any reason that may exist that may cause either party to question the expert’s impartiality. The scope and terms of the engagement should be in writing and signed by both lawyers. The expert should be advised of the need to be available for discussion of their opinions or findings with the parties and with the lawyers. They should be advised that they may be required to attend one or more of the four-way meetings.

Effect of opinion or finding of expert

The opinion or finding of a neutral expert engaged in the collaborative process is not binding on the parties unless the parties agree in writing to be bound by such opinion or finding.

Related work papers and opinions of expert

An expert’s work papers, opinions and facts upon which they are based are available to all parties and their lawyers. All information provided to an expert by one party must be provided to the other party. However, an expert’s work papers, opinions and the facts upon which they are based are not discoverable and are inadmissible in any adversarial

proceedings resulting from the dispute or in any other adversarial proceedings amongst any of the parties. Therefore, an expert is prohibited from giving evidence in any proceedings resulting from the dispute or any other proceedings amongst the parties, unless agreed to by both parties.

Lawyer must not act as a specialist litigation lawyer

A retained expert, who is a lawyer, and any lawyer associated in the practice of law with such lawyer, shall not act as the litigation lawyer for any party in any adversarial proceedings arising from the dispute or in any other adversarial proceedings involving one or more of the parties.

Impasse

If, during the collaboration, there is an impasse either in relation to a specific issue or in relation to one of the options open to the parties which they wish to adopt to resolve their matter, the parties and their lawyers may engage an expert to provide an opinion which both parties agree to be bound by in relation to the issue in dispute. For example, if there is a specific question of law about which the lawyers disagree, the parties and lawyers may agree to engage another lawyer (solicitor or counsel) to provide an opinion on the specific issue or issues. If the issue in dispute is in relation to the children, then the parties and lawyers may engage a children's expert whose recommendations the parties agree to be bound by. This approach also applies to financial issues. Alternatively, the parties may agree to engage an arbitrator and to be bound by the decision of the arbitrator in relation to a specific issue. Other interventions for moving beyond an impasse include:

- Asking questions to move one party from rigid thinking; for example:
 - (a) How will you convince your spouse of the reasonableness of your proposal?
 - (b) How important is this to you in the overall picture?
 - (c) How important will this be five years from now?
- Ensure clients have all the information they need.
- Use hypothetical situations; for example: 'What if you were to ...?' or try trial agreements; for example, 'What if you were to trial this for the next month?'
- Use other professionals; for example:
 - (a) refer to counselling
 - (b) refer to mediation
 - (c) bring in neutral financial specialists, or
 - (d) obtain a legal opinion.
- Consider the best and worst alternative to a negotiated agreement.

3.13 Agreement

When an agreement is reached, one lawyer should be responsible for drafting the relevant documents in the form agreed by all parties; for example, consent orders, financial agreement and/or child support agreement. Any issues that may arise as a result of documents drafted should be dealt with in a further four-way meeting convened for that purpose. Once signed by both clients and both lawyers, one lawyer should arrange for filing of the documents with the relevant court, if applicable. Both lawyers may represent their clients in court for the purposes only of seeking Orders to be made by consent formalising the agreement reached by the parties during the collaborative process. Both lawyers may continue to represent the clients with regard to the implementation of the agreement.

3.14 Transitional matters

A matter may move from litigation to collaborative law or from collaborative law to litigation. If litigation has already commenced, either to preserve a party's interest because of an approaching time limit or to seek orders to preserve the status quo, and thereafter the client wishes to enter into the collaborative law process, then this may occur if:

- the lawyer remains on the record for the purposes of the court proceedings and the proceedings are adjourned pending the outcome of the collaborative law process, or
- in the event that the collaborative law process breaks down, the lawyer and the firm that acted for the client during the collaborative law process must cease to act for that party in the court proceedings, and the client must obtain new representation.

3.15 If the collaborative process fails

Subject to the terms of engagement, the lawyer may withdraw from a collaborative matter as in any other matter. If the parties wish to continue the collaboration then the lawyer should assist the successor lawyer to become familiar with the matter. The successor lawyer must sign the collaborative law contract.

A lawyer should explain to their client that the collaborative law process is voluntary and may be terminated at any time and for any reason. However, the contract may stipulate penalties if a client withdraws from the collaboration subject to the reasons for the withdrawal.

If one party's lawyer learns during the collaboration that their client has violated or proposes to violate the contract in a manner that would compromise the integrity of the process then that lawyer must terminate the collaborative law process. The authority to terminate the process must be incorporated in the contract.

If the collaborative law process is terminated and litigation ensues, then the specialist settlement lawyers should assist the specialist litigation lawyer in becoming familiar with the matter. The specialised litigation lawyer must not be a lawyer in the same firm as the collaborative lawyer. The collaborative lawyer must cease further work on the matter.

