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## THE LEGAL PROFESSION POST-ADR: FROM MEDIATION

### TO COLLABORATIVE LAW

*Anne Ardagh and Guy Cumes\**

#### **Abstract**

*This article examines the changing role of the legal profession with regard to the incorporation of alternative dispute resolution (ADR) and collaborative law into legal practice. Lawyers have adapted to ADR, both in the ways in which they have adopted mediation as a form of practice within the litigation cycle and also in the way they seek to incorporate ADR within the profession through collaborative law. While change within legal practise is welcomed, reflection is needed about the nature of these developments. The point has been reached in the development of mediation in Australia where we need to seek answers to questions about where lawyer mediation is situated as a dispute resolution method, how it is defined and practised, and whether the practice of collaborative law better serves the community.*

#### **Introduction**

Since the 1980s in Australia there has been an evolution of dispute resolution processes. We have witnessed a movement through three distinct phases; the first being the predominance of adversarial processes in a traditional legal environment. The second was a growth of a new phase in which “alternative dispute resolution” involving non-legal processes and outcomes (as well as non-legal practitioners) were the subject of major legal reform. In the 21<sup>st</sup> century the third stage is a post ADR period where alternative dispute resolution methods have been accepted as a normal part of conflict resolution and have become more institutionalised, rather than “alternative”. Lawyers have sought to adapt their practices to take account of changes and adopt alternative methods of dispute resolution. One newer area of legal dispute resolution is called “collaborative law.”

#### **The changing legal profession**

The profession has undergone many structural changes since the 1990s that have altered the composition of legal firms due to, among other things, changed government policy on regulation and competition and the advent of multi-disciplinary practices.<sup>1</sup> The practice of law has also been altered because of legislative changes for example in conveyancing, tort law reform and family law reform as well as institutionalised ADR and the more recent development of collaborative law.

As a result, practises within firms have changed along with their business structures, namely incorporated business practices with nationally consistent standards for admission to the legal profession and recognition of interstate practising certificates.<sup>2</sup> The accentuation of the business of legal practice has encouraged competition in formal legal services as well as informal legal services, such as alternative dispute resolution. This in turn has led to legal practitioners adopting ADR practices and most recently collaborative law as part of the competition cycle.

### **Alternative dispute resolution (ADR)**

The adoption of ADR resulted from pressure exerted upon the profession from courts, parliaments and the public to make the legal system more comprehensible, accessible, efficient, cheaper and fair.<sup>3</sup> In Australia during the 1990's several reports<sup>4</sup> identified a number of factors pointing to the conclusion that the legal system is often beyond the understanding of the community; failing to adequately recognise and satisfy human needs, and to provide for direct participation. Reviews sought ways of overcoming the inadequacies of the Australian legal system, based on an adversarial

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<sup>1</sup> See for example Tonking, I. (1995) 'Implications for the legal profession in competition policy reforms.' 33(7) *Law Society Journal*, p 38; Law Society of New South Wales (1997). Professional Regulation Task Force Report, October 1997; Heinrich, R. (1998) "Centralised regulation of the legal profession" 36(5) *Law Society Journal*, p 2.

<sup>2</sup> <http://www.findlaw.com.au/news>, 23 May 2007, "Qld passes Legal Profession Bill"

<sup>3</sup> Spencer, D. (1998) 'Liability to advise on alternative dispute resolution options' 9 *Australian Dispute Resolution Journal*, p. 292.

<sup>4</sup> For example, Law Foundation of New South Wales - Justice Research Centre, (1997) *Briefing note on plaintiffs' satisfaction with dispute resolution processes: trial, arbitration, pre-trial conference and mediation*. Sydney (Justice Research Centre Report, April 1997); Sackville, R. (1994) *Access to Justice Report*. Access to Justice Advisory Committee. Australian Government Publishing Service, Canberra.

model<sup>5</sup> and alternative models of dispute resolution have been developed to deal with areas of dispute which are not amenable to satisfactory resolution within formal court litigation processes.

The move towards a preference for ADR exists across the range of business and professional organisations as well as industry ombudsman programs covering areas such as water and energy, banking, insurance, telecommunications and universities.

