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Lorraine Lopich

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**New Developments in ADR Practice**

Collaborative practice — 'We already do that'

Lorraine Lopich

Introduction

The most common response to a brief explanation of collaborative practice from both lawyers and/or mediators is 'we already do that'. The lawyers tell you, we settle most of our matters and we often do so with our clients present during a round table conference. The mediators will tell you that collaborative practice is a form of co-mediation.

Sir Laurence Street would not entertain the view that collaborative practice was anything other than mediation.¹ It might reasonably be presumed however, that Sir Laurence, along with most other lawyers, would not view lawyer-negotiated settlements as mediation.

Although collaborative practitioners need mediation skills, collaborative practice has some very distinctive features that distinguish it from the broadest definition of mediation. It is fundamental to the collaborative process that the collaborative lawyers are not neutral or impartial third parties in the process. On the contrary, their role is to advise their clients and they are their clients' allies.² The legal advice that collaborative lawyers give to their clients is acknowledged, however, to be simply one facet of the dispute to be taken into account as the clients work toward a resolution that meets their needs.

While the lawyer's knowledge of the law is also essential to the collaborative process, it is fundamental to the process that the lawyers do not enter into positional bargaining as they do during a settlement conference. The clients conduct the negotiations based on their interests; the lawyers advise their clients and assist them to conduct principled negotiations, especially when the parties are negotiating competing interests. The lawyers also advocate for their client's

when the parties are negotiating competing interests and at this stage the lawyers model principled negotiations to the clients.

Founding collaborative law

After approximately 20 years experience practising family law, Minnesota lawyer and mediator Stuart Webb clearly did not believe that he could practice collaborative law in his role as a traditional lawyer or as a mediator when he decided that he just could not take it any more. He could no longer represent clients in an adversarial family law system that exacerbated the problems for families going through separation and he obviously did not find the solution to his concerns as a mediator.³

In the late 1980s Webb commenced a course in psychology. By the beginning of 1990, however, he knew that he did not want to become a psychologist either, he wanted to continue to practice law, but his way. In January 1990 Stu Webb commenced practice as a collaborative lawyer and mediator.⁴ He quickly realised that collaborative practice would only succeed if it did not occur in the shadow of the court. Hence he insisted that he and the other lawyer, along with their clients, sign a contract that required the lawyers to withdraw from the matter if the clients decided to proceed to litigation.

Developing a team approach

Around the same time that Webb founded *collaborative law* in Minnesota, Californian psychologists Peggy Thompson and Rodney Nurse and social worker Nancy Ross were searching for a better approach for family law service providers to post-separation families. Thompson and Nurse worked with couples trying, sometimes unsuccessfully, to avoid the

breakdown of their marriage. It was their common experience to observe well-meaning clients move from respectful to acrimonious communications once they entered into the family law system.⁵

Peggy Thompson was also a custody evaluator and a high conflict divorce counsellor working with parents involved in ongoing conflict after divorce, including custody disputes. Thompson and Nurse were concerned

that the custody evaluations were being done after court proceedings were commenced and the battle lines were drawn.⁶

In 1993 Pauline Tesler, an experienced and highly respected Californian family lawyer, became aware of collaborative law and she brought it to San Francisco. In 1993 Peggy Thompson, Rod Nurse, Nancy Ross and Pauline Tesler came together to develop an interdisciplinary collaborative team to provide an integrated holistic service to families after separation. Under the enthusiastic stewardship of Pauline Tesler, Peggy Thompson and Nancy Ross, interdisciplinary collaborative practice grew rapidly in California. In 1997 Pauline, Peggy and Nancy were founding members of the International Academy of Collaborative Practice⁷ (IACP), which is recognised as the international collaborative practice peak organisation.

International growth and the evolution of other models

Collaborative practice has spread across the US, Canada and Britain and it has taken root in Austria, France and Germany. It is spreading rapidly in Australia and has been introduced to New Zealand. Various models have developed, partially in response to cultural differences but also in response to the needs and restraints of the diverse communities to which collaborative practice has been introduced.

For example, collaborative practice is often highly successful in small communities; however small communities may not contain all of the

professionals that are required for the interdisciplinary team approach. Further, even if there are all of the professionals required for an interdisciplinary team

- The clients do their own negotiation while the role of their respective lawyers is that of ally, adviser and advocate within the process.

