REFORM OF THE CIVIL JUSTICE SYSTEM 25 YEARS PAST - (IN)ADEQUATE RESPONSES FROM LAW SCHOOLS AND PROFESSIONAL ASSOCIATIONS? (AND HOW BEST TO CHANGE THE BEHAVIOUR OF LAWYERS)

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I INTRODUCTION

In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them.¹

By the mid-1980s, the civil justice system in many common law jurisdictions was reportedly ‘in crisis’;² crippled by excessive delay, cost and complexity in proceedings³ and out of reach of ordinary people.⁴ During the next twenty-five years, law reform commissions and other relevant agencies were charged with identifying problems with

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² See, eg, Sir Gerard Brennan, ‘Key Issues in Judicial Administration’ (1997) 6 Journal of Judicial Administration 138, 139. This was not a matter on which there was universal agreement. The investigation conducted by the Australian Law Reform Commission did ‘not support the crisis theory’: the Australian Law Reform Commission (ALRC), Managing Justice: A Review of the Federal Civil Justice System, Report No 89 (2000) [1.48] (hereafter referred to by the Commission’s reference ‘ALRC 89’). The Commission’s terms of reference were limited to a review of federal courts and tribunals in Australia. However, Weisbrot and Davis note that ‘many of the major themes arising from the Managing Justice report can be applied to the Australian justice system as a whole (and, indeed, to civil justice systems generally)’: David Weisbrot and Ian Davis, ‘Litigation and the Federal Civil Justice System’ in Wilfrid Prest and Sharyn Roach Anleu (eds), Litigation: Past and Present (2004) 122, 125. Other commentators stopped short of declaring a crisis and expressed the situation as one of ‘dissatisfaction with the court system’, and ‘erosion of confidence in the justice system’: Justice David A Ipp, ‘Reforms to the Adversarial Process in Civil Litigation – Part I’ (1995) 69 The Australian Law Journal 705, 705. However it is described, and whatever the true state of the justice system, there is no shortage of commentators who assert that the community perceived ‘the justice system to be costly, inaccessible and beset with delays’: see eg Justice Ronald Sackville, ‘Reforming the Civil Justice System: The Case for a Considered Approach’ in Helen Stacy and Michael Lavarch (eds), Beyond the Adversarial System (1999) 34, 35. As Bamford notes, the perception, whether or not it was soundly based, was real and acted as a ‘catalyst for procedural change’: David Bamford, ‘Litigation Reform 1980-2000: A Radical Challenge?’ in Wilfrid Prest and Sharyn Roach Anleu (eds), Litigation: Past and Present (2004) 146, 148.
the civil justice system and with making recommendations for its improvement.\(^5\) One influential commentator and advocate for reform in the United States had earlier concluded that ‘[a] comprehensive effort to improve our legal system will call for help from every quarter: lawyers, judges, legislators, regulatory officials’\(^6\). He included educators in this role call for the thrust of his work was towards the need for reform in legal education as well as the legal profession.\(^7\)

Not unexpectedly then, the recommendations made by relevant commissions and reform agencies were aimed at procedural and institutional reform; and additionally, at the structures and regulatory framework of the legal profession; the rules of conduct governing the profession; and legal education. Many reforms were implemented as a result of the efforts of these agencies.\(^8\) One of the aims of this paper is to examine those reforms.

The paper is in four parts. Parts II-IV provide an overview of the reforms made to the civil justice system in the last twenty-five years. Part II deals with procedural and institutional concerns. Part III focuses on professional issues, while legal education is the subject of part IV. Each part proceeds by identifying perceived problems, recommendations for reform and reforms that have been made to date. Although the focus of the paper is on jurisdictions in Australia (as exemplified by the position in Queensland and New South Wales), it also compares the situation in England (and Wales) and the United States.

The discussion in parts II-IV demonstrates two interrelated ‘trends’ in reform initiatives. First, the majority of reforms have been procedural and institutional in nature, brought


\(^6\) Bok, above n 4, 581.

\(^7\) Ibid. More recently, see ‘A Strategic Framework for Access to Justice’, above n 5, wherein the Taskforce affirmed that policy makers need to take ‘a system wide approach to access to justice issues’ inclusive of the legal profession and legal education: above n 5, 161.

\(^8\) Another spate of reform activity took place early this decade in response to rising concern about a looming litigation explosion by an increasingly litigious population. Concern peaked in 2002 in Australia and, coupled with community concerns about increases in public liability insurance premiums (which coincided with the untimely collapse of several medical indemnity and insurance groups), paved the way for extensive tort law reform, specifically in personal injuries and medical negligence proceedings: Generally see Chief Justice Paul de Jersey, ‘A Review of the Civil Liability Act and Tort Reform in Queensland’ (Paper presented at the Queensland Law Society Personal Injuries Conference, Brisbane, 29 June 2007). Also see Ted Wright and Angela Melville, ‘Hey, but who’s Counting? The Metrics and Politics of Trends in Civil Litigation’ in Prest and Anleu, above n 2, 96 and 115.
about largely through legislative intervention and judicial activism (in the form of rules of court and practice directions). Second, there is a growing tendency to regulate professional practice issues and the conduct of legal practitioners by legislation and court rules.

For the reasons discussed in part V of the paper, these trends are a cause for concern. Part V discusses the various ways in which to influence and regulate the attitudes and behaviours of lawyers. It highlights the importance of codes of conduct and education for lawyers and points to the disadvantages of attempting to regulate them through legislation, rules of court and practice directions. That these trends have emerged should not come as too much of a surprise. At least one influential commentator predicted that legislative intervention was inevitable unless the profession took its responsibilities seriously and set down appropriate standards for its members. It is submitted in this paper that neither professional bodies nor law schools have stepped up to the plate.

II PROCEDURAL AND INSTITUTIONAL CONCERNS

A Problems

Lord Woolf identified three key interrelated problems facing the civil justice system in England and Wales: delay, cost and complexity. According to Lord Woolf, the cumulative effect of these problems constituted ‘a denial of access to justice’. The same problems were identified with the civil justice systems in Australia and the United States. These problems were attributed in large part to a number of characteristics of the common law adversarial system. The system was, said its critics:

Formalistic, inflexible, complex. These related characteristics can themselves be traced to a number of different sources including the existence of multiple judicial

9 There are three main sources of procedural law: legislation which establishes the court, its composition, administration and statutory powers (generally the Supreme Court Acts in various States and Territories, the Judiciary Act 1903 (Cth), and the Federal Court of Australia Act 1976 (Cth)); delegated legislation, that is, the Rules of Court ‘devised by rules committees, which are composed of judicial officers and representatives of the government and the legal profession’; and practice notes and directions made by the court pursuant to its inherent jurisdiction: Stephen Colbran et al, Civil Procedure: Commentary and Materials (2nd ed, 2002) 6. As Colbran et al note, although practice directions are not legally binding, ‘courts may ensure they are complied with by exercising their inherent power to make an order against a party such as a stay on proceedings or an order for costs’: Colbran et al, 6.

10 Ipp, above n 2, 730.


12 Access to Justice, Interim Report, above n 3, [13].


15 The ICJ Justice Report, above n 11. [76]. On the complexity of litigation, see Justice Geoffrey L Davies, ‘Fairness in a Predominantly Adversarial System’ in Stacy and Lavarch, above n 2, 102, 103.
hierarchies (in Australia, most notably those at State/Territory and Federal level); the existence of multiple courts within a particular hierarchy, each with different jurisdiction; the existence of separate procedures and rules for each court; complicated rules of court; the variety of ways of instituting proceedings (in some jurisdictions, there were as many as four different initiating procedures); procedural distinctions which applied to different types of cases; and a ‘multiplicity of practice directions’.16

*Overly dependent on party-control of the ‘conduct, pace and extent of litigation’.*17 At least until trial, litigation was heavily reliant on inter-party regulation. Parties, or more often their lawyers, determined the issues and evidence put before the court and they had complete control over the pace at which matters proceeded through the litigation process. Such rules of procedure as existed were ‘all too often … ignored by the parties and not enforced by the court’.18