Within the public sector and at all levels of government decision making and complaint handling<sup>6</sup> ADR is increasingly used. Many State and Commonwealth legislative schemes provide specifically for mediated outcomes, for example farm debt mediation, health care conciliation, the Departments of Fair Trading (for retail leases, consumer complaints, community land management and Strata Schemes among other things), Workplace Injury and Management and Workers Compensation Act 1998 (NSW), Native Title Act 1993 (Cth), Trade Practices Act 1974 (Cth), Workplace Relations Act 1996 (Cth), Family Law Act 1975 (Cth).<sup>7</sup>

Dispute resolution methods include arbitration, facilitation, negotiation, mediation, conciliation, conferencing, neutral evaluation, expert appraisal and many variations of these methods. Structured settlement conferences are used for institutional litigants for example insurance companies as well as in other legislative schemes. Online techniques and other telecommunication methods are also used. All methods involve the goal of resolution of disputes but differ in their assumptions and their method and process of achieving this outcome.<sup>8</sup>

Within the court system traditional adversarial methods are now recognised as having a more limited role as a method for final resolution when preliminary alternative dispute resolution (ADR) processes have not resolved the dispute. The evidence for this is the presence of ADR methods in

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<sup>5</sup> Reviews of the adversarial system carried out by the Australian Law Reform Commission include Australian Law Reform Commission (1997) *Review of the adversarial system of litigation: rethinking the federal litigation system*. Issues Paper 20. ALRC, Sydney; and Australian Law Reform Commission (1998) *Review of the adversarial system of litigation: ADR – its role in federal dispute resolution*. Issues Paper 25. ALRC, Sydney. The several reviews are numbered Issues Papers, 20 through to 25.

<sup>6</sup> For example, in State and federal Ombudsman's Offices.

<sup>7</sup> See New South Wales Law Reform Commission (2005) Report 106 - Community Justice Centres. NSW Attorney-General, Sydney, at [1.14]; National Alternative Dispute Resolution Advisory Council (NADRAC), (2006) *Legislating for alternative dispute Resolution: a guide for government policy makers and legal drafters*. Attorney General, Canberra, p. 2

<sup>8</sup> There has been a rapid expansion of ADR methods to deal with disputes in other common and civil law jurisdictions as well as in Australia.

state and federal courts as a mandatory first step as well as the growth of tribunals using informal methods of dispute resolution.<sup>9</sup>

Reforms have led to case management of litigation in order to, among other things, rank and assess those cases that can be dealt with by alternative resolution methods. Justice McClellan observed that prior to the introduction of case management techniques in the Land and Environment Court legal practitioners “had exclusive control of the pre-trial processes, the issues to be litigated and the evidence to be called” leading to delay, unnecessary use of expert evidence and excessive cost in the resolution of disputes.<sup>10</sup> These reforms are now being introduced into the common law division of the Supreme Court of New South Wales.<sup>11</sup>

Sourdin notes two streams of ADR processes - one attached to the court system and another which is essentially outside and independent of it.<sup>12</sup> Court referred and court annexed mandatory mediation has resulted in mediation becoming an integral part of the court system within the “shadow of the law” as well as the tribunal system.<sup>13</sup> Boule notes that these models tend to use evaluative and settlement techniques and processes and are largely conducted by lawyers (or registrars) who may not necessarily have training or qualifications in mediation.<sup>14</sup>

Guidelines for ADR practice have been developed by the professional legal associations. For example, the Law Council of Australia initially published a policy on ADR in 1989.<sup>15</sup> Callaghan discusses in detail the roles and responsibilities of the Law Council’s guidelines as well as the NSW Law Society’s. His view is that lawyers should be actively working at securing their involvement in

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<sup>9</sup> Mack, K. (2003) ‘Court Referral to ADR: criteria and research’. Australian Institute of Judicial Administration and National Alternative Dispute Resolution Advisory Council. NADRAC, Canberra; Sourdin, T. (2005b) *Facilitating the resolution of disputes before tribunals*. Paper presented to 8<sup>th</sup> Annual AIJA Tribunals Conference, 9-10 June. Sydney.