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model but there is only one financial adviser, it would not be practical to require that he or she does not act in the future for either of the parties to a dispute. The same problem may arise for collaborative coaches and/or child consultants. Collaborative practice is flexible enough to respond to this and numerous other factors but the fundamental principles do not change:

1. The parties each engage a lawyer to advise them and to advocate for a result that is in their best interest.

2. The substantive issues are openly negotiated by the parties in four-way meetings that allow six-way communication, using principled negotiations in which their respective lawyers are their allies.

3. The lawyers and the clients enter into a contract that provides that the lawyers must withdraw if the negotiations fail and parties proceed to litigate.

Other processes have developed such as cooperative law in which the lawyers are not required to withdraw if the parties end up in court but that is not collaborative practice, it is something else.

Collaborative practice

Collaborative law

The fundamentals of collaborative law illustrated in Diagram 1 are as follows:

- The clients are represented by trained collaborative lawyers.
- The collaborative lawyers are bound by the same professional ethical mandates that all lawyers must honour.

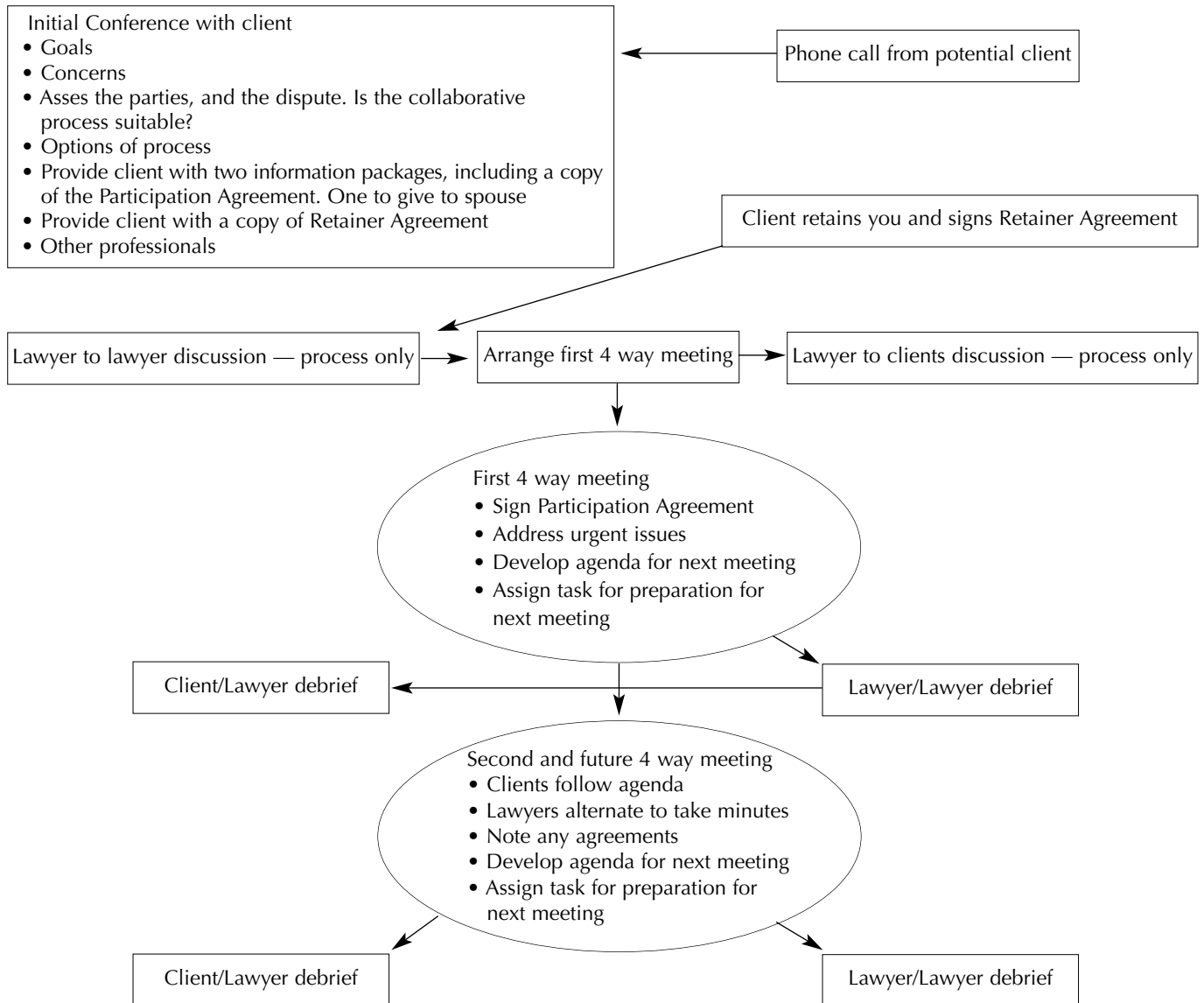
- The lawyers are retained pursuant to limited-purpose retainer agreements. The sole purpose for which the lawyers are hired is to help their clients negotiate a resolution that meets the needs of the family without litigating or threatening to litigate.
- The clients retain their right to terminate the collaborative process and to take their dispute to court, but the collaborative lawyers and other collaborative professionals cannot go with them.
- Information is shared fully and freely.
- All negotiations take place directly, face to face, in four-way meetings. The lawyers do not bargain as agents in the absence of their clients.
- The clients are assisted to participate in principled negotiations, not positional bargaining.
- The clients may engage their own experts and professionals such as financial advisers, and coaches, but such professionals should not adopt an adversarial position, especially if they participate in settlement meetings.