*Designed along the lines of trial by battle.* The system encouraged a strongly adversarial approach, one which Justice Davies referred to as ‘the adversarial imperative’ consisting of twin compulsions that each party has ‘to see the other as the enemy who must be defeated’19 and ‘to leave no stone unturned’.20 With ‘no effective control of [the parties’] worst excesses’,21 adversarialism is unrestrained. Lord Woolf asserted that the ‘main procedural tools for conducting litigation efficiently had each become subverted from their proper use’.22 He singled out for attention: pleadings which failed to state the facts as required and to establish the issues in the case; sham defences;23 voluminous and unnecessary discovery;24 the approach to expert evidence which resulted in the involvement of too many, too ‘eminent’ witnesses subject to partisan pressure;25 and combative interlocutory disputes.26

*A closed system.* The system was ‘designed to keep much of the information available to each party in watertight compartments’ so that parties were required to investigate, prepare and progress the case independently without obligation to assist each other.27 As a consequence, much of the work of opposing lawyers had to be duplicated.28

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16 Access to Justice, Interim Report, above n 3, [44].
17 Access to Justice, Interim Report, above n 3, [5].
18 Access to Justice, Final Report, above n 4, [2]. Also see the ICJ’s Justice Report, above n 11, [153].
20 Ibid 7.
21 Access to Justice, Interim Report, above n 3, [5]. Also see Davies, above n 19, 7.
22 Access to Justice, Interim Report, above n 3, [8].
23 Ibid.
24 Ibid [10].
26 Ibid [41]. For more examples of ‘adversarial excesses’, see Ipp, above n 2, 728.
27 The ICJ Justice Report, above n 11, [85]-[87].
28 Davies, above n 19, 7.
Too heavily dependent on an ‘all-embracing trial’.

The trial was viewed as the main event. Little time or effort was devoted to pre-trial activities including case preparation. The consequences of focusing on the trial included inadequate or late investigation of the facts, last-minute settlements, and the danger of surprise at trial.

B Recommendations for Reform

The various reform bodies published extensive lists of recommendations aimed at, inter alia:

- Making litigation less complex.
- Assisting parties to avoid litigation wherever possible.
- Promoting early informal exchange of information.
- Ensuring early cost-effective case preparation.
- Encouraging appropriate and timely settlement of disputes.
- Shifting responsibility for the management of cases to the courts.
- Eliminating delays in the civil litigation process.
- Keeping the costs of proceedings proportionate to the importance and complexity of the subject matter of disputes and making costs more predictable.
- Diverting matters to more suitable dispute resolution processes.
- Facilitating determination of the real issues in dispute between the parties.
- Streamlining the gathering of expert evidence.
- Ensuring efficient use of judicial and administrative resources.

The major structural and procedural reforms made to the civil justice system are discussed below in the sequence in which they are likely to be encountered in practice.

C Reform Initiatives

1 Reducing the Complexity of Litigation

A number of initiatives have been taken to simplify litigation (and to reduce associated costs). Although it predates the period under review in this paper, mention must be made of the fusion, or concurrent administration, of law and equity which occurred in England with the Judicature Acts of 1873 and 1875 (UK). Australian jurisdictions eventually...

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29 The ICJ Justice Report, above n 11, [76]. Historically, the focus on the trial is linked to dependence on oral examination of witnesses by the parties before a jury: Ipp, above n 2, 709.
30 Davies, above n 19, 7; and the ICJ Justice Report, above n 11, [77]-[99].
31 For a complete list of the particular goals sought to be achieved by the Australian Law Reform Commission in formulating its recommendations for reform, see ALRC 89, above n 2, [1.154]. The Commission made 138 recommendations relating to a range of matters including practice, procedure and case management, legal costs and education, training and accountability. In particular, see ALRC 89, above n 2, [1.155]. Lord Woolf’s recommendations covered case management, rules of court, procedure and evidence: see Access to Justice, Interim Report, above n 3, chs 6 and 7. Also see Access to Justice, Final Report, above n 4, [9]. Compare the access to justice ‘methodology’ and recommendations set out in ‘A Strategic Framework for Access to Justice’, above n 5, 63-68.
adopted the *Judicature Act* system. The jurisdictional issue was also simplified in Australia with the cross-vesting of jurisdiction scheme which cross-vests jurisdiction between Supreme Courts of the States and Territories and ‘vests certain jurisdiction of federal courts in the Supreme Courts’. Notwithstanding the High Court’s invalidation of part of the scheme, it has been hailed as a success in integrating some elements of the Australian judicial system. However, jurisdictional problems remain. The Access to Justice Taskforce recently recommended that the Federal Attorney General commission a review ‘of the interrelationship between Commonwealth and State/Territory justice systems’ to look at, inter alia: areas of duplication, inefficiency, and ways to overcome obstacles to a more unified system.

The following structural and procedural changes have been made across a number of jurisdictions:

- Creation of the Small Debts and Small Claims Courts from which legal representatives are generally excluded.
- Creation of numerous tribunals and specialized courts.
- The large extensions in the jurisdiction of lower and intermediate courts.
- Creation of uniform rules of court and reduction in the complexity involved in instituting proceedings. In many jurisdictions there is now a single set of uniform rules governing all courts in a particular hierarchy, and there are only two different forms of initiating proceedings.
- The tailoring of court procedures to the types of matters involved (for example, there are special procedures for personal injury cases and for commercial cases);

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32 James Crawford and Brian Opeskin, *Australian Courts of Law* (4th ed, 2004) 135 and generally, see the discussion at 6–8 and 134–135. The authors point out that enactment of the legislation in Australia was ‘a slow, disputatious process’: 135.

33 See *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and its State and Territory counterparts, discussed by Crawford and Opeskin: ibid 137–8.

34 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

35 Crawford and Opeskin, above n 32, 47-53.

36 *A Strategic Framework for Access to Justice*, above n 5, 162.

37 Ibid.

38 In Queensland, jurisdiction regarding small debts and small claims is now exercised by the Queensland Civil and Administrative Tribunal, established by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

39 There has been a huge growth in the number, jurisdiction and quantity of matters dealt with by tribunals, a trend which Justice Sackville refers to as ‘tribunalisation’: Sackville, above 2, 59. The trend is affirmed by the development of the Queensland Civil and Administrative Tribunal, mentioned above n 38. The number of other institutional bodies such as industry complaints and ombudsman schemes and other consumer protection authorities has also grown and may be given a boost by the recommendation of the recently commissioned Access to Justice Taskforce: see *A Strategic Framework for Access to Justice*, above n 5, 164-165.

40 See, eg, the Land and Environment Court in New South Wales (established by the *Land and Environment Court Act 1979* (NSW)). Queensland and Tasmania also have specialised Land Courts.

41 See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 3 and *Uniform Civil Procedure Rules 2005* (NSW) r 1.5. In the UK, see *Civil Procedure Rules 1998* (UK) r 2.1(1).

42 See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 8 and *Uniform Civil Procedure Rules 2005* (NSW) r 6.2. There is only one form of initiating proceedings in the Federal Court of Australia – an application: see *Federal Court Rules O 4 r 1*.
coupled with the creation of special lists (for example, there is a special list for complex cases and for cases requiring urgent attention).

- Provisions expanding the jurisdiction of registrars.43
- An extension of proceedings for summary dismissal of cases (plaintiffs and defendants alike can apply for summary judgment).44
- Provisions requiring judges to dispense with the rules of evidence, and to take evidence by telephone, video link or other means.45
- Provisions for decisions without a hearing.46

The number of jury trials has been significantly reduced. This is due, in large part, to reforms aimed at modifying tort law and civil liability.47

2 Pre-action Procedures and Protocols

In some jurisdictions, lawyers and other service providers have a ‘pre-action’ obligation to advise parties about alternatives to litigation. This obligation is imposed by legislation and rules of court.48 For example, family law practitioners in Australia are obliged to:

1. Advise clients, as early as practicable, ‘of ways of resolving the dispute without starting legal action’ (and to this end, to provide clients with information about various alternatives to litigation);49 and
2. Subject to it being in the best interests of the client and any child, to ‘endeavour to reach a solution by settlement rather than start or continue legal action’.50

Pre-action protocols have been established in many jurisdictions. In as much as these requirements apply before the commencement of proceedings, they have been described as ‘a significant extension to the reach of procedural law’.51 The pre-action protocols operating under the Civil Procedure Rules 1998 (UK) provide a good example.52 The protocols are aimed at, inter alia, encouraging ‘more pre-action contact between the parties’, ‘better and earlier exchange of information’, ‘better pre-action investigation by

