CHARLES STURT UNIVERSITY

CRO CSU Research Output
Showcasing CSU Research

http://researchoutput.csu.edu.au

It is the paper published as:

Author: A. Ardagh

Title: Collaborative law: Lessons learned from the ACT

Year: 2010

Editor: Tania Sourdin

Conference Name: Fourth National ADR Research Forum, Trends and Issues in ADR Research

Conference Title: National Alternative Dispute Resolution Advisory Council (NADRAC) Research Forum

Conference Location: Canberra

Publisher: NADRAC

Date: 16-17 July 2010

Abstract: This research, including in depth interviews with collaborative practitioners, investigated the use of collaborative law in the Australian Capital Territory (ACT). Amongst other things, it looked at the models which practitioners used and the results since it started in 2005. A fuller account of the research, covering the background, the early history of collaborative law in Australia, the significance of the research, research methods, client demographics and findings, is to be published in Australasian Dispute Resolution Journal, November 2010. This paper focuses on the lawyer motivations, perceptions and difficulties experienced.

URLs: http://www.nadrac.gov.au/Pages/default.aspx

http://researchoutput.csu.edu.au/R/-?func=dbin-jump-full&object_id=25161&local_base=GEN01-CSU01

Author Address: aardagh@csu.edu.au/

CRO identification number: 25161

Collaborative Law: Lessons learned from the Australian Capital Territory

Anne Ardagh*

ABSTRACT This research, including in depth interviews with collaborative practitioners, investigated the use of collaborative law in the Australian Capital Territory (ACT). Amongst other things, it looked at the models which practitioners used and the results since it started in 2005. A fuller account of the research, covering the background, the early history of collaborative law in Australia, the significance of the research, research methods, client demographics and findings, is to be published in *Australasian Dispute Resolution Journal*, November 2010. This paper focuses on the lawyer motivations, perceptions and difficulties experienced.

Introduction

Collaborative law has been vigorously promoted and training courses have proliferated in Australia. Training courses started in 2005 and continued into 2009[1] with collaborative professional groups formed in several jurisdictions in Australia.[2] Several hundred lawyers and other professionals have been trained in collaborative law in Australia.[3]

However, there have been no empirical studies undertaken in Australia concerning collaborative law or evaluations concerning its success. This case study of collaborative lawyers in the ACT investigated questions that have been raised about this new approach to lawyering. The research employed archival evidence such as newspaper and other reports, minutes of meetings, relevant correspondence and training materials as well as academic literature. A detailed history was recorded and a purposive sample of ACT collaborative lawyers was chosen for in depth interviews.

---

* Associate Professor in Law, Charles Sturt University; practising mediator accredited to the National Standard; also accredited with NSW Community Justice Centres; NSW Legal Aid Commission; NSW Health Conciliation; registered family dispute resolution practitioner. The author acknowledges the Faculty of Business, Charles Sturt University for funding this project and thanks the many family lawyers who shared their experiences.

1 Training was an adjunct to the International Collaborative Practice Conference, Sydney March 2009: http://www.collaboratingdownunder.com/schedule-of-pre-and-post-conference-training.html> at 12 April 2009. UTS conducts frequent basic training courses, for example 13-14 November 2009 and 19-21 November 2009 (Advanced Collaborative Practice). See http://datasearch.uts.edu.au/law/courses/pdu> at 28 Oct 2009. There have been numerous courses in other Australian States. In general, the trainers have been from North America although in some jurisdictions for example Victoria these are being replaced by Australian trainers.

2 Collaborative Professionals (NSW) Inc website lists collaborative professionals in NSW, mainly lawyers: http://www.collabprofessionalsnsw.org.au/ For Australian Capital Territory practitioners see Collaborative Practice Canberra<http://www.collaborativepracticecanberra.com.au> at 27 March 2009. Websites for Queensland (23 "lawyers and lawyer mediators" listed) and Western Australia (all lawyers) are linked on the New South Wales website. Victorian practitioners can be found at http://www.liv.asn.au/Collaborative-Professionals> at 4 Nov 2009 (59 lawyers, 6 financial advisors, 1 counsellor and 1 psychologist).

3 M Scott (2008) "Collaborative Law: Dispute Resolution Competencies for the 'New Advocacy'" 8(1) *QUT Law and Justice Journal* 213 at 219.

Lawyers' motivations to undertake collaborative legal processes in the ACT

Legal changes, loss of business and *professional realignment*

The Canberra lawyers were very proactive in promoting their new practice to cater for family law clients, creating a new professional identity and offering an alternative to family mediation and a way of providing better client service. Whereas the adoption of collaborative law in overseas jurisdictions was self motivated following disillusionment with family practice over many years[4], in Australia it can also be seen as being 'pushed' by the legislative changes in the family law area. One early practitioner described it as 'seeing the writing on the wall' particularly following the *Every Picture Tells a Story* report[5].