The referral models

- The referral models incorporate that which is fundamental to collaborative law. The difference is that if the clients require the services of other professionals, including experts, such professionals must also sign the participation agreement.
- Each client may have a coach to help them constructively to articulate emotions and key issues.



Diagram 1: Collaborative Law



- Instead of being kept in the dark and out of the loop, the clients' children may have a voice in the process if the clients decide to include a neutral child consultant.
- The clients may also choose to engage a neutral financial adviser to help the parties and their lawyers gather the financial data, analyse the family resources, and help the couple to understand the size of the pie, suggest creative options for consideration that can be far beyond a court's power to order, and test the long term consequences of each of the options.
- Instead of playing the litigation game the neutral financial adviser ensures that all financial questions are answered and all necessary information is brought to the table so

that sound solutions can be devised.

- These professionals all work with the clients to help the couple focus not just on reaching a settlement, but on laying a foundation for optimum communications and problem-solving during the period of rapid changes a family experiences after separation.

Interdisciplinary team model

In the interdisciplinary collaborative team model (see Diagram 2), the team comprises, from the outset, two lawyers, two coaches, a financial adviser and, if there are children involved, a child consultant.

If during the process the clients require professional assistance other than that provided by the team they may be referred out to the appropriate professional, or the professional may be

brought into the process in the same way as occurs in the collaborative law. For example, one or both of the parties, or their child, might require the assistance of a therapist, as opposed to the collaborative coach.

The clients are assisted by their coaches to use good communication skills before they participate in negotiation sessions. They have assistance from a financial adviser to work out how they will manage their finances during the negotiation process and to prepare their financial information. The preparation ensures that the clients use the lawyers' time effectively and in a cost-efficient manner.

If there are children involved, then early in the process the child consultant will see the children and may also see the clients. The child consultant will inform the lawyers of the effect that the parents' separation is having on the children. In a session with the lawyers, and may be with the coaches also present, the child consultant will inform the clients of their children's views.

The information about the children assists the clients to be child-focused during the negotiation process. The professional team work closely together,

while maintaining their respective professional boundaries. The team synergy provides the clients with a holistic process.

Interdisciplinary team synergy

The professionals and experts who are brought into the process must not act in the future for either client, even with the consent of both of the clients to do so.

The advocates say of the interdisciplinary team model that it:

- (1) provides the clients with a holistic resolution of their issues;
- (2) produces agreements that endure far longer than any other process does;
- (3) the clients are given more support both during and after the process;
- (4) the process provides the clients with conflict resolution skills that will assist them in future disputes;
- (5) the team remains available to the clients in the event of future disputes (which is one reason why the members of the interdisciplinary collaborative team cannot act for either of the clients at any time in the future).