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43 See, eg, Uniform Civil Procedure Rules 1999 (Qld) ch 12; and Uniform Civil Procedure Rules 2005 (NSW) r 1.10.
44 See, eg, Uniform Civil Procedure Rules 1999 (Qld) rr 292 and 293.
45 See, eg, Uniform Civil Procedure Rules 1999 (Qld) r 392.
46 See, eg, Uniform Civil Procedure Rules 1999 (Qld) ch 13 pt 6.
47 For instance, in Queensland, a jury trial is not allowed in proceedings for damages for personal injuries arising out of motor vehicle accidents, medical negligence and industrial accidents: see Motor Accident Insurance Act 1994 (Qld) s 56; Civil Liability Act 2003 (Qld) s 74; Personal Injuries Proceedings Act 2002 (Qld) s 58; Workers’ Compensation and Rehabilitation Act 2003 (Qld) s 390.
48 A similar obligation is imposed under the professional practice rules, discussed in part III of this paper.
49 Family Law Act 1975 (Cth) s 12E. Also see Family Law Act 1975 (Cth) s 12F in relation to court officials.
50 Family Law Rules 2004 (Cth) – sch 1, pt 1.6 for financial cases and pt 2.6 for parenting cases. Also see Federal Magistrates Act 1999 (Cth) s 23.
51 Bamford, above n 2, 160. Also see A Strategic Framework for Access to Justice, above n 5, 103 and 165 which emphasised the importance of pre-action protocols.
52 There are a series of protocols for specific types of cases such as Personal Injury claims and Construction and Engineering disputes.
both sides’, and at putting ‘the parties in a position where they may be able to settle cases fairly and early without litigation’.  

Pre-action protocols normally require, inter alia:  

1. Exchange of letters between the parties giving details of the claim and a response, and enclosing copies of the essential documents which are relied on by the parties.  
2. Negotiation between the parties with a view to settling the claim without court proceedings.  
3. If negotiation is unsuccessful, consideration by the parties of ADR and an attempt to reach an agreement as to the alternative process to be adopted.  

Possibly the most stringent controls over pre-litigation behaviour are to be found in the Family Law Act 1975 (Cth). As from 1 July 2007, parties must attend and attempt to resolve disputes by family dispute resolution before filing an application for orders in relation to children. Additionally (commencing July 2004), the Family Law Rules 2004 (Cth) establish pre-action procedures similar to those mentioned above for all cases. 

In all cases in all jurisdictions, where proceedings are commenced, the court can take non-compliance with the requirements of pre-action protocols into account when making orders about case management and costs.  

3 Obligation to Further the Objectives of the Civil Procedure Rules  

In many jurisdictions, the reform process resulted in new or revised civil procedure rules (and governing legislation) and new practice directions. The key objectives desired of the civil justice system are captured in an ‘overriding objective clause’ introduced at the beginning of the new rules. This clause is itself an innovation – it is designed to bring the goals of efficiency and expedition of proceedings to the forefront. For example, the Uniform Civil Procedure Rules 1999 (Qld) proclaim that the objective of the rules is to ‘facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense’. Further, the same rule imposes upon parties to proceedings, an implied undertaking ‘to the court and to the other parties to proceed in an expeditious

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53 Civil Procedure Rules 1998 (UK), Practice Direction - Pre-action Conduct, Pre-action Protocol for Personal Injury Claims, [1.2]. Also see Access to Justice, Final Report, above n 4, [9].  
54 Civil Procedure Rules 1998 (UK), Practice Direction - Pre-action Conduct, Pre-action Protocol for Personal Injury Claims, [3.1]-[3.15].  
55 Civil Procedure Rules 1998 (UK), Practice Direction - Pre-action Conduct, Pre-action Protocol for Personal Injury Claims, [2.16]-[2.17].  
56 Section 10F of the Family Law Act 1975 (Cth) defines ‘family dispute resolution’ as ‘a process (other than a judicial process) … in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other’, Family Law Act 1975 (Cth) s 60I.  
57 Family Law Rules 2004 (Cth) r 1.05 and sch 1, pt 1 for financial cases and pt 2 for parenting cases.  
58 In the case of the Civil Procedure Rules 1998 (UK), see rr 3.1 and 44.3(5)(a). Also see, eg, Family Law Rules 2004 (Cth) sch 1, pt 1.2(3).  
way. 61 The rule also codifies the court’s power to sanction a party who does not comply with the rules or an order of the court. 62

4 Costs Orders Against Legal Practitioners for Instituting Certain Proceedings

Legal practitioners have always had an obligation to filter out frivolous or vexatious claims (commonly understood to be proceedings that are instituted to harass or annoy another party). All courts have inherent jurisdiction to strike out claims of this nature and to penalise a party and/or the party’s lawyer for wasted costs. 63 In some jurisdictions, this power is now to be found in statute. 64

In certain circumstances, practitioners will also be sanctioned for instituting and/or pursing a hopeless case. Courts in all relevant jurisdictions have held that ‘lawyers must not commence a proceeding irresponsibly, in particular, without any, or any proper, consideration of the question whether the proceeding has any prospect of success at all’. 65 In the absence of legislative intervention (such as that which has occurred in New South Wales), courts have indicated that, in deciding whether or not to penalise a lawyer for instituting a case, they will consider whether the lawyer:

- had sufficient knowledge of the case to justify pursuing it;
- caused a letter before action to be written;
- considered settlement;
- had a proper grasp of the issues;
- had turned his or her mind to the relevant law and facts;
- had read the relevant authorities, and
- had advised the client that his or her chance of success was very poor. 66

Further, the courts will sanction a practitioner where it considers that he or she has an ulterior purpose in instituting the proceeding, such that the practitioner’s actions amount to an abuse of process. 67

61 Uniform Civil Procedure Rules 1999 (Qld) r 5(3). Also see Civil Procedure Rules 1998 (UK) r 1.3.
62 Uniform Civil Procedure Rules 1999 (Qld) r 5(4). Also see Civil Procedure Rules 1998 (UK) r 1.2.
63 The court has an inherent power to control its own processes in order to prevent an abuse of process and to that end, to strike out vexations claims.
64 See, eg, the Vexatious Proceedings Act 2005 (Qld) which confirms the court’s power to treat a litigant as vexatious and subject her or him to a general restriction on access to the court. The legislation repealed the Vexatious Litigants Act 1981 (Qld) which could be difficult to invoke. Vexatious proceedings are now defined widely by section 3 (and the schedule of definitions). The Access to Justice Taskforce has recommended the implementation of more of this type of legislation: see A Strategic Framework for Access to Justice, above n 5, 167.
65 Cook v Pasminco (No.2) (2000) 107 FCR 440, [65] (Lindgren J). In the United Kingdom, the Privy Council has confirmed that the court has inherent jurisdiction to award costs against legal practitioners where there has been a serious dereliction of the practitioner’s duty to the court: Harley v McDonald [2001] 2 WLR 1749, [67].
67 This was found to be the case in eg, White Industries v Flower and Hart (1998) 156 ALR 169. There, the proceedings were commenced to delay an inevitable outcome (namely, bankruptcy) and to achieve a breathing space. Also see Levick v Deputy Commission of Taxation [2000] FCA 674, [44]. For the position
The common law position described above has been modified in some jurisdictions. For example, in New South Wales, a law practice is specifically prohibited from providing legal services on a civil claim or defence of a claim for damages unless a legal practitioner responsible for the provision of the services concerned ‘reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success’. Practitioners are required to complete a certificate to this effect in order to file relevant court documentation. Lawyers and practices who institute proceedings ‘without reasonable prospects of success’ may be subject to disciplinary action and adverse costs orders. While the New South Wales Court of Appeal has held that ‘a lawyer would only be exposed to liability when their belief that they had material which objectively justified proceedings “unquestionably fell outside the range of views which could reasonably be entertained”’, in Degiorgio v Dunn (No 2) Justice Barrett conceded that the legislation imposed a more demanding standard on lawyers than previously had been the case.

While lawyers should not be penalised for taking on difficult matters, the cases confirm that as a result of legislative amendments such as those in New South Wales, lawyers are required to ‘prejudge cases to a considerably greater extent than they might previously have thought it their duty to do’.