<sup>10</sup> McClellan, Justice P. (2005) “The value of civil claims: how should courts and tribunals allocate resources? The recent experience of the Land and Environment Court”. Paper presented to the 8<sup>th</sup> Annual AIJA Tribunals Conference, 9-10 June. Sydney.

<sup>11</sup> Lewis, J. (2007) “McClellan puts his stamp on the Supreme Court” 45(2) *Law Society Journal*, p. 24-25.

<sup>12</sup> Sourdin, T. (2005a) *Alternative Dispute Resolution (2<sup>nd</sup> ed)*. Thomson.

<sup>13</sup> Boule, L. (2005). *Mediation: Principles, process, practice (2<sup>nd</sup> ed)*. LexisNexis Butterworths, Sydney.

<sup>14</sup> *Ibid*, at p.43-45 Boule charts these different models of mediation.

<sup>15</sup> Callaghan, P. (2006) “Roles and responsibilities of lawyers in ADR” paper delivered at Negotiation and ADR skills for lawyers, The University of New South Wales, Faculty of law, Centre for Continuing Legal Education, 1 December. Sydney, p. 1. The Law Council of Australia also published “Ethical Standards for Mediators” in February 2000.

ADR: “To be metaphorical, ADR represents for lawyers not just fruit on the sideboard but it is a real slice within the cake of professional work”.<sup>16</sup>

### **The legal profession and mediation**

The legal profession has adapted to alternative dispute resolution methods, including mediation. However, “mediation” within legal practice is broadly defined and often tacked on to the existing profession as an additional process within the adversarial system rather than an alternative to it. The word “mediation” has been used to include processes that traditionally have not been regarded as mediation. As practiced by many lawyers, the aims of mediation are to settle and/or evaluate (or the often heard phrase ‘doing deals’) rather than to allow parties to resolve by recognising their own needs and interests. Lawyers use directive and recommendatory methods that have an efficiency goal. Settlement mediation as practiced by lawyers is a form of negotiation in which legal rights are the basis upon which a compromise is sought between disputing parties.<sup>17</sup> Simply put, the bottom line for lawyers in mediation is to settle a dispute as quickly as possible.<sup>18</sup> The dispute resolution processes have “taken on the aura of legal proceedings in terms of legal representation, the limits of confidentiality and disclosure and the contractual style settlement agreements drafted upon resolution”.<sup>19</sup>

In contrast, the facilitative model of mediation (as described by NADRAC and adopted as the Australian Standard)<sup>20</sup> adheres to the inherent values of dispute resolution in its classical or purist form where participation is voluntary and the mediator is independent having no determinative or advisory role in regard to the dispute or the outcome. This model recognises that the issues of conflict are broader than merely presenting issues and entails outcomes that resolve conflict through dialogue between the parties in a face to face meeting with a neutral facilitator (mediator) in order to assist the disputants to understand each other’s point of view and reach an agreement that is acceptable to them and in which their needs are met. A focus on empowerment and recognition and behavioural/personal choices are part of facilitative mediation models, as is self-determination.<sup>21</sup> The goal of facilitative mediation is not to settle per se, but to allow parties to

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<sup>16</sup> Ibid, p. 13

<sup>17</sup> Spencer, D. & Altobelli, T. (2005) *Dispute Resolution in Australia; cases, commentary and materials*. Thomson Lawbook Company, Sydney, at p. 473 discuss the particular problems of the separation of the professional role of lawyer/mediators within the evaluative mediation model.

<sup>18</sup> Macfarlane, J. (1997). ‘The mediation alternative’, in Macfarlane, J. (ed) (1997). *Rethinking Disputes: the mediation alternative*. Cavendish Publishing, London.

<sup>19</sup> Spencer, D. & Altobelli, T. op. cit., n 17, p. 26.

<sup>20</sup> National Alternative Dispute Resolution Advisory Council (NADRAC) (2001) *A Framework for ADR Standards*. Attorney General, Canberra.