There are however, a number of issues that the interdisciplinary team model raises including:

- (1) the extent to which the

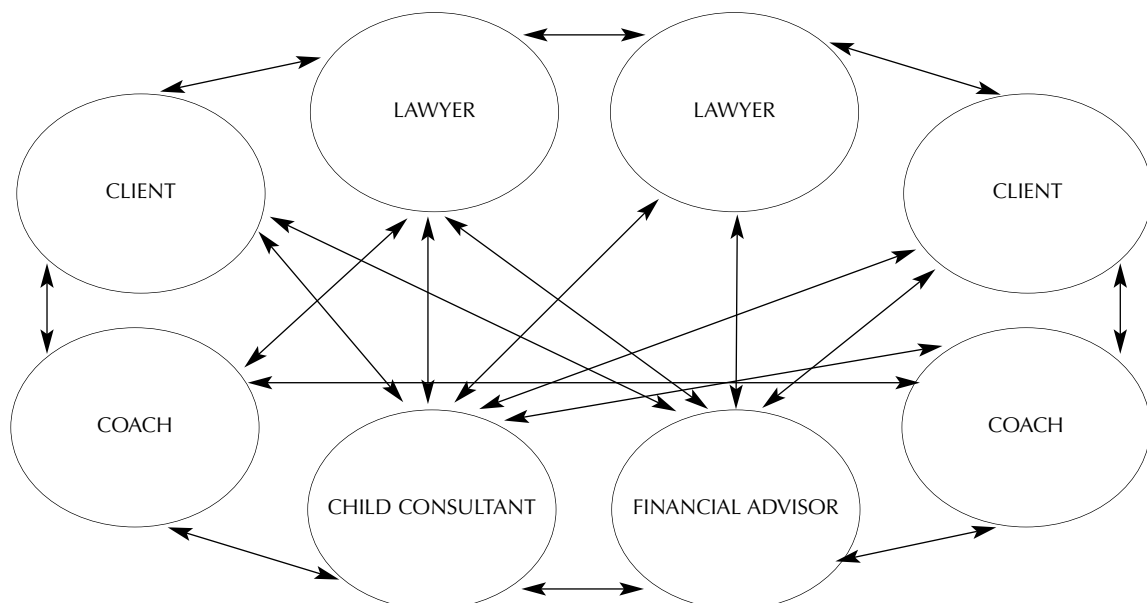
collaborative team are on one hand claiming to empower the clients and on the other hand totally dictating the process and how the clients will conduct themselves during the process;

- (2) the occasions on which members of the team, or the full team may meet without the clients present;
- (3) the transparency of the process;
- (4) whether the clients are actually empowered by the process to negotiate their own resolution, or rehearsed to act in accordance with the process;
- (5) confidentiality between each of the professionals and their respective clients;
- (6) the control by the clients of the costs, including their ability to calculate the future costs.

Notwithstanding those questions, this model is very successful. The team is structured to systematically respond to the mental health issues that arise out of the dispute. The team can also assist with mental health issues that become apparent during the negotiations. The synergy in the team is illustrated in Diagram 3.

The advocates of this model also argue that it is in fact less expensive than the other collaborative practice models. They say that because the clients are fully prepared and informed

Diagram 2: Interdisciplinary team model





up front by professionals, all of whom cost less than lawyers, the clients are able to participate more effectively in the negotiation meetings. Consequently, their legal costs are reduced.

Collaborative practice introduced to Australia

In 2003 His Honour Justice Robert Benjamin, then president of the NSW Law Society,⁸ attended the American Bar Association and returned keen to introduce the Australian legal profession to collaborative practice.

It took a further two years before Stu Webb and Marion Korn delivered the first collaborative law training in Australia in July and August 2005. In less than two years it has been adopted in four States and the Australian Capital Territory.⁹

Development of collaborative practice in Australia

New South Wales

In 2003 a Collaborative Law sub-committee of the NSW Law Society was established. It investigated how to generate training for lawyers interested in becoming collaborative law practitioners.

In August 2005 American Stu Webb¹⁰, and Canadian family lawyer Marion Korn¹¹ conducted the first collaborative law training in NSW at the University of Technology, Sydney.

Collaborative Professionals (NSW) Inc (CP NSW)¹² was established in June 2006. CP NSW is a not-for-profit association to promote collaborative practice to the public, liaise with the Law Society and other professional bodies, which represents the members of the association, liaises with government to assist the development of collaborative practice, and develops education and training of collaborative professionals. CP NSW now has approximately 95 members and a corporate member, Relationships Australia (NSW).

Queensland

In early 2003 a group of family law practitioners from Brisbane, the Gold Coast and Cairns formed a pilot

group to discuss collaborative law. In September 2003 family lawyer, Susan Purdon¹³ and Professor John Wade¹⁴ jointly presented a paper on collaborative law at the Annual Conference of the Family Law Practitioners Association of Queensland.¹⁵ The presentation met with a positive response and identified the need for collaborative law training.