5 Case Management Schemes

A number of case and hearing management schemes have been implemented by rules and practice directions in all of the major trial courts in relation to all cases. These schemes

in the UK, see the decision of the English Court of Appeal in Ridehalgh v Horsefield [1994] Ch 205 where the court emphasized the need to distinguish between the hopeless case (which a client is entitled to pursue) and a case which amounts to an abuse of process.

See, eg, Civil Procedure Rules 1998 (UK) r 3.11 (and relevant practice direction), which provides that the court may make a Civil Restraint Order against a party who has issued claims or made applications ‘which are totally without merit’. In the US, see rule 11 of the Federal Rules of Civil Procedure.

Legal Profession Act 2004 (NSW) s 345(1). These amendments were part of the New South Wales’ government’s reforms to personal injury and civil liability litigation.

Legal Profession Act 2004 (NSW) s 347.

Legal Profession Act 2004 (NSW) s 348.


Lamb and Littrich, above n 72, 234.


Lamb and Littrich, above n 72, 234.


These procedural changes have been ongoing since the early 1970’s. The importance of active case management as a ‘central judicial function’ was recently emphasised by the Access to Justice Taskforce in A Strategic Framework for Access to Justice’, above n 5, 106-110, 166.
are in essence coordinated mechanisms for court control. They differ in detail but share the common features listed below:

1. Stipulation (by a judge or senior court officer) of a timetable for events from the date of commencement to the time of disposition of cases (resulting in a more or less fixed timetable of events).
2. Enforcement of the timelines and other procedural steps through sanctions for non-compliance with the rules and directions (such sanctions include adverse costs orders, removal of a case from the active list and even, the forced hearing of a case when a party is not ready to proceed).
3. Establishment of different tracks for different kinds of cases, usually depending on the amount of the claim and/or the complexity of the issues involved (the court identifies urgent and complex cases early so that they may be targeted for high-level court supervision).
4. Pressure for early listing of cases for hearing.
5. Maintenance of strict control of adjournments.
6. Procedures requiring early exchange of documents and information between the parties and a narrowing of the issues in dispute.
7. Mandatory pre-trial hearings and settlement conferences at which directions are given for the continued conduct of an action. Directions may be given about a wide range of matters. The court may, for instance, require that evidence be given by affidavit, limit the number of witnesses that a party may call and the time to be taken in giving evidence, require written submissions from the parties and require the parties to provide witness statements.

A predominate feature of all case management regimes is the consideration given to the use of ADR procedures.

6 Institutionalization of ADR Processes

Use of ADR by the courts is not a new development. The Family Court of Australia added counselling, mediation and arbitration services to those that it offered to disputants as early as 1991. The Federal Court of Australia and various State courts in Australia also added mediation and arbitration at about the same time.

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78 Case management may take one of two main forms, namely, continuous control by a judge who personally monitors a case on an individual basis (referred to as an individual list) and control exercised by requiring the parties to report to the court (to a court registrar or master) at fixed milestones (referred to as a master list): Colbran et al, above n 9, 31.
79 See, eg, Supreme Court of Queensland Practice Direction 4 of 2002, [4.3].
80 See, eg, the provision for assigning cases to different tracks provided by the Civil Procedure Rules 1998 (UK) r 26.1.
81 See, eg, Uniform Civil Procedure Rules 1999 (Qld) r 367 and Uniform Civil Procedure Rules 2005 (NSW) r 2.3 for a list of the court’s supervisory powers. For the Federal Court of Australia, see the Federal Court Rules O 10.
83 See Federal Court Rules O 10 r 1(2)(g) and O 72 and Supreme Court of Queensland Practice Direction 22 of 1991.
However, with the emphasis given to ADR through case management schemes, use of ADR has increased. In Australia, matters can be diverted to ADR before proceedings are commenced (as evidenced by the pre-action protocols of the Family Court), after commencement of proceedings; and even after trial and before an appeal, if an appeal is likely.

Similar provisions have been made in other jurisdictions. In Australia and the United States, the majority of courts have the power to refer parties to mediation with or without their consent and courts in both jurisdictions have shown a willingness to make a mediation referral order over the objection of a party. The courts in England have taken the view that they will encourage the parties to use mediation (and other forms of ADR) but will not compel them to do so. In deciding whether or not to refer a matter to mediation and whether or not to penalize a party with an adverse costs order for failing to attend, or impeding, mediation, the courts will take into account factors such as the nature of the dispute (for the court recognises that not all disputes are appropriate for mediation) and prospects of success at mediation.

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84 See, eg, rule 1.4(2)(e) of the Civil Procedure Rules 1998 (UK) where ADR is a stated goal of case management.
85 The recently commissioned Access to Justice Taskforce recommended further expansion of ADR services: see A Strategic Framework for Access to Justice, above n 5, 92-96, 165.
87 See, eg, rule 1.4(2)(e) of the Civil Procedure Rules 1998 (UK). In the US, legislative support was given to ADR by the Alternative Dispute Resolution Act of 1998 (and its predecessor of 1990). The Act requires every federal court to ‘devise and implement its own alternative dispute resolution program ... to encourage and promote the use of alternative dispute resolution in its district’: discussed in Wayne D Brazil, ‘Court ADR 25 Years After Pound: Have We Found a Better Way?’ (2002-2003) 18 Ohio State Journal on Dispute Resolution 93, 112.
88 See, eg, Federal Court of Australia Act 1976 (Cth) s 53A; Federal Magistrates Act 1999 (Cth) s 34; Civil Law (Wrongs) Act 2002 (ACT) s 195(1); Civil Procedure Act 2005 (NSW) s 26; Uniform Civil Procedure Rules 1999 (Qld) rr 320 and 323; and Alternative Dispute Resolution Act 2001 (Tas) s 5. In the case of the Family Court of Australia, the parties can only be referred to mediation with their consent: see the Family Law Act 1975 (Cth) s 19B. Similarly, parties in family law or child support proceedings in the Federal Magistrates Court can only be referred to mediation with their consent. For an account of the legislative position in each jurisdiction in Australia, see David Spencer and Michael Brogan, Mediation: Law and Practice (2006) 272-304.
89 See eg, Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd [2004] FCA 516 and Australian Competition and Consumer Commission v Lux Pty Ltd [2001] FCT 600. Also see the cases mentioned in Jill Hunter, Camille Cameron and Terese Henning, Litigation I: Civil Procedure (2005) 54-55. For a discussion of the position in the US, see Brazil, above n 87, 123 and 131; and Roselle L Wissler, ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2001-2002) 17 Ohio State Journal on Dispute Resolution 641, 648.
91 See, eg Supreme Court of Queensland Act 1991 (Qld) s 103. In the UK, see Civil Procedure Rules 1998 (UK) r 44.3(5)(a).
92 See Halsey v Milton Keynes General NHS Trust and Steel v Joy and another [2004] 1 WLR 3002, [16]-[27]. In Australia, see David Spencer, ‘Costs Sanctions Against Parties Refusing to Mediate’ (May 2005)
7 Increased Importance of Offers of Settlement

The costs associated with litigation have always provided an incentive to settle.⁹³ Even a successful party may not recover all of their real expenses. For some time, all of the major courts have had rules providing for payments into court which allowed them to penalize parties (usually plaintiffs) who failed to accept certain settlement offers.⁹⁴ More recently, an offer of compromise system has replaced or been used to supplement the payment-in system in many jurisdictions.⁹⁵ The rules of court set out the possible consequences of failure to accept an offer of compromise. Generally, the rules adopt a differential principle in respect of offers of compromise made by plaintiffs (who may recover costs on an indemnity basis if judgment for the plaintiff is equal to or better than the offer made) and offers of compromise made by defendants (who may recover costs on a standard basis for the period after the offer was served if the plaintiff obtains a judgment that is not more favourable to the plaintiff than the offer to settle).⁹⁶

In *Maitland Hospital v Fisher (No 2)*,⁹⁷ the plaintiff was awarded costs on a full indemnity basis because she recovered $206,090 by judgment, having earlier offered to compromise for $200,000. In a joint judgment, the court argued that the possibility of costs orders of this nature did not make litigation any more like a lottery and did not unreasonably add to the peril of litigation. However, the court also stated:⁹⁸

The rule does no more than to oblige litigants, and those advising them, to consider realistically, upon the best information available to them, the prospects of success and the likely outcome of the litigation … *The purpose of the rule is to put a premium on realistic assessment of cases … It has added a new duty to the functions of legal practitioners advising litigants. It is a duty which is both protective of the interests of litigants and of the public interest in the prompt and economical disposal of litigation. It is the duty of courts, allowing for exceptions in particular cases, to give effect to the purpose of the rule.* (emphasis added).