Lawyers' difficulties with practice models and procedures

Despite the enthusiasm for collaborative law, the research shows that there has been confusion and disagreements about models and methods of practice in the ACT, as well as about the suitability of the collaborative processes for clients: 'issues about who is the right client, who is the right lawyer and should there be a team approach' as summarised by one respondent. There have also been disagreements about collaborative practice between New South Wales, Victoria, the ACT and Queensland with no national approach. Different models have been used, reflecting the particular North American trainers and their model.[6]

Canberra lawyers started with a collaborative law model (lawyers and clients) and then several cases were switched to a collaborative practice model (which includes other professionals) because: 'we were persuaded to use the team model by overseas trainers'. The experience of this model was said to be 'less than ideal'. There has not been agreement on which model is preferable although the majority appeared to be in favour of 'negotiating in fours'(two lawyers and two clients) and 'being flexible'. Another respondent said: 'There are more collaborative law matters than collaborative practice matters, because it is more expensive to have multidisciplinary teams and clients are usually scared away by the expense.' Others reflected on the rigidity of the practice model and found its processes to be 'terribly detailed'. Another had the view: 'difficult matters can get tied up with vast amounts of money spent and then reach a stalemate' and expressed the conclusion they could no longer recommend collaborative law to clients because of 'the interminable nature of things'.

By mid-late 2007 there were some matters that had 'fallen over' and there were 'philosophical differences' amongst the group in terms of what matters are suitable for

---

4 See S Webb and R Ousky, *The collaborative way to divorce: the revolutionary method that results in less stress, lower costs, and happier kids, without going to court*. Plume, New York, 2007.

5 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* (2003). High levels of consumer dissatisfaction with family lawyers were reported.

6 Queensland Collaborative Law has been established to promote collaborative Tesler law according to its website; see note 12 above. The website also refers to a new body called the Australian National Council of Collaborative Lawyers. Victorian training which commenced in 2006 was initially conducted by the current president of the International Academy of Collaborative Professionals, Sherri Goren Slovin.

collaborative law and what are not; a big difference between the ‘theory and practice’ of collaborative law.

The collaborative law contract

Apart from the process issues and differences concerning models, the collaborative law contract itself was also a source of tension in the ACT. Issues concern (1) whether there should be a contract at all which restricts a lawyer’s future involvement with their client if the collaborative law process fails; (2) if there is a contract what is its effect in terms of how the process runs and how rigid the process is; and (3) what terms should the contract contain. The first issue was raised by many of the lawyers interviewed in terms of the duty to the client and the sense of letting the client down when the process fails, with the client then having to start again with another lawyer. One respondent concluded: ‘we need an alternative model without signing a contract so that the client does not lose the lawyer at the end (if negotiation fails)’.

However, others saw the contract as the ‘key’ to collaborative processes: ’The most important thing is you sign the contract which provides the container which keeps people in it, even when they don’t want to be in it, they’re still stuck in it (and therefore have to settle)’. Another confirmed: ‘the contract has to say we don’t go to court’.

Costs clauses

The legalistic nature of collaborative contracts was identified by several practitioners as a factor that hadn’t worked. This concerned a costs clause in the contract—a penalty provision against the partner who withdraws from the negotiation in terms of having to pay the costs of the other party. This clause was thought to be ‘unacceptable’ by one practitioner. Another felt that ‘punitive’ measures should not be the case in collaborative processes ‘it’s not part of most collaborative law models— it has caused disagreements in Canberra. There is no way I would enter into that sort of contract, ever, ever again’. Another respondent explained that it caused disagreements about who broke the contract first and caused lawyers to talk too much; they became ‘positional’, with the clients having to pay.

Mistrust and adversarialism

Mistrust in working together as collaborative lawyers was identified by many practitioners as a factor affecting both the contract and the success of the collaborative process. This concerned trust between the lawyers themselves as well as between firms. Several commented on adversarialism and the danger of becoming positional or what can be called ‘reverting to type’. Collaborative law may not be an easy transition for lawyers to make given their traditional lengthy training and experience in adversarial practice. It may work well until there are real problems with the negotiations or stalemates and hence the tendency to retreat to what is traditionally known and practised.

Costs and ethics of collaborative law processes

Collaborative law processes can be unethical and result in a lost investment according to Fines.[7] It may also amount to over servicing: 'our clients went home having already met once and even though they initially wanted it (collaborative law) they said "this is ridiculous, we know what we want … settle it". I felt it was ludicrous to have another meeting to decide what we were going to talk about.'

What has been learned from the experience?

The ACT experience was experimental and introduced at a time of change in the family law system. One practitioner observed: 'We rushed in with collaborative law in Australia—we didn't evaluate it—there has been no evaluation of its success of otherwise as a process around the world'. However this practitioner went on to acknowledge the positive learning experiences: 'We've learned from working and training with other professional groups that in the new family law system clients need all of us, and it's important that we talk to each other and clients feel that whether they are with a mediator or a child specialist or the lawyers they are in safe hands in terms of getting through the process.' This confirms the findings of the *Enhancing inter-professional relationships report*[8] about the importance of all family law professionals understanding what other professionals do and learning to work cooperatively.

