



Précis Paper

Challenges for Collaborative Lawyers in providing CP Processes – Part 1

A discussion of the challenges faced by collaborative practice lawyers and the benefits that practice groups can provide to practitioners.

Discussion Includes

- Collaborative practice research
- Types of collaborative practice groups
- International studies on collaborative practice
- Professional learning communities
- Lawyer/client professional dynamics within collaborative practice

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Challenges for Collaborative Lawyers in providing CP Processes – Part 1

1. In this edition of BenchTV, Marilyn Scott (Senior Lecturer – University of Technology, Sydney) and Pauline Collins (Associate Professor – University of Southern Queensland) discuss their research they conducted regarding collaborative practice groups and the challenges that are faced by collaborative practitioners

Collaborative practice research

2. Collaborative practice is a relatively new process, having only been around in Australia for about 12 years. It is a form of negotiation that is conducted with both lawyers and both clients in the room together. It is run on a business meeting model, so there is an agenda and minutes recorded from the meeting, and the clients negotiate in the context of problem solving and making well informed decisions.
3. Other professionals can be included in the process, for example financial advisors, child development experts, and so on. It is a sophisticated form of negotiation and allows you to plan for your transition from pre-divorce to post divorce.
4. Much like Law Associations have training opportunities and collegiality for law practitioners, a collaborative law practice group is a focused and specialized group that is specifically for those collaborative practitioners.
5. Marilyn Scott and Pauline Collins undertook research recently which involved looking at two collaborative practice groups: one in metropolitan Sydney and one in regional centre in Queensland. They used a qualitative research approach which included reflexivity and contextualized consideration of human behaviour.
6. Whilst the study group was small (16 participants), it nevertheless provided useful insights into the current operation of practicing groups in Australia. The report on the research findings can be found within the *Australian Journal of Family Law* (Marilyn Scott & Pauline Collins, 'The Challenges for Collaborative Lawyers in Providing CP Processes' (2017) *Australian Journal of Family Law*, 31) and the *Australian Dispute Resolution Journal* (Marilyn Scott & Pauline Collins, 'The Essential Nature of a Collaborative Practice Group for Successful Collaborative Lawyers' (2017) 28 *Australian Dispute Resolution Journal* 12–18).

Types of collaborative practice groups

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7. Originally when collaborative practice training commenced in 2005 in Australia, there was a Canadian lawyer who ran the training. After this there was training provided by people from California, other parts of Canada and more recently from Texas. Each of these regions in North America had different approaches to collaborative practice, perhaps because of their different affiliations.
8. Practice groups often arose out of people who had been at one training, or had been trained by a particular trainer. Some practice groups will have more emphasis on one model than another. When people were joining different practice groups, there had to be some sort of cohesion about what they were going to do as a group.
9. Over time, as the practice groups matured, they tended to more often involve the coaches, the mental health, the child consultations, and so on.
10. Some lawyers engaged in collaborative practice training because they wanted to understand and become competent in the process, a process which was quite different to what they had been doing in the more traditional adversarial process, and were less interested in joining practice groups.
11. As time has progressed, the practice groups have picked up more on the interdisciplinary approach. Initially there was not many other professions involved in collaborative practice, but now there has been a much larger uptake by financial advisors, accountants and communication coaches.
12. There are practice groups in each state. In NSW there are 10 practice groups, 8 of which are in the Sydney metropolitan area, and one of those is specifically an interdisciplinary collaborative practice group. In Queensland and South Australia there are 3 practice groups, 2 in Victoria, and 1 each in the ACT, WA and Tasmania.
13. Each of the states has an umbrella group which is essentially for networking and cohesion. In 2016/17 the national group, the Australian Association of Collaborative Professionals, was formed, which came out of all of the practice groups and representations from each state.
14. On an international scale, the overarching organisation commonly referred to by collaborative practitioners is the International Academy of Collaborative Professionals. The Academy has a very strong emphasis on education and development of the practice, and they hold a bi-annual forum.