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⁹³ Costs are always in the discretion of the court but the general rule, in Australia and the United Kingdom, is that costs follow the event or cause: see eg *Uniform Civil Procedure Rules 1999* (Qld) r 681 and *Civil Procedure Rules 1998* (UK) rr 44(3)(1) and 44.3(2). The general rule in the United States is that each party pays their own legal fees.

⁹⁴ Hunter, Cameron and Henning, above n 89, 24-5.

⁹⁵ There are some fundamental differences between a payment-in provision and provisions for offers of compromise. Perhaps the most significant is that the payment-in provision could only be utilized by defendants. The new scheme allows offers of compromise to be made by both parties. See Hunter, Cameron and Henning, ibid, 24-7.


⁹⁷ *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 (CA).

Law reform agencies made a series of recommendations with respect to the gathering and evaluation of expert evidence which had traditionally been one of the greatest costs burdens of litigation. Most of the recommendations have been implemented by relevant rules of court, as exemplified by the *Uniform Civil Procedure Rules 1999* (Qld). The Rules attempt to limit expert evidence to that of a single expert. Part 5 of the Rules states that the purpose of that part is to ensure that “if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court.” Although parties are free to appoint their own experts, they face the possibility of an adverse costs order if the court considers that the appointment of a single expert might have ‘facilitated’ the proceedings. The rules of court in many other jurisdictions also permit the court to appoint an expert on its own motion as well as on the application of a party.

The court may, at any stage of a proceeding (and in particular, at the pre-trial stage), direct experts to meet for the purpose of identifying matters on which they agree or disagree and to attempt to resolve any disagreements.

Expert evidence (that is to say, evidence-in-chief) is given by way of written report. Disclosure of reports relatively early in the proceedings is made a precondition of their admissibility at trial. An expert is cross-examined at trial only if the opposite party requests it. Consequently, the circumstances in which an expert attends the trial and gives oral evidence are limited.

**9 Increased Control of Procedural Devices**

Over a period of time, more stringent rules have been introduced to govern those ‘procedural tools’ which, according to Lord Woolf, had become subverted from their proper use. Some of the more significant changes to the rules of procedure have been in relation to:

*Pleadings*: parties must now plead all material facts on which they intend to rely at trial (sufficient so that the other party is not taken by surprise). In response, a party may admit, deny or not admit an allegation. A party must now ‘make positive
allegations’ by way of denial rather than blanket denials of ‘every allegation made by
the other party’ as previously occurred.\(^{108}\) Whereas previously the rules permitted
parties to ‘not admit’ an allegation where they did not genuinely contest it and even
where they knew it to be true, a party may now use a ‘non-admission’ only if the
party has made reasonable enquiries to find out whether the allegation is true or
untrue, and gives a reasonable explanation for the party’s belief that the allegation is
untrue or cannot be admitted.\(^{109}\)

*Discovery and interrogatories*: the rules require the parties to disclose documents but
limit disclosure to those documents that are ‘directly relevant to an allegation in
issue’,\(^{110}\) so limiting the volume of material exchanged between the parties.
Interrogatories are allowed only with the court’s leave and the number of
interrogatories permitted is restricted.\(^{111}\)

*Interlocutory applications*: the court has the power to impose cost penalties on parties
who are ‘obstructionist’ in the interlocutory stages of a proceeding. A party (or the
party’s lawyer if he or she is responsible) will pay for failing to comply with
procedures such as requests for further and better particulars\(^ {112}\) and discovery.\(^ {113}\) The
court may also penalize for, and so deter, the making of unnecessary applications –
generally by ordering an unsuccessful party to pay the other party’s costs of the
application immediately (as opposed to making an order for those costs at the trial, at
which time they may be lost in the overall calculation).\(^ {114}\)

### III LEGAL PRACTICE AND THE PROFESSION

#### A Problems

Much of the ‘blame’ for the problems besetting the civil justice system was laid at the
feet of lawyers who, it was said, had the capacity and the willingness to exploit
weaknesses in the civil litigation system for their own benefit.\(^ {115}\) Indeed, in the latter
quarter of the last century, the legal profession was also said to be in crisis and was itself
the subject of a number of separate inquiries.\(^ {116}\)


\(^{109}\) See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 166.

\(^{110}\) See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 211(1).

\(^{111}\) See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 229.

\(^{112}\) See, eg, *Uniform Civil Procedure Rules 1999* (Qld) rr 161 and 163.

\(^{113}\) See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 225.

\(^{114}\) See, eg *Uniform Civil Procedure Rules 1999* (Qld) rr 682 and 693.

Review* 773, 773. Also see, eg, Justice David A Ipp ‘Opportunities and Limitations for Change in the
Australian Adversary System’ in Stacy and Lavarch, above n 2, 68, 83 who comments that ‘[a]s long as
costs are defined by the length of time spent on the case, advocates are effectively rewarded for delay,
ineptitude and obstructionism’.

\(^{116}\) In Australia, see eg, the New South Wales Law Reform Commission, *First Report on the Legal
known as the Australian Competition and Consumer Commission] Report: *The Professions – Legal* (1994);
1 Regulatory Framework, Structure and Practices

These inquiries were driven by several concerns about the regulatory framework and structure of the legal profession. In Australia, the profession was (and remains so today) regulated at the State and Territory level – it lacked an integrated national approach to the accreditation and regulation of practitioners and the provision of legal services. Practitioners were restricted to practising within the confines of the jurisdiction/s in which they had been admitted to practice and for which they held a practising certificate. This raised problems where legal work had an interstate or global element.

The profession in Australia and the United Kingdom had long been criticized for the division of its members into two branches (with each branch prevented from undertaking specific tasks and clients being denied direct access to barristers). Other practices such as the ‘two-counsel’ rule, ‘third line forcing’ and the ‘two-thirds rule’ were considered archaic and ‘designed to protect the profession rather than to provide efficient and cost-effective access to legal services for the community’.

2 Legal Costs

It was noted in Part II of this paper that the cost of litigation was considered to be excessive. Lawyers were considered to be at the heart of this problem. They were criticised for overcharging and overservicing clients and for unnecessarily running up costs, for example, ‘by instructing endless experts for endless reports’; by conducting ‘unnecessarily lengthy cross-examination’ and by their ‘prolix and repetitive arguments’. There is evidence that some lawyers ran up costs without the knowledge or fully informed consent of their clients. Legal fees were often disproportionate to the amount at stake in a claim - it was not unusual for settlement monies to be exhausted in payment of legal fees.

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117 See, eg, ALRC 89, above n 2, beginning at [3.49].
118 Lamb and Littrich, above n 72, 106.
120 Ipp, above n 115, 80. Also see ALRC IP 20, above n 119, [1.8].
121 Ipp, above n 115, 80. Also see ALRC IP 20, above n 119, [1.8]. Davies agreed that labour intensity on the part of lawyers was the main reason the system was so costly, although he appears to have fallen short of accusing lawyers of deliberately complicating litigation: Davies, above n 19, 7.
122 See the discussion and cases mentioned in Stephen Corones, Nigel Stobbs and Mark Thomas, Professional Responsibility and Legal Ethics in Queensland (2008) 162-3. Also see the discussion by the Access to Justice Taskforce in A Strategic Framework for Access to Justice, above n 5, 124.
3 Complaint Handling and Disciplinary Matters

Complaints against legal practitioners were handled by their own professional associations. The associations were perceived to have a conflict of interest in, at once representing their members, and acting as the monitor of legal standards.\(^{123}\) There was a perception of lack of independence, transparency and accountability.\(^{124}\) As Corones, Stobbs and Thomas noted, there was frequent criticism from a number of quarters that the relevant bodies ‘were not detached, objective and independent enough, nor adequately resourced, to ensure that alleged misconduct by lawyers was properly investigated and sanctioned’.\(^{125}\)

4 Professionalism and Professional Practice Standards

The disquiet about lawyers went deeper than concerns about ‘externalities’ such as regulatory practices and structure. The situation is perhaps best summed up by Susan Daicoff who identified a ‘tripartite crisis’ in the legal profession in the United States, consisting of a decline in professionalism, a decline in the public opinion of lawyers, and the decline in lawyer satisfaction and mental health.\(^{126}\)

Lawyers were charged with:

- Being discourteous to clients, each other and judicial staff.\(^{127}\) They were said to have lost civility and collegiality.\(^{128}\)
- Using ‘sharp practice; deliberate delay and obstructionism’\(^{129}\) in litigation.
- Adopting an unduly confrontational approach to dispute resolution.\(^{130}\) Lawyers had, said Justice Olsson, a ‘warrior mentality’.\(^{131}\)

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\(^{123}\) Lamb and Littrich, above n 72, 198.