<sup>21</sup> Bush, R. Baruch & Folger, J. (1994) *The promise of mediation: responding to conflict through empowerment and recognition*. Jossey-Bass, San Francisco.

identify options and solutions that are based on their needs and interests rather than legal rights and intervention.

The facilitative model of mediation calls for the exercise of skills and the adoption of a role for which the legal profession is generally not equipped through training and education and one in which they are not usually the most comfortable. Tillet observes that “it is difficult to understand how lawyers can become mediators on the basis of qualifications and experience in a discipline which is in fact the antithesis of mediation”.<sup>22</sup> The traditional role of lawyers is to represent and advocate on behalf of clients in an adversarial system. It is not to act as an independent facilitator who believes in the ability of persons to negotiate and settle things for themselves.

In the continuum of dispute resolution processes, litigation and mediation are at opposite ends of the spectrum and require the application of opposite principles. There has been a lack of knowledge, training and education amongst lawyers about mediation processes, philosophy and outcomes.<sup>23</sup> Australian law schools teach doctrinal principles of appellate law based on the adversarial system and very little time teaching non-adversarial alternatives.<sup>24</sup> However legal education is changing with some law degrees becoming more generic and inclusive of alternative dispute resolution methods. This will change the culture of the next generation of the legal profession. Nevertheless, for existing practitioners calls have been made for “re-education”, “so that they understand and operate within the objectives that underpin these reforms”.<sup>25</sup> Many mediation and dispute resolution courses are now offered through tertiary institutions and private providers; and the trend is towards requiring training to undertake mediation practice.<sup>26</sup> An example is registration requirements for family dispute resolution providers under the new provisions of the Family Law Act, as well as a new accreditation system for family dispute resolution practitioners being phased in from 1 July 2007.<sup>27</sup>

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<sup>22</sup> Tillet, G. (1989) ‘Conflict Resolution Training and Education’, paper given at Conflict Resolution Trainers Conference, Sydney University quoted in Astor, H. & Chinkin, C.M. (1992) *Dispute Resolution in Australia*. Butterworths, at p. 222.

<sup>23</sup> Spegel, N. (1997). ‘Australian lawyer attitudes towards mediation: implications for training and education’. Paper delivered at the International Association for Conflict Management 10th Annual Conference, Bonn.

<sup>24</sup> Spencer, D. & Altobelli, T. op. cit., n 17, p. 28.

<sup>25</sup> Olsson, Justice L.T., (1999) “Combating the warrior mentality” in Sampford, C., Blencowe, S. & CondlIn, S. (1999) *Educating lawyers for a less adversarial system*, Federation Press, Sydney, at p. 2

<sup>26</sup> Pollard, J. (2007) “Collaborative Law gaining momentum”, 45(5) *Law Society Journal*, p. 68-74. At p. 72 Pollard notes that it is estimated that since the early 1980s up to 20,000 Australian lawyers have undertaken mediation training, but very few have practised as mediators.

<sup>27</sup> See Farrant, K. (2006) “Accreditation – a new direction for family dispute resolution practitioners”. Paper presented to Mediation Conference for Chairpersons, Legal Aid NSW, 29 November. Sydney; and Lawson, D. (2006) *National Consistency in Training and Assessment for Dispute Resolution Practitioners*. Paper presented to Mediation Conference for Chairpersons, Legal Aid NSW, 29 November. Sydney. A national mediation accreditation system is also being developed under the auspices of NADRAC.

## Lawyer's roles in mediation

Lawyers may be involved in mediation in at least two different ways.<sup>28</sup> One role is as a mediator actually conducting a mediation session, discussed above. A second is as a representative (or more strictly, advisor) of a client in a mediation session, where the session is conducted by a neutral third person/mediator.<sup>29</sup>

In this role, if lawyers allow clients to assert their own interests and underlying needs, which is what mediation should be about, a lawyer's presence is usually not necessary to the process. Lawyers are at risk of becoming redundant in the process as they are in fact not "representing" a client in the traditional way. This may explain the "reluctance on the part of some lawyers to allow their clients to play a central role".<sup>30</sup>