It was observed that there may be less need for collaborative law as a separate process since Relationships Australia had changed the way it operates family dispute resolution in the ACT by allowing lawyers to be present in joint family mediation sessions if parties agree[9]. In New South Wales Legal Aid is trialling having lawyers available to clients for Family Relationship Centres mediation processes.

Developing inter professional relationships was described as a continuing learning process. It appeared to be a description of a new kind of cooperative practice—not necessarily cooperative law (or collaborative law "lite" as described by some researchers)[10], but a cooperative inter professional set of working relationships. This is the kind of collaboration that will enhance inter-professional relationships in the new family law system in Australia.

Collaborative law complicated lawyering in the ACT to the extent that although there was

---

7 B Glesner Fines, "Ethical Issues in collaborative Lawyering" 21 J. *Am. Acad. Matrimonial Law* 141 (2008).

8 H Rhoades et al, *Enhancing Inter-Professional Relationships in a Changing Family Law System*, (Final Report, University of Melbourne, 2008).

9 This was confirmed by the researcher in telephone conversation with ACT Relationships Australia, November 2009. Lawyers may also attend the separate pre-mediation meetings.

10 John Lande has written extensively about cooperative practices of lawyers which have grown up in the shadow of collaborative law, but do not use a disqualification clause which excludes the lawyer if the collaborative process breaks down; see for example 'Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin', 2008 *Journal of Dispute Resolution* 203; 'Developing Better Lawyers and Lawyering Practices: Introduction to the Symposium on Innovative Models of Lawyering', *2008 Journal of Dispute Resolution* 1; "Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering" 64 *Ohio State Law Journal* 1315 (2003). See also D Hoffman, "Collaborative Law in the World of Business", 6 (3) *The Collaborative Law Review* 1 (2004).

much initial enthusiasm the experiment faltered[11]. The collaborative law process, which commenced in 2005 had a total of about 45-50 matters till the end of 2008. The number of collaborative matters still in progress at November 2008 was around 5 or 6 and the rate of new collaborative matters had almost ground to a halt.[12] As put by one person 'everyone has had to face reality; there are grave concerns with it and a lot of soul searching at the moment'.

However, the experience of Canberra lawyers confirms McFarlane's research in the 'New Lawyer' [13] (and her other reports) concerning the convergence between lawyer's traditional advocacy and new consensual conflict resolution processes. The experience led to experimentation with more flexible and different consensual approaches to lawyering, including conferencing and other settlement facilitation methods.

As noted above, it also confirms the research of Rhodes et al[14] that what are emerging are more flexible cooperative dispute resolution methods in family law practice which are more suitable for the unique federal system of family law which exists in Australia; a system which dedicates itself to encouraging dispute resolution, keeping separating couples out of court and enhancing inter professional relationships in family law. Moreover the Legal Aid system in Australia which provides for lawyers to be present with clients in family law conferencing may also contribute to a more limited place for collaborative law in Australia as does the introduction of legal advice in family relationship centres in some jurisdictions.

Furthermore, the Legal Aid approach provides a valuable alternative model for collaborative law which practitioners in the ACT were searching for. Incorporating a mediator/family dispute resolution practitioner to facilitate joint meetings provides independent control and management of the process and makes the lawyering role less ambiguous (or hybrid). It also prevents adversarialism and reverting to type possibilities and enhances the empowerment of parties by having an impartial facilitator of their dialogue.

Conclusion

The research has revealed that in order to practise collaboratively lawyers need a clear and agreed sense on what practice model is being used and why; what is the effect on the clients and the cost; what kind of contract concerning the lawyer/client relationship should be used; and the need for a high degree of trust between the legal practitioners and confidence in their commitment to collaboration and interest based negotiation.

The research has also contributed to an understanding of the aspirations and difficulties of a dedicated group of pioneering lawyers in the ACT who enthusiastically spent their time and money developing a new form of practice. Further research is needed to learn whether experiences have been similar or different in other Australian jurisdictions.

---

[11] C Caruana, 'Dispute resolution choices; a comparison of collaborative law, family dispute resolution and family law conferencing services', *Family Relationship Quarterly* no. 15 2010, fn 3 confirms that collaborative law was trialled in the ACT but considered by ACT practitioners to be unsuitable for a range of reasons.

[12] A telephone survey by the firm Dobinson, Davey, Clifford and Simpson Family Lawyers in November 2008 concluded: 'in the ACT there are a very small number (of collaborative law matters) that are being started'.

[13] J Macfarlane (2008) *The New Lawyer: How Settlement is Transforming the Practice of Law. UBC Press*.

[14] Rhodes, H. et al *Enhancing Inter-Professional Relationships in a Changing Family Law System*, (Final Report, University of Melbourne, 2008).