\(^{125}\) Corones, Stobbs and Thomas, above n 122, 10-11.


\(^{127}\) Ipp, above n 115, 80.


\(^{130}\) Ipp, above n 115, 80.

\(^{131}\) Justice Leslie T Olsson, ‘Combating the Warrior Mentality’ in Sampford, Blencowe and Condlin, above n 129, 4. Justice Ipp considered clients just as confrontational as their lawyers: Ipp, above 115, 84. Justice Davies thought that lawyers were the more adversarial of the two groups: Geoffrey L Davies, ‘The Uniform Civil Procedure Rules: A Judicial Overview’ (Paper delivered at the Queensland University of Technology and Department of Justice Conference: The New Queensland Uniform Civil Procedure Rules, Brisbane, 5 November 1997) 5.
• Subverting reform and circumventing new procedures because of their own self-interest.¹³²

Some commentators warned that without significant changes to professional standards to support procedural reform, lawyers would simply be ‘spurred to new ingenuity’.¹³³

But it seems that the professional practice standards were inadequate to begin with.

In its Managing Justice Report, the Australian Law Reform Commission (hereafter referred to as ALRC) identified a series of problems with existing professional practice rules in Australia. In the Commission’s view, the rules were overly directed to litigation and court advocacy rather than to the full range of professional activities in which lawyers were engaged.¹³⁴ This concern was shared by commentators in the United States who maintained that the existing rule-systems for lawyers were fashioned with adversarial litigation in mind¹³⁵ and that they were incompatible¹³⁶ and inappropriate¹³⁷ for alternative forms of dispute resolution, in particular, problem-solving negotiation¹³⁸ and mediation.¹³⁹ It was asserted that the rules did not provide guidance to resolve the dilemmas presented by new forms of practice in ADR.¹⁴⁰

The ALRC observed that even in the limited context of advocacy and litigation, the existing professional practice rules in Australian jurisdictions fell short in a number of respects. Most significantly, the rules focused on client interests, instead of duties to the administration of justice. The Commission noted that the rules in most jurisdictions contained unequivocal statements about the importance of client interests. In contrast, the

¹³³ Parker, above n 132, 7; and White, above n 132, 2.
¹³⁴ ALRC 89, above n 2, [3.84].
¹³⁶ Menkel-Meadow, above n 135, 410.
¹³⁷ Menkel-Meadow, above n 135, 410.
¹³⁹ Menkel-Meadow, above n 135, 410.
¹⁴⁰ Ibid; and Kovach, above n 135, 620.
duties to the administration of justice were contained in vague statements of principle. They could be interpreted narrowly so as not to restrict a lawyer’s ability to present the client’s case in the best possible light. For example, the Commission pointed to the fine distinction that could be drawn between fabricating evidence, which was not permitted, and not disclosing evidence, which was allowed. These sorts of distinctions resulted, said the Commission, in lack of candour in litigation. Further, the Commission considered that the rules provided only limited guidance as to the circumstances in which a conflict arose between the duty to the administration of justice and the duty to a client. According to the Commission, the legal profession had failed ‘to set out the correct balance to be maintained by a legal practitioner between the duty to the client and the duty to the administration of justice’.

Ethicists have been concerned for some time about over emphasis in the codes of professional conduct on ‘an ethic of zeal’ in favour of clients. The codes in all jurisdictions reflected what has been called the standard, dominant or adversarial advocacy conception of lawyers’ ethics. The approach was been labelled an ‘amoral’ one which encourages lawyers to act without conscience because the only question is whether the action to be taken on the client’s behalf is within the bounds of the law – the question of morality is irrelevant. Of particular interest in the context of this paper, the approach has been criticised for marginalising the ethical duty to the court and for encouraging excessive adversarial behaviour in litigation. Gordon opined that:

[lawyers] are expected and even encouraged to exploit every loophole in the rules, take advantage of every one of their opponents’ tactical mistakes or oversights, and stretch every legal or factual interpretation in favour of their clients. The guiding premise of the entire system is that maintaining the integrity of rights-guarding procedures is more important than obtaining convictions or enforcing the substantive law against its violators.

While Gordon’s view might be considered extreme, it is clear that the rules did not encourage collaboration between practitioners on ‘opposing sides’.

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141 ALRC IP 20, above n 119, [11.15].
142 ALRC 89, above n 2, [3.85].
143 ALRC 89, above n 2, [3.47].
According to the ALRC, the rules in Australian jurisdictions also failed to prescribe appropriate conduct in response to specific practice problems such as whether and to what extent to assist claims which had little or no merit. They also failed to explicitly prescribe manipulative discovery tactics.150

Finally, professional practice codes were often criticized for being too general and for failing to strike a balance between prescriptive and aspirational material.151 Overall, the ALRC judged the professional practice standards in Australian jurisdictions to be ‘incomplete or inadequate statements of the ethics and standards of practice expected of lawyers’152 and asserted that it was time to ‘place the onus on the legal profession to develop professional practice standards which promote ethical behaviour and professional responsibility’.153

B Recommendations for Reform

1 Regulatory Framework, Structure and Practices – Consumerism, Competition and the Need for a National Market

Reform agencies in all jurisdictions looked for ways to protect and promote the interests of consumers and to promote competition in the provision of legal services.154 In Australia, attention has focused on the need for development of an integrated national market for legal services with formal recognition in each State and Territory of practising rights of lawyers admitted in another jurisdiction.155 For instance, the LCA emphasised the need to remove interstate barriers to practice156 and to develop national uniformity in a number of areas including professional conduct and ethics.157 The ALRC also considered that ‘legal professional associations and regulatory bodies should give priority to the development and implementation of national model professional practice rules’.158

150 ALRC 89, above n 2, [3.84].
153 ALRC 89, above n 2, [1.154]; and ALRC DP 62, above n 152, [5.3].
154 See, eg, ALRC 89, above n 2, discussion beginning at [3.49]. In the UK, see the Clementi Report, above n 116, discussed in Boon and Levin, above n 144, 97-101. In Australia, see the Report by the Independent Committee of Inquiry, National Competition Policy (1993) 136 (hereafter the Hilmer Report). Also see the discussion by Dal Pont, above n 151, 10-13.
158 ALRC 89, above n 2, [3.71], Recommendation 13. Also see Olsson, above n 131, 8.
The Commission preferred the option of a single national regulatory body with responsibility for all practitioners according to one set of professional practice standards. However, it was ultimately acknowledged that there were too many obstacles in the path of this approach, not least, the opposition from State and Territory professional bodies. Instead, it was hoped that individual jurisdictions would cooperatively adopt a set of model rules.

2 The Need to Disclose Information about Costs

Both the LCA and the ALRC were concerned to ensure that clients were provided with adequate and regular information about the costs of legal services. The ALRC recommended the enactment of legislation that would harmonise the requirements for practitioners to disclose ‘actual, expected or charged fees’, with the additional requirement that they advise clients at regular intervals ‘of costs incurred to date’ and of estimated future costs to resolve the dispute. Over the years, there has also been a number of calls for legal costs to be capped in various ways and for lawyers to be innovative in the way in which they deliver legal services (through contingency fee schemes and so forth) but discussion of these arrangements is outside the scope of this paper.

3 A Call for Independence and Transparency in Complaint and Disciplinary Processes

Reform agencies called for the establishment of ‘an external and transparent process of accountability’ for lawyers. They recommended that complaint handling and disciplinary functions be removed from Law Societies and Bar Associations to independent bodies. A strong case was also made for lay participation in the processes of complaint handling and discipline.