Where lawyers for both sides are present in such a mediation session, a dilemma arises as to who has control of the content of the discussion, the lawyers, the disputants or the mediator. As the process is a non-legal one, the lawyer's role should be one of impartial support and this is required by professional guidelines.<sup>31</sup>

If lawyers compete with one another as in an adversarial contest, or "sabotage" the role of the mediator by entering into the content of the mediation between the parties, the process will be hindered and with it the possibility of settlement.<sup>32</sup> Given the dynamics of lawyers in mediation there is a difficulty for the mediator, whether the mediator is a lawyer or a non-lawyer is maintaining authority over the process and control of the lawyers. This could well detract from the flow of the mediation and divert the mediator's attention from the facilitation role and from the disputants;

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<sup>28</sup> Ardagh, A. & Cumes, G. (1998) 'Lawyers and mediation: beyond the adversarial system?' 9 *Australian Dispute Resolution Journal*, p. 72-80.

<sup>29</sup> Alternatively a lawyer may refer a client to mediation where the lawyer representative is not actually present and therefore does not participate in the mediation session.

<sup>30</sup> Charlton, R. (2007) "Whose mediation is this anyway?" 45(1) *Law Society Journal*, p. 44-45, at p. 44

<sup>31</sup> Charlton, R. *ibid*; Sordo, B. (1996) 'The lawyer's role in mediation', 7 *Australian Dispute Resolution Journal*, 20. In some schemes for example New South Wales Legal Aid Family Law Conferencing the role of the parties' lawyers (where parties may or may not be represented) is to advise their clients and write up the terms of settlement.

<sup>32</sup> Dewdney, M. (2007) "Party, mediator and lawyer-driven problems and ways of avoiding them". *LEADR Update*, 5 June 2007, p. 10



their needs and interests, and their need to communicate unhindered with one another. Ultimately this impacts on the legitimacy of the process and on the satisfaction of the client.

All of these matters indicate that lawyers involved in a client's mediation need to consider carefully what their purpose will be and what outcome is considered *by the client* to be desirable. Client satisfaction requires full participation and empowerment of the client in the mediation process, not decisions by the lawyer. As noted above, this creates a confusion of two quite different roles, which require different skills and objectives<sup>33</sup> and may be a fundamental dilemma for lawyers regarding whether they are a representative/advocate of a client or a more passive adviser/assistant in the mediation process.<sup>34</sup>

This discussion of lawyer mediation demonstrates tensions between ADR and current legal practice. In the next section we examine the underpinning assumptions and constitutive practices of collaborative law and consider whether the dilemma between being a representative as opposed to an advisor is overcome in this new model.

### **Collaborative law**

Like facilitative mediation, collaborative law commits to resolving disputes by negotiation but without a mediator present. Rather it is in '4s' with a 6 way communication.<sup>35</sup> It could be viewed as an alternative method of dispute resolution because it is an established agreement by lawyers and parties to bypass the litigation process and pursue settlement negotiations.<sup>36</sup> If the negotiations fail both clients must instruct separate lawyers if they wish to take the dispute to court. The process is voluntary and the agreement requires that parties exchange information and commit to resolving the dispute in a way that respects their shared goals.<sup>37</sup> The initial focus of collaborative law has been in family law, however as a process of resolving disputes and making decisions through strategic cooperation rather than litigation it can be applied in any personal or commercial conflict which may lead to civil litigation including, for example, employment law, estate planning and probate and construction law.

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<sup>33</sup> Emmett, S. "The Bar in Mediation and ADR" (2001-02) *Bar News*, Summer, 25 extracted in Spencer, D. & Altobelli, T. op. cit., n 17 p. 38. Emmett notes the role of the bar in mediation as advising the client about a settlement that a client can live with rather than one that the barrister can live with.

<sup>34</sup> See Parker, C. & Evans, A. (2007) *Inside lawyers' ethics*. Cambridge University Press. Cambridge, p. 148-149.

<sup>35</sup> See Pollard, J. op. cit., n 26 at p. 71-72.

<sup>36</sup> See <http://www.collabprofessionalsnsw.org.au>

<sup>37</sup> Scott, M. (2006) "The connection between mediation and collaborative law", Paper presented to Mediation Conference for Chairpersons, Legal Aid NSW, 29 November. Sydney.