In August 2005 three Gold Coast law firms established Queensland Collaborative Law (QCL).¹⁶ QCL now has approximately 20 members.

Australian Capital Territory

In March 2005 two Canberra law firms¹⁷ launched a pilot program to educate family lawyers in the Canberra Region about collaborative law. In August 2005 Stu Webb conducted the first training in Canberra which was attended by approximately 23 lawyers who practise in the Canberra region.

In June 2006 the ACT Law Society¹⁸ established a Collaborative Law Committee and in early 2007 Collaborative Practice Canberra¹⁹ (CPC) was established. CPC currently has 38 members.

Victoria

In November 2005 the Law Institute of Victoria²⁰ (LIV) hosted a meeting attended by approximately 40 legal practitioners. Experienced US collaborative lawyer and trainer Sherri Goren Slovin made a presentation via video link to the attendees.

In March 2006 the LIV collaborative law working group held a collaborative law training program facilitated by the LIV. The training was conducted by Sherri Goren Slovin²¹ and Professor Tania Sourdin²² of La Trobe University.

Collaborative Professionals Victoria (CPV)²³ was established in early 2007. CPV has 52 members.

Western Australia

The first collaborative practice training in Western Australia was organised by the Family Law Practitioners Association of Western Australia.

In February 2007 Marion Korn conducted training of 28 family lawyers in Perth. The Honourable Chief Judge of the Family Court of Western Australia, Stephen Thackeray, made a brief visit to the training and was supportive of the process. The 28 practitioners formed Collaborative Professionals WA²⁴(CP WA) at the end of the training. The members of CP WA have worked hard to establish basic rules, documents, client contracts etc.

Commonwealth

Collaborative practice and the new family law system

Since August 2005, the Federal Attorney-General has given his and the Government’s support to the promotion of collaborative law in Australia.

Attorney-General referred collaborative law to the Family Law Council

On 31 January 2005 the Attorney-General gave the Family Law Council (Council) a reference on collaborative

law. In consultation with the Law Council of Australia (LCA) and the National Centre of Collaborative Law (NCCL), the Council was requested to advise how the government in partnership with the legal profession can assist in promoting collaborative law in Australia with particular

guidelines for the practice of collaborative law and, if so, how could these best be developed?²⁵

Council established a Collaborative Law Working Group (working group) comprising three members of Council, one representative from the Family Law Section of the Law Council of

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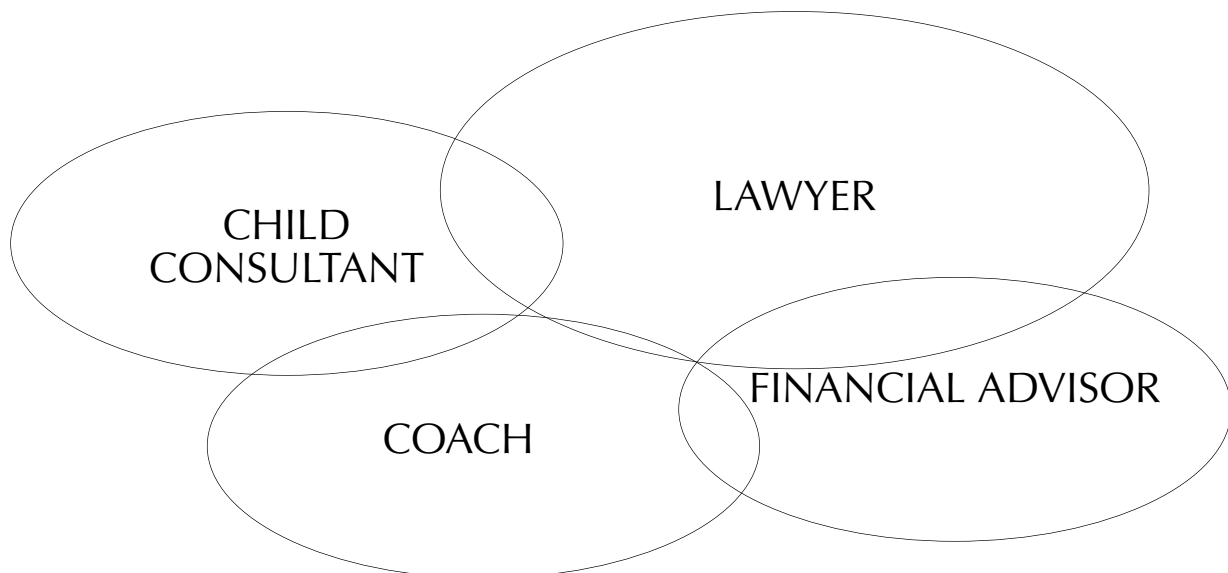
consideration given to:

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?
4. Is it desirable to have national

Australia and four representative from the NCCL, all of whom were family law practitioners from the Australian Capital Territory.