4 Professionalism and Professional Practice Rules – New (More Explicit) Rules, New Focuses

In addition to emphasising the need for national model professional practice rules, the ALRC made a number of more specific recommendations with respect to the content and format of the rules. It considered that prehearing conduct ought to have the same degree of attention as that given to litigation and advocacy. It recommended the formulation

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159 ALRC DP 62, above n 152, [5.30].
160 Ibid. This approach was also preferred by the Committee which produced the Hilmer Report, above n 154.
162 ALRC 89, above n 2, [4.37] and recommendation 26.
163 Ibid.
164 LCA, Blueprint for the structure of the legal profession: A national market for legal services (1994) 4.
165 See, eg, NSWLRC 32, above n 124, [4], [33]-[36]. Also see LCA, Blueprint for the structure of the legal profession: A national market for legal services (1994) 27.
166 See, eg, NSWLRC 32, above n 124, [21].
167 ALRC 89, above n 2, [3.101].
of standards requiring practitioners to advise clients of non-litigious avenues of dispute resolution and to endeavour to reach settlement without institution of court proceedings where it was in the client’s best interests to do so. In the United States, the American Bar Association’s Commission on Evaluation of the Rules of Professional Conduct recommended that similar changes be made to the ABA Model Rules of Professional Conduct.

Recognising the growing importance of ADR, the ALRC along with other commentators in Australia, recommended the development of standards of conduct for legal representatives in negotiation and other ADR processes (with inclusion of a requirement that practitioners act in good faith) and the development of standards of conduct for lawyer neutrals. Other bodies and other commentators in other jurisdictions made similar recommendations, essentially calling for new non-adversarial ethics standards for lawyer mediators and for lawyers who represent clients in ‘less or non adversarial work’.

With respect to other aspects of the rules, the ALRC preferred statements of express obligations owed to the administration of justice as opposed to broad statements of objectives. To this end, it recommended that the rules make more explicit the ethical obligations of candour owed to the court and the efficient administration of justice.

It also recommended the development of standards to address those ‘specific practice problems’ mentioned above (eg as to whether or not to assist claims which have little or no merit). In this regard, it recommended that national model practice rules incorporate a rule consistent with Rule 11 of the US Federal Court Rules of Civil Procedure (although couched in slightly different terms). Rule 11 is similar in content to sections 345(1)-348 of the Legal Profession Act 2004 (NSW) which is designed to deter the bringing of unmeritorious claims and those presented for an improper purpose.

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168 ALRC DP 62, above n 152, [5.5]; ALRC 89, above n 2, [3.100] and [3.109].
171 ALRC 89, above n 2, [3.119].
173 ALRC 89, above n 2, [3.40].
174 Ibid [3.92].
175 Rule 11 of the Federal Rules of Civil Procedure, discussed above n 68. The Commission considered that the terms ‘to the best of the practitioner’s knowledge or information’ should be used, instead of ‘to the best of the practitioner’s knowledge, information and belief’: ALRC 89, above n 2, [3.96].
176 See above notes 69-71.
The Commission considered that the rules should make more explicit the requirements for practitioners to be prompt, to complete work within time limits set by the court, to limit presentation of their case to genuine issues and occupy as short a time as possible, and generally, to limit work to that reasonably necessary to advance and protect a client’s case.177

Finally the Commission recommended the development (by the LCA) and adoption of a rule-commentary approach in the format of the rules ‘to promote greater clarity, ease of application and usefulness for instructors.’ 178

C Reform Initiatives

1 Towards a National Regulatory Scheme, with New Structures

At the time of writing, legal practice in Australia is still regulated by different State and Territory legislation and practitioners are bound by professional practice rules promulgated by State and Territory Law Societies and Bar Associations (there are two sets of rules in each jurisdiction, one set intended primarily for solicitors and amalgams – referred to hereafter as the Solicitors’ Rules, and the other, for barristers – referred to hereafter as the Barristers’ Rules).179

In June 2009, Professor Michael Lavarch claimed that ‘Australia remains far away from a national legal profession’.180 He likened the building of a national regime for lawyers ‘to a hobby project of adding a deck to the holiday house – there have been bursts of activity but the project never gets finished’.181

There have been a couple of major bursts of activity towards the development of a national legal profession in Australia. The bursts have included the development in the early 1990s of a mutual recognition scheme which enables a person who has been admitted to practice in one Australian jurisdiction (State, Territory or Commonwealth) to

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177 ALRC 89, above n 2, [3.89]. A workable rule had already been proposed in NSW (now to be found in the New South Wales Bar Association Rules, r 42).
178 See ALRC 89, above n 2, [1.184] and recommendation 14.
179 The Legal Profession legislation in each jurisdiction permits the Councils of the Law Society and the Bar Councils and Associations to make rules with respect to the practices of solicitors and barristers. In fact, the rules in several jurisdictions have now been given a statutory foundation and other regulatory bodies are involved in the rule-making process. The process differs between jurisdictions: see Dal Pont, above n 151, 17-18. The process is Western Australia has recently changed. There, by virtue of section 576 of the Legal Profession Act 2008 (WA), the Legal Practice Board of Western Australia has been given power to make legal profession rules concerning the standards of conduct of lawyers. The rules will be considered subsidiary legislation, see section 583 of the Legal Profession Act 2008 (WA). A ‘new’ set of draft rules has been released for review and discussion: see Draft Practitioner’s Conduct Rules, Review and Discussion Draft, 15 February 2010, prepared by a Committee consisting of representatives from the Legal Practice Board, Legal Profession Complaints Committee, the Law Society of Western Australia and the Bar Association of Western Australia (hereafter referred to as Draft Practitioner’s Conduct Rules for WA).
181 Ibid 17.
seek to be admitted to practice at an equivalent level in another Australian jurisdiction by registration under the relevant *Mutual Recognition Act*.\(^\text{182}\)

The second burst of activity was the promulgation in April 2004 by the Standing Committee of Attorneys-General (SCAG) of Model Provisions for the Legal Profession.\(^\text{183}\) The Model Provisions were intended as the foundation for uniformity of State and Territory legislation governing the legal profession. During the period 2004-2009 the Model Provisions ‘were translated into a Legal Profession Act in all but one State and Territory’.\(^\text{184}\)

However, the resulting Legal Professional legislation is not uniform across States and Territories of the Commonwealth. It is also complex and lengthy. According to Ross, local modifications to the Model Provisions have ‘resulted in great inefficiencies and has been widely criticized’.\(^\text{185}\)

The Law Council of Australia is still intent on achieving uniform national legislation and nationally agreed rules of professional conduct and practice (at least in key areas).\(^\text{186}\) In 2009, a task force was established at the request of the Council of Australian Governments (COAG) to draft new legislation to regulate lawyers and to once again consider the possibility of a single national regulator. A proposal for a new national profession Bill and Rules was expected to be put to COAG in April, 2010 but the timetable has been pushed out.\(^\text{187}\)

Still some positive reforms have been made by the current legislative scheme. Practitioners are now allowed to use some business structures previously denied them, such as incorporated\(^\text{188}\) and multi-disciplinary practices (MDPs).\(^\text{189}\) As well as fostering

\(^{182}\) See the *Mutual Recognition Act 1992* (Cth) and its equivalent in all jurisdictions. Also see Dal Pont, above n 151, 28 and Geoff Monahan and David Hipsley, *Essential Professional Conduct: Legal Ethics* (2007) 4.


\(^{185}\) Ross, above n 145, 5.

\(^{186}\) Corcoran, above n 184, 5. As to the LCA’s proposals in this regard, see LCA, *Regulatory Framework for a National Approach to Regulation of the Legal Profession* (2009). Lavarch asserts that ‘A national legal profession will no longer be a hobby project for government’: Lavarch, above n 180, 18.

\(^{187}\) Announced by Federal Attorney-General Robert McClelland at a Law Society of Western Australian function, 26 February 2010.

\(^{188}\) Model Bill, ch 2, pt 2.7, div 2. Also see *Legal Profession Act 2004* (NSW) pt 2.6, div 2; and *Legal Profession Act 2007* (Qld) ch 2, pt 2.7, div 1.

\(^{189}\) Model Bill, ch 2, pt 2.7, div 3. Also see *Legal Profession Act 2004* (NSW) pt 2.6, div 3; and *Legal Profession Act 2007* (Qld) ch 2, pt 2.7.
competition, MDPs have been supported as a way to provide a ‘one stop’ service for clients.