As originally proposed in the field of family law the role of the lawyer is to assist the client in a process of shared problem solving. The lawyer has a duty to maintain the integrity of the process, including the requirements of honesty, disclosure and good faith. In this sense collaborative law has a clearly articulated set of goals and values which in many respects are similar to those of mediation; the ideal practice being characterised by:<sup>38</sup>

- A recognition by lawyers in the process that litigation is an option of last resort, and is the most destructive way, emotionally and financially, of resolving disputes
- The lawyer's advice to clients as to how to resolve the dispute being directed towards a fair process and just outcomes for *both* parties
- Promotion of constructive communications
- Focus on best interests of children

A principal objective is to reach an amicable, timely and inexpensive resolution of the dispute; to resolve disputes according to interest based negotiation between the parties, rather than positional bargaining. This means the 'legal' position is not the standard against which the parties and their lawyers seek to resolve the dispute. However, the extent to which a party engages in interest based negotiation may depend on the strength of their legal position. Where the parties are in positions of 'mutual relativity' (that is, where their legal rights are relatively equal, and they are to have an ongoing relationship in some way) compromise between them may produce a settlement that is fair for both.

Collaborative law could have real benefits for parties engaged in ongoing familial or commercial relationships if it serves the basic criteria of what parties, who are in dispute, want – timely, cost effective and fair resolution of their dispute. It has been endorsed by the Commonwealth Attorney-General and the Chief Justice of the Family Court.

Notwithstanding the benefits and promotion of collaborative law by the legal profession there are a number of factors that need to be examined.

Collaborative law is a process that sits more comfortably with lawyers than mediation because they maintain control of the negotiated settlement. They set the agenda and are responsible for keeping minutes of each meeting and debriefing with clients. Although at first blush, collaborative law principles seem similar to mediation, collaborative law is a process without mediators and seems to have arisen in response to the competition from mediators, particularly in the family law area, and to other changing legislative demands. Whether or not this is a positive development is questionable given that similar alternative dispute resolution services may be found elsewhere more cheaply.

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<sup>38</sup> Family Law Council Sub-Committee for Consultation (2006) *Draft Best Practice Guidelines for Collaborative Family Law Practice*. See [www.ag.gov.au/agd/WWW/flc](http://www.ag.gov.au/agd/WWW/flc)

According to Pollard collaborative family law sessions normally require four to seven sessions.<sup>39</sup> The number of sessions required as well as the business formality associated with them will have a substantial effect on the costs of the process and will undermine the goals of speedy, inexpensive and informal resolution. Moreover, collaborative law could be viewed as creating a two-tiered method of dealing with family law disputes. It is being promoted as an “alternative” or an addition to the new Family Law mediation requirements. The Family Law Council has recommended that the Law Council of Australia considers developing and disseminating information about collaborative practice and lists of practitioners to Family Relationship Centres and community based service providers of family dispute resolution.<sup>40</sup> There may be limitations in regional and rural areas concerning this recommendation, because the reality is that collaborative law requires more than one collaborative legal practice.

Collaborative law could be seen as a way of recapturing ADR, particularly in the family law area where mediation is now mandatory under the 2006 amendments to the Family Law Act. The rise of collaborative law since these amendments were proposed leaves open the suggestion that lawyers are creating another dispute resolution process which they control. Collaborative law is being promoted at the time that family law is excluding lawyers as the primary dispute resolution practitioners. This is too much of an overlap to be merely coincidental. Without this less adversarial response to family law by the profession a large slice of work would have been eroded. According to Pollard over 400 professionals (mainly lawyers) have completed two-day basic training courses in collaborative practice throughout Australia in the last two years with courses proliferating all over Australia.<sup>41</sup> Some see collaborative law as just another “training opportunity” as one lawyer-mediator observed at a 2006 mediation conference. It could be argued that there is no need for a type of practice called collaborative practice if the legal profession can practise within the largely non-legal dispute resolution methods, based on mediation and conciliation as part of the current framework of dispute resolution developed by courts and the broader legislative system.