3.16 Resources available

Model documents for each stage of the collaborative process, information for clients on the collaborative process, and information dealing with separation and the breakdown of relationships are available from local collaborative law practice groups. Details of collaborative law practice groups can be obtained from State and Territory law societies:

- Law Society of New South Wales:
<<http://www.lawsociety.com.au/page.asp?partid=66>>.
- Queensland Law Society:
<<http://www.qls.com.au/content/lwp/wcm/connect/qls/home/>>.
- Law Society of South Australia:
<<http://www.lssa.asn.au/>>.
- The Law Society of Western Australia: <<http://www.lawsocietywa.asn.au/>>.
- Law Institute of Victoria:
<<http://www.liv.asn.au/>>.
- The Law Society of the Australian Capital Territory:
<<http://www.lawsocact.asn.au/content/home2/index.asp>>.
- Law Society Northern Territory: <<http://www.lawsocnt.asn.au/fmi/xsl/lmnt/index.xsl>>.
- The Law Society of Tasmania:
<<http://www.taslawsociety.asn.au/>>.

Appendix B: Collaborative practice groups in the United States of America

Arizona	Collaborative Divorce Professionals of Arizona
	Collaborative Law Group of Southern Arizona
	Arizona Association for Collaborative Law, Inc
California	Collaborative Practice San Francisco
	Alliance of Collaborative Professionals
	Association of Collaborative Law Attorneys
	Central Valley Collaborative Law Affiliates
	Coalition for Collaborative Divorce
	Collaborative Alternatives
	Collaborative Council of the Redwood Empire
	Collaborative Divorce Associates
	Collaborative Family Lawyers of Ventura County
	Collaborative Law Association of Contra Costa
	Collaborative Practice of Santa Cruz County
	Collaborative Lawyers of N. California (Shasta County)
	Collaborative Practice Silicon Valley
	Collaborative Practice Group of Contra Costa
	El Dorado Collaborative Negotiation Group
	Collaborative Practice, San Mateo County
	Sacramento Collaborative Practice Group
	San Francisco Bay Area Collaborative Practice Group
	A Better Divorce
	Collaborative Family Law Professionals of Marin
	Collaborative Lawyers of Coachella Valley
	East County Family Law Collaborative Group
	Santa Barbara Collaborative Law Group
	Los Angeles County Collaborative Family Law Association
	Collaborative Divorce Solutions
	Collaborative Family Law Group of San Diego
	Collaborative Divorce Network of Northern California
	North San Diego County Collaborative Practice
	Los Angeles Westside Collaborative Divorce Professionals
	Bakersfield Collaborative Practice Group
Colorado	Colorado Collaborative Law Professionals
	South Metro Collaborative Law Group
	Northern Colorado Collaborative Family Law
	Pike's Peak Collaborative Law Association
	Rocky Mountain Collaborative Family Law Group
	Nez Perce Collaborative Practice Group
	Academy for Collaborative Legal Practice
	Collaborative Divorce Professionals of Boulder

Connecticut	Collaborative Divorce Attorneys of Fairfield County
	Collaborative Divorce Lawyers Association (Hartford)
	Collaborative Family Lawyers of Greater New Haven
	Collaborative Divorce Team of Connecticut
	Collaborative Divorce Group of Connecticut
	Divorce Solutions of Connecticut
Florida	Collaborative Family Lawyers Institute
	Collaborative Family Lawyers of South Florida
	Collaborative Lawyers of Southwest Florida
	Collaborative Divorce Lawyers Association of Palm Beach County
	Collaborative Family Law Group of Tampa Bay
	First Coast Collaborative Family Law
	St. John's County Collaborative Family Law Group
	Collaborative Divorce Team, Inc.
	Collaborative Family Law Group of Central Florida
Lake County Collaborative Law Group	
Hawaii	Hawaii Collaborative Law Professionals
Illinois	Collaborative Law Institute of Illinois
Kansas	Collaborative Law Institute of Kansas
Kentucky	Northern Kentucky Collaborative Group
	Kentucky Collaborative Family Law Network
Louisiana	Collaborative Professional Group of Acadiana
	Collaborative Professionals Group of Central Louisiana
	Collaborative Professionals Group of Louisiana
	Collaborative Professionals Group of Southeast Louisiana
	Collaborative Professionals Group of Northeast Louisiana, Inc.
Maryland	Collaborative Divorce Association
	Collaborative Family Law Society
	Maryland Collaborative Law Association, Inc.
	Collaborative Dispute Resolution Professionals, Inc.
Massachusetts	Massachusetts Collaborative Law Council
Michigan	Collaborative Law Institute of Michigan
Minnesota	Collaborative Law Institute of Minnesota
	Southern Minnesota Family Law Collaborative
Missouri	Collaborative Family Law Association (St. Louis)
	Collaborative Law Institute of Missouri
Nevada	Collaborative Professionals of Nevada
New Hampshire	Collaborative Law Alliance of New Hampshire
New Jersey	Jersey Shore Collaborative Law Group
	North Jersey Collaborative Law Group
New Mexico	Albuquerque Collaborative Practice Group
	New Mexico Collaborative Practice Group
New York	Association of Collaborative Family Law Attorneys
	Association of Collaborative Lawyers of Rockland-Westchester
North Carolina	Carolina Collaborative Law Group
Ohio	Center for Principled Advocacy
Oklahoma	Oklahoma Academy of Collaborative Professionals