International studies on collaborative practice

15. Scott and Collin's research was based upon 2 international studies that considered collaborative practice.
16. Julie Macfarlane's study (2005), The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases, involved in-depth interviews with lawyers and their clients in 16 matters in Canada.
17. This study looked at variations in collaborative family law at that time, the motivations for the lawyers taking up this approach, and the clients choosing to use the process. It also looked at the negotiation experience, and there was careful consideration of how the negotiation was moving from adversarial to interest based. Macfarlane's study also looked at how emotions were handled in the process, how to give legal advice in a negotiation, and how that impacted the negotiation style.
18. The other study used was a study completed by Sefton in 2006/2007, which was completed because there had been a strong uptake of collaborative law training under the umbrella of Resolution which is a UK organisation for family lawyers. This study considered the multi-disciplinary potential of the process, and the benefits, challenges and the quality of the agreed outcomes of collaborative practice.
19. The findings of Scott and Collin's research can be grouped into three major headings:
 - Professional learning communities
 - Lawyer/client professional dynamics
 - Communication, in particular the paradigm shift

Professional learning communities

20. Although Sharon Sandeen (2013) was writing about the context of outcomes based education in law schools, she provided some useful discussion that informed the functioning of practice groups in the collaborative practice domain.
21. Sandeen referenced Angelo (1996) stating that 'learning communities work collaboratively towards shared significant goals in environments in which competition is deemphasised and everyone has the opportunity and responsibility to learn and help each other'.
22. In her article 'Professional Learning Communities and Collaborative Teams: Tools to Jumpstate the Learning Outcomes Assessment Process' (2013), Sandeen recognises 6 key areas that are generally understood as successful characteristics of successful professional learning communities. Scott and Collin's applied these characteristics to the practice groups in their study:

- 1) There must be an aspirational framework for the practice groups, including their shared mission, vision, values and goals
 - 2) There should be collaborative culture with a focus on learning – this was evident amongst the participants as there was a continuous dialogue amongst them about their desires to learn and develop.
 - 3) Collective inquiry into best practice and the current reality – most of the practitioners in this study, and collaborative practice generally, are very involved in seminars and conferences, and a lot of practice groups actually work out what the best practice protocols are for their particular group of people
 - 4) Learning by doing – the participants said that they really wanted to have discussions about what was working and what was not working in practice.
 - 5) A commitment to continuous improvement – this was something that arose a lot in discussions. These people were very passionate, involved and dedicated, wanting to be able to better themselves professionally.
 - 6) Results orientation
23. Practice groups are viewed by practitioners that are involved in them in a very positive light. One participant said:
- 'The [practice] group is everything. This monthly meeting helps sustain a commitment to cooperative bargaining through learning from the successes and learning from others. Practice groups function as a discreet professional learning community that responds to the individual needs of each specific cohort. We need to build a practice group that reflect our need as practitioners and is democratic. This also brings the advantages of group identification of being known as one who wants to practice in that area and to keep up to date, and to keep alive'.
24. Another aspect identified in this research is that cohort learning needs are not static, and practitioners move around so the group has to be able to be flexible and adaptable to accommodate new members.
25. It was observed that allowing people to participate as observers to gain an understanding and confidence was also important.
26. It was identified that there is value in separating the administrative functions from the learning functions where possible. One participant said they established a management committee, so they had a representative from each office of the sub-committee and the management committee meet separately to complete the majority of administrative tasks.

This meant by the time they got to the meeting of the wider practice group, there was much more time to focus on the training and what they were actually there for.

27. Whilst you can have regular training events, it was also important for the clinical setting to have reflective practice and learning from the experiences that the various members have had.
28. More experienced legal practitioners talked about there being a life cycle of a practice group. This highlights the need to be conscious of the fact that building a practice group requires an ability to change and adapt over time, and to acknowledge that there can be high points and low points in the energy of the practice groups, and to focus upon keeping enthusiasm.
29. Sustaining and educating practitioners is really at the centre of the relationship between the practice group and the collaborative law community.
30. There are three essential aspects to successful practice groups:
 - 1) The need for an administrative function to accommodate development of protocols, documentation, information sharing, etc.
 - 2) Educative function – crucial to consolidate new learning and support continuing learning to facilitate professional and cultural transitions for all professionals. This includes a regular calendar of topics for seminars, guest speakers, master classes and also a robust social program so that there is enthusiasm, fun and support.
 - 3) Mentoring program from both the intra and inter professional development of the practice group and the member's experience. Some groups will actually mentor other practice groups, depending upon how experienced they are.
31. Elements of a healthy practice group are critical mass, the need to balance administrative concerns with the substantive interest of the group, and the need to keep an open verbal communication line.
32. The function of the overarching collaborative practice organisations is to be able to let practitioners know where there are similarly trained practitioners. It is also important for trust to be developed between the professions. Professional and personal trust being built up in these organisations is important because it means that people can actually practice collaboratively.