Because collaborative law rules out commencing litigation it could be seen as less than satisfactory if parties fail to agree. The requirement that parties would have to instruct other solicitors with the time and cost burdens that this would impose is a disincentive and places pressure on parties to settle. This reduces one of the core services of legal practice namely the capacity to commence litigation. Furthermore, under new family law provisions concerning children parties would still be required to obtain a “mediation” certificate from a registered family dispute resolution practitioner if they wish to proceed to court.

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<sup>39</sup> Pollard, J. op. cit., n 26 p. 72

<sup>40</sup> Family Law Council, (2007) *Collaborative Practice in Family Law: Report to Attorney-General (December 2006)*. Commonwealth of Australia, Canberra. See Recommendation 4 at pp. 2 & 40

<sup>41</sup> Pollard, J. op. cit., n 26 p. 69. Despite the numbers of trained professionals relatively few collaborative law matters have been conducted. See Thomson, J. (2007) “A true collaboration”, 45(5) *Law Society Journal*, p. 22-24.

Collaborative law seeks to retain the reality of dispute resolution within legal practice for those who can afford it. It is the entrepreneurial business interest of lawyers that drives this push to collaborative law and which may be followed unquestioningly or reluctantly by others who may feel they cannot be left out of this new area of practice in order to be competitive. As Callaghan warns about the “bread and butter” benefits of lawyer involvement in mediation, the same applies to the promotion and development of collaborative law.

The Family Law Council Report *Collaborative Practice in Family Law* recommended to the federal Attorney-General that national guidelines for collaborative practice be developed.<sup>42</sup> These are being resisted by the Collaborative Professionals NSW.<sup>43</sup> Further community consultation, law reform and peer consideration of its theoretical underpinning and ethical application is also needed. Pollard observes that collaborative law raises ethical questions which lawyers accustomed to litigation are unlikely to have encountered before and that those that are “particular to collaborative law need to be acknowledged and addressed in the guidelines”.<sup>44</sup> In addition to the client/lawyer issues that Pollard notes, further questions include: who ensures whether collaborative law negotiations are conducted “in the best interests” of children, in the absence of a neutral third person? What will prevent lawyers from falling back into hard ball negotiation tactics and deciding for their clients in “2s” rather than allowing interest based negotiations in “4s”? Can collaborative law be seen as part of the lawyer model of mediation? Will it influence this model or has it been influenced by it? Pollard notes that lawyers who have had mediation training are better equipped to be collaborative lawyers.<sup>45</sup> These and many other questions are topics for further research.

## CONCLUSION

In this post-ADR period, similarly to its initial response to ADR, the legal profession and legal processes are again at an important crossroad. The profession realises that it must respond to calls for change, but it also wants to maintain pre-eminence in the provision of ADR services. The profession has provided these services including ‘mediation’ in the form of legal settlement without making fundamental changes in the way traditional legal processes work.

At this early stage in the development of collaborative law in Australia it could be that its goals, principles and practices, which seem to include some of the principles and ideals of facilitative mediation, and which initially bypasses court proceedings, could produce a more satisfactory alternative to an ad hoc tacking on of ‘mediation’ within adversarial processes. On the other hand it

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<sup>42</sup> Family Law Council, *op. cit.*, n 40. See <http://www.ag.gov.au/agd/WWW/flcHome.nsf/Page/Publications>

<sup>43</sup> See Lewis, J. (2007) “Report recommends enshrining new approach in family system”, 45(3) *Law Society Journal*, p. 16-18, referring to comments of the Secretary of Collaborative Professionals NSW, Lorraine Lopich.

<sup>44</sup> Pollard, J. *op. cit.*, n 26 p. 74

<sup>45</sup> *ibid*, p. 72

could be viewed as a professional desire (the newest fad) on the part of individual lawyers to maintain control of dispute resolution services whilst making minimal changes to their practices, yet appearing to be at the forefront of its reform. If this is the purpose and effect of collaborative law then it raises real questions about whether or not it is a genuine ADR reform or just a legal “alternative” to institutionalised ADR.