Oregon	Collaborative Family Lawyers of Oregon
	Northwest Collaborative Institute
	Collaborative Practice Northwest
Pennsylvania	Collaborative Family Law Affiliates (Wayne)
	Independent Collaborative Attorneys of Central Pennsylvania
	King of Prussia Collaborative Group
	Pennsylvania Collaborative Practice
Texas	Collaborative Family Law Practitioners
	Collaborative Family Lawyers of Houston
	Collaborative Law Center of Rockwell
	Collaborative Law Dallas
	Collaborative Law Group of Greater Houston
	Collaborative Law Institute of Texas
	Collaborative Lawyers of Tarrant County
	Gulf Coast Collaborative Law Network
	Alliance of Collaborative Family Lawyers
	Central Texas Collaborative Family Lawyers
	Dallas Alliance of Collaborative Professionals
	Texas Collaborative Lawyers
	Texas Collaborative Law Council
	Collaborative Family Lawyers of Denton County
	Austin Collaborative Family Lawyers
Interdisciplinary Collaborative Practice Group for Families	
Utah	Collaborative Family Law of Utah
Vermont	Collaborative Law Section of Vermont Bar Association
Virginia	Collaborative Family Law Society
	Roanoke Valley Collaborative Family Law Attorneys
	Virginia Collaborative Professionals
	Virginia Academy of Collaborative Professionals
	Virginia Collaborative Professionals of Lynchburg
Washington	Washington Collaborative Law
	Sound Collaboration
	Collaborative Practice Northwest
	Collaborative Law Professionals of Pierce County
Wisconsin	Collaborative Family Law Council of Wisconsin, Inc

Further information on these associations is available at
<http://www.collaborativepractice.com/t2.asp?T=LocateGroup>.

Appendix C: Functions and members of the Family Law Council

Functions of the Family Law Council

The Family Law Council is a statutory authority which was established by section 115 of the *Family Law Act 1975*. Council's functions are set out in subsection 115(3) of the Act as follows.

It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning:

- (a) the working of this Act and other legislation relating to family law;
- (b) the working of legal aid in relation to family law; and
- (c) any other matters relating to family law.

Council may provide advice and recommendations either on its own motion or at the request of the Attorney-General.

Membership of the Family Law Council (as at 1 June 2006)

- Professor Patrick Parkinson, *Chairperson*
- Ms Nicola Davies
- Mr Kym Duggan
- Federal Magistrate Christine Mead
- The Hon Susan Morgan
- Mr Clive Price
- Ms Susan Purdon
- Justice Garry Watts

The following seven agencies have observer status on Council (with names of observers):

- Australian Institute of Family Studies: Dr Bruce Smyth
- Australian Law Reform Commission: Ms Lani Blackman
- Child Support Agency: Ms Yvonne Marsh
- Family Court of Australia: Ms Angela Filippello and Ms Dianne Gibson
- Family Court of Western Australia: Principal Registrar David Monaghan
- Federal Magistrates Court of Australia: Mr John Mathieson
- Family Law Section of the Law Council of Australia: Ms Maurine Pyke

Appendix D: Members of the Collaborative Law Committee

The members of the committee who prepared this report are:

- Ms Susan Purdon, *Convenor*
- Ms Nicky Davies
- Mr Kym Duggan
- Federal Magistrate Christine Mead
- Ms Maurine Pyke
- Justice Garry Watts

The Committee was assisted by the Family Law Council Secretariat:

- Ms Anita Mackay
- Ms Rosa Saladino
- Ms Roweena Singh
- Ms Ingrid Fusting
- Ms Jessica Mackay
- Ms Dianne Bramich
- Mr Luke Allard

The Committee was assisted by the following members of the National Centre of Collaborative Law:

- Mr Stephen Bourke
- Mr Phil Davey
- Ms Julie Dobinson
- Ms Juliette Ford
- Ms Kathryn Heuer

The Committee was assisted by the following members of the National Alternative Dispute Resolution Advisory Council:

- Professor Tania Sourdin
- Federal Magistrate Norah Hartnett
- Ms Elizabeth Sinodinos (Secretariat)