Lawyer/client professional dynamics within collaborative practice

33. A lot of collaborative practice is about engaging with people from different disciplines, and using the inter-disciplinary process in learning to become comfortable with each other. This

is a transitional process so it allows the couple to transition from their married/together relationship through their separation, and helps them with how they are going to function in the future in their new roles, whilst hopefully maintaining some of their original goals.

34. As these practice groups develop the understanding of what each profession can offer to the process is becoming more evident. Practice groups often now have sessions for each profession to present on what they contributed to the process and how this can fit in with what everyone was doing. This was a shift from sending people off to a profession to learn, towards now incorporating that in group training.
35. It was found that once the professions started to understand what they could offer each other, the relationships blossomed. For example one practitioner was amazing at what a financial advisor could bring to the process, and now uses financial advisors routinely in their litigation processes as well.
36. An essential element of collaborative practice is the requirement of a screening process for clients to determine whether they are suitable for collaborative practice. It was found that an individual practitioner's own sense of confidence and their belief in their own level of competence and experience may have a subtle impact on the screening process. For example, perhaps they weren't just screening clients out as they were unsuitable, but were screening themselves out as if they were not suitable or capable to conduct that particular matter.
37. There is a need for a growing confidence, and as a collaborative practitioner matures they may take on matters that they have previously rejected as not being suitable for the collaborative process.
38. From a lawyer's perspective, they are coming from the Court which has a checklist regarding matters that are sent to mediation. This often shapes the way individuals will think about mediation and other alternative dispute resolution options.
39. The mental health professionals, the mediators, the communication coaches, etc. are much more accustomed to working with people in highly emotional states. This means that whoever is conducting the intake would impact upon which clients are chosen for the process. For example, the lawyer with the tighter frame is probably less open, whereas if the intake was done by a social scientist, they would be much more comfortable with the level of conflict and the emotional state of the parties.
40. There are different approaches to the screening process. One participant said that they always screen out, meaning the client must persuade the practitioner that they are suitable

for collaborative practice. Others took the view that everyone is suitable for collaborative practice, but they just need to assess whether the client is ready at that particular time.

41. Another issue that arose was the giving of legal advice. In the collaborative process the legal advice from both lawyers is open for both parties to hear, so working on how that was actually going to be put into the process is an issue faced by these groups.
42. There is a challenge in ensuring that both lawyers are collaboratively trained, because it is problematic if one is trained and the other is not. Having a lawyer on the other side who knows what to do, without it being your responsibility to monitor them is really important.
43. Another potential problem is that there are different collaborative practice training styles, so you may have an opposing lawyer who is collaboratively trained, but differently to your own training.
44. The high level of communication and analysis, and how that leads to a dynamic, or lack thereof, is very important to the process, which highlights the potential need for the use of a neutral coach.
45. As family matters cover a wide range of issues such as property, financial, children, etc., the collaborative model is advantageous as the limits of the lawyer's competence can be extended and enhanced by having the inclusion of specialist professionals.
46. With the complexity of modern families, blended families and extended families, this strategic use of professional advice is very useful. It allows for making informed decisions and gives clients more than just a legal outcome.
47. Collaborative practice helps them see the other side's position meaning they can work more towards joint problem solving, rather than just attacking each other and having their own experts in each area.
48. In mediation there has been a lot of recognition in the literature that a lot of women are at a disadvantage because they have no knowledge about the financials. The financial advisors can coach the party with the lower financial information or knowledge, meaning they can learn about their finances and be better prepared for negotiation.
49. The whole collaborative process can be tailored to suit each situation. It allows you to design a system for each particular group of people.

BIOGRAPHY

Marilyn Scott

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Marilyn is Head of the Dispute Resolution Program at UTS and presented the first training in Australia on Collaborative Law. This training program went on to be presented in Queensland, Western Australia and New Zealand. Her qualifications as a lawyer, arbitrator, practicing mediator and negotiation strategist bring practical experience to her teaching. She researches and publishes in the field of Interdisciplinary Collaborative Practice and is founding Vice President of Collaborative Professionals (NSW) Inc. and a foundation member of the Australian Association of Collaborative Professionals.

Pauline Collins

Associate Professor – University of Southern Queensland

Pauline is an Associate Professor in the School of Law and Justice. She is also a nationally accredited Mediator, currently mediating in the QCAT Minor Civil Jurisdiction. Pauline has professional memberships in the Downs and Southern Western Queensland Law Association as well as the International Law Association. Her research interests include International and Comparative Law, Legal Education, Mediation and Military Law.

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