On 2 March 2007 the Attorney—General released *Collaborative Practice in Family Law — A Report to the Attorney-General* prepared by the Family Law Council²⁶ (Report). The Report contains the following recommendations:

Diagram 3: Interdisciplinary team synergy



**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.

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.

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.

The Government is considering the recommendations, however at the launch of the Western Sydney Collaborative Lawyers on 9 July 2007 the Attorney-General Phillip Ruddock referred to the Government's current consideration of the recommendations made by the Family Law Council and said; 'You can take it that we are very responsive'. ●

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.

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.

Recommendation 6

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

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

National Legal Aid should monitor developments in collaborative practice.²⁷

Lorraine Lopich, LEADR member, is a lawyer, mediator and arbitrator experienced in local government, environmental planning and development law, general commercial law and family law.

Lorraine is currently a director of Mediation and Dispute Resolutions Australia Pty Limited and Collaborative Lawyers Pty Limited.

Endnotes

1. Personal telephone conversation with the writer.

2. Bernard S Mayer *Beyond Neutrality — Confronting the Crisis in Conflict Resolution* (Jossey Bass, San Francisco, 2004).

3. See <www.collaborativelaw.com>.

4. See <www.collaborativepractice.com>.

5. Pauline H Tesler & Peggy Thompson, *Collaborative Divorce — The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move on with Your Life* (Harper Collins Publishers Inc. New York, 2006) pp 4–5.

6. Note 5 above.

7. See <www.collaborativepractice.com>.

8. The Law Society of New South Wales, 170 Phillip Street, Sydney NSW 2000, Australia; DX: 362 Sydney; phone: (02) 9926 0333; fax: (02) 9231 5809; website: <www.laws.lawsocnsw.asn.au>.

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

10. Stu Webb, 4345 Coolidge Avenue South, Minneapolis, MN; email: <StuWebb@aol.com>, website: <www.divorcenet.com/MN/webb.html>.

11. Marion Korn, Principal, Queen Street Law, Toronto; email: <mkorn@queenstlaw.com>, website: <www.queenstlaw.com>.

12. Collaborative Professionals (NSW) Inc; website: <www.collabprofessionalsnsw.org.au>; postal address: Lopich Lawyers, PO Box 245 Shellharbour Square, NSW 2529, Australia; phone: (02) 4297 5524; fax: (02) 4297 5565; email: <lorraine@lopichlawyers.com.au>.

13. Susan Purdon, Partner, Hopgood Ganim <www.hopgoodganim.com.au>.

14. Dispute Resolution Centre, Research Centres, Bond University; website: <www.bond.edu.au>; email: <drc@bond.edu.au>.

15. The Family Law Practitioners' Association of Queensland Limited <www.qldflpa.org.au>.

16. Queensland Collaborative Law;

website: <www.qldcollablaw.com.au>; contact: via the website or Cassandra Pullos, Adamson Bernays Kyle and Jones, Solicitors, PO Box 1046, Southport QLD 4215, Australia; phone: (07) 5532 3199; fax (07) 5591 3402; email: <CJP@ABKJ.com.au>.

17. Farrar Gesini & Dunn <www.fgd.com.au> and Dobinson Davey <www.dobinson.com.au>.

18. The Law Society of the Australian Capital Territory, Level 3/11 London Circuit (GPO Box 1562), Canberra, ACT 2601; DX 5623 Canberra; phone: (02) 6247 5700; fax: (02) 6247 3754; email: <mail@actlawsociety.asn.au>.

19. Collaborative Practice Canberra <www.collaborativepracticecanberra.com.au>. Contact: via website or Kathryn Heuer, Postal Address: Farrar Gesini & Dunn, GPO box 2990, Canberra ACT 2601 Australia; phone: (02) 6257 6477; fax: (02) 6257 4382; email: <k.heuer@fgd.com.au>.

20. Law Institute of Victoria, 470 Bourke Street, Melbourne VIC 3000, PO Box 263C Melbourne VIC 3001; DX 350 Melbourne; phone: (03) 9607 9311; fax: (03) 9602 5270; email: <lawinst@liv.asn.au>; website <www.liv.asn.au>.

21. Sherri Goren Slovin J D Sherri

Goren Slovin Co, LPA, 30 Garfield Place, Suite 920, Cincinnati, Oh 45202, email: <sgslovin@slovinlaw.com>, or visit <www.slovinlaw.com>.

22. Professor Tania Sourdin, Coordinator Graduate Programs in Conflict Resolution and Family Law Mediation, School of Law, La Trobe University <www.latrobe.edu.au>.

23. Collaborative Professionals Victoria <www.collaborativelaw.asn.au>. Contact: via the website or Catherine Gale, Kennedy Wisewoulds, Lawyers, Level 29, 459 Collins Street, Melbourne, VIC 3000 Australia; phone: (03) 9618 7300; email: <cathy.gale@wfl.com.au>.

24. Collaborative professionals WA <www.collaborativeprofessionalswa.com>. Contact: via the website or Elizabeth Hynes, Postal Address: DCH Legal Group, 15 Hay Street, Subiaco, WA 6006, Australia, phone: (08) 9382 8488; fax: (08) 9382 8348; email: <elizabeth@dch.com.au>.

25. See Family Law Council report to the Attorney General entitled *Collaborative Practice in Family Law* December 2006.

26. See Report at <www.ag.gov.au/agd/WWW/flchome.nsf/Page/RWD39302570C01E947CA2578F0016D3EB>.

27. See Report at pp 2 and 3.

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ADR Diary

- **The VI International Conference of the World Mediation Forum** will host **'The Multicultural Spectrum of Mediation'** in Jerusalem, Israel from 9–11 October. The conference will last for two and a half days and will include Keynote Speakers, Presentation of Papers and Case Studies, Panels, Workshops, Open Space Learning (Round Table dialogue) Study Tours, and Conversation Hours with Keynote Speakers. On the first two days, from 18.00 to 19.30, the General Assembly Meetings of the World Mediation Forum members will be held with all the members of the World Mediation Forum invited to these meetings. A Pre-Conference workshop will be held from the 6–8 October. For more information and registration forms visit the official site at <www.wmf2007.com>.
- The **Bond University Dispute Resolution Centre (BUDRC)** is running 4-day **basic mediation courses** on the **Gold Coast** from 29 November–2 December. The course also has a Foundation Family Mediation stream, run in conjunction with AIFLAM (Australian Institute of Family Law Arbitrators and Mediators). They are also running a four-day Basic Mediation Course in conjunction with the **Leo Cussen Institute** in **Melbourne** from 18–23 December.
- **BUDRC** are also running a **family dispute resolution practitioner workshop** on 3 December on the Gold Coast and 22 October in Melbourne. For more information on courses, visit <www.bond.edu.au/study-areas/law/centres/drc/drc.html>.
- **ACPACS** are running a 2-day **advanced mediation course** in **Brisbane** from 26–27 September. The course is skills focused and has CPD approval by the Bar Association of Queensland.
- **ACPACS** will also conduct a 3-day intensive **international commercial arbitration course** in **Brisbane**. The course will introduce participants to the law and practice of international commercial arbitration, discuss international documents and treaties, such as the UNCITRAL Model Law on International Commercial Arbitration, and cover the recognition and enforcement of foreign arbitral awards. It focuses on practical aspects of international arbitration. The program is accredited by the Chartered Institute of Arbitrators in London. Participants who complete the course can apply to become Associate Members (ACI Arb) of the institute. In addition a certificate of attendance is provided by ACPACS.
- Association of Dispute Resolvers will be holding 4-day **mediation training sessions** in Australia and New Zealand. These courses are open to individuals who are keen to add mediation to their professional skill set, in addition to those who are engaged in dispute resolution on a daily basis. Australian courses will take place in **Sydney** on 7–10 November; in **Melbourne** on 17–20 October; in **Brisbane** on 31 October–3 November; and in **Perth** on 17–20 October. New Zealand courses will take place in **Auckland** on 7–10 November. Early registration is recommended and can be done at <www.leadr.com.au>.

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