In some jurisdictions the two branches of the profession have merged (at least officially); solicitors and amalgams have been granted the right of audience in all superior courts (ending the monopoly of barristers on court work); the prohibition on direct access to barristers by clients has been removed; and the ‘two-counsel’ rule and the practice of ‘third line forcing’ have been abolished.

2 Requirements to Disclose Information on Costs

Some important changes regarding the provision of information on legal costs have been made. As Dal Pont notes, the Legal Profession legislation makes provision for the most extensive costs disclosure requirements to date. Legal practices in Australia are now required to provide written information to clients or prospective clients about, inter alia: the basis on which legal costs will be calculated; the right to negotiate a costs agreement; the right to request an itemised bill; the right in certain circumstances to receive regular progress reports, an estimate of the total legal costs (or a range of estimates) and an estimate of the range of costs that might be recovered if the client is successful in a litigious matter (and a statement to the effect that a court order for the payment of costs will not necessarily cover all the client’s legal costs and that the client might be ordered to pay if unsuccessful). There are strict formalities involved in delivering a bill of costs to a client and clients have the right to request that their costs be assessed by an independent person (a taxing officer or costs assessor).

3 Independent, Transparent Complaint Handling and Disciplinary Procedures

Responsibility for complaint handling and discipline has been moved in most jurisdictions to independent boards or tribunals constituted by statute (although as

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190 The profession in New South Wales, Victoria and Queensland has remained divided. For a discussion of the history of attempts, even by legislation, to fuse the profession, see Ross, above n 145, 81-9.
191 See, eg, section 209 of the Supreme Court Act 1995 (Qld) which allows for the appearance of a lawyer in the Supreme Court.
192 See, eg, Legal Profession Act 2004 (NSW) s 83(3) and 83(4) and Legal Profession Act 2004 (Vic) s 3.2.3(1). Also see the Barristers’ Rules which envisage a contract between barristers and clients, eg Australian Bar Association Model Rules (hereafter the ABA Model Rules) (amended as at December 2002) r 80; Barristers’ Rules (NSW) r 80; and Barristers’ Rule 2007 (Qld) r 83. Generally, see Dal Pont, above n 151, 47-8.
193 Barristers’ Rules: ABA Model Rules r 84; NSW r 84; Qld r 88. Also see Ross, above n 145, 86-7.
194 Dal Pont, above n 151, 82; and Coronis, Stobbs and Thomas, above n 122, 12.
195 Model Bill, part 3.4. Also see the Family Court Rules rr 19.03, 19.04 and 19.20-19.25.
196 The court retains the power to set aside costs agreements that are unreasonable and unfair. The power has now been recognised by statute in most Australian jurisdictions. In some jurisdictions the power is vested in the Law Society or costs assessors. See discussion by Dal Pont, above n 151, 326-8.
197 Ibid 337-8.
198 In most States and Territories, complaints against legal practitioners are dealt with by a tribunal constituted under the relevant Legal Profession legislation. Tribunals may refer disputes for mediation or conciliation: see, eg, Model Bill, ch 4, pts 4.4 and 4.6; Legal Profession Act 2004 (NSW) ch 4; Legal Profession Act 2007 (Qld) ch 4.
Lamb and Littrich point out, in reality, there is not a complete separation between the Councils of Societies and Associations and independent bodies). Two other trends in complaint handling are worth noting: the first is the adoption of a common disciplinary approach for all lawyers, regardless of whether they practise as a barrister or solicitor, and the second, is the amalgamation of a number of tribunals (including Legal Practice Tribunals) into a tribunal which has general jurisdiction to review administrative decisions.

4 Professional Practice Rules – Piecemeal Changes

Although there continues to be different practice rules operating in each State and Territory in Australia, some uniformity has been achieved due to the efforts of the Law Council of Australia and the Australian Bar Association (this might well be considered as the addition of another deck to the holiday house). The LCA adopted a set of Model Rules of Professional Conduct and Practice in March 2002 (hereafter the LCA’s Model Rules). In 1993 the Australian Bar Association published a Code of Conduct as a framework for national uniformity. It was subsequently revised to form the Australian Bar Association Model Rules (hereafter the ABA Model Rules).

Aside from this step towards uniformity, there have been only two significant improvements made to the rules, in accordance with the recommendations for reform discussed above. The first is the inclusion in the rules in many jurisdictions of a specific obligation on practitioners to inform clients (and where the practitioner is a barrister, to inform the instructing solicitor and client) about ‘the reasonably available alternatives to fully contested adjudication’. Unfortunately, the rules stop short of imposing an

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199 Lamb and Littrich, above n 72, 198. In part, this may be explained and justified by a lack of resources to set up completely independent bodies.
200 Dal Pont, above n 151, 531.
201 As is the case, eg, in Queensland: see the Queensland Civil and Administrative Tribunal established 1 December 2009.
202 See the Law Council of Australia, Model Rules of Professional Conduct and Practice (hereafter the LCA’s Model Rules) (as at March 2002). These have been adopted in the majority of Australian States and Territories.
203 ABA Model Rules (amended as at December 2002) which have also been adopted in the majority of Australian jurisdictions.
204 A practitioner is freed from this obligation in some circumstances. See, eg, Solicitors’ Rules: LCA’s Model Rules r 12.3; NSW r 23A.17A; and Qld r 12.3. Barristers’ Rules: ABA Model Rules r 17A; NSW r 17A; Qld r 18. On the position in the UK, see Boon and Levin, above n 144, 420 where the authors note that ‘The solicitors’ and bar codes impose no duty to consider ADR, even in relation to the basic standard required by the courts, but the case law ensures that it is part of the general duties of competence and diligence to include ADR in initial advice, even when litigation is not immediately contemplated’. Although the American Bar Association Rules make no explicit provision to this effect, several authors are of the view that the responsibility to do so arises from a combination of several provisions of the Rules: see, eg, Lawrence M Watson, ‘Initiating the Settlement Process – Ethical Considerations’ in Bernard and Garth, above n 169, 13 and Carrie Menkel-Meadow, ‘Ethics in ADR: The Many “C”s of Professional Responsibility and Dispute Resolution’ (2000-2001) 28 Fordham Urban Law Journal 979, 981. Additionally, many US state bar codes require practitioners to advise clients which dispute resolution methods are most appropriate, see, eg, the bar codes in Texas and Colorado discussed by Boon and Levin, above n 144, 421.
obligation on practitioners to try to settle cases (as was done, for instance, in the case of family lawyers operating under the FLA regime).205

The second improvement is that practitioners are now explicitly required by the rules to ensure that proper and responsible use is made of the court process and privilege. There are specific prohibitions against, for example, making allegations in documents,206 in court,207 and in cross-examination208 unless the practitioner has reasonable grounds for supporting them. More generally, the rules require that practitioners confine the case to issues that are genuinely in dispute, present issues clearly and succinctly, and ‘occupy as short a time in court as is reasonably necessary to advance and protect the client’s interests which are at stake in the case’.209

However, the rules remain deficient in some important respects.

First, the rules still focus on litigation and court advocacy (the Solicitors’ Rules and the Barristers’ Rules contain a common set of advocacy and litigation rules). While several categories of the Solicitors’ Rules are more general in nature, for example, governing relations with clients and relations with other practitioners, pre-hearing conduct per se is not a feature of either the Solicitors’ or the Barristers’ Rules.

Despite the urging of commentators and bodies such as the ALRC, the relevant professional bodies have not developed separate or additional codes of conduct for lawyers representing clients in unassisted negotiation.210

And there have been only minor steps taken in Australia towards the development of ‘codes’ of conduct (the word ‘codes’ is used loosely here) for lawyers representing parties in mediation. The most recent step was taken by the LCA with the release of its Guidelines for Lawyers in Mediations.211 The Guidelines are non-binding in nature. They were developed ‘to give assistance to lawyers representing clients in the mediation of civil and commercial disputes’.212 Currently, the Guidelines do not impose any additional obligations on legal representatives (nor do they derogate from the usual obligations imposed on them).213 At present, the Guidelines only deal specifically with two ‘Ethical

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205 As recently as September 2009, the Taskforce on Access to Justice again recommended that both procedural and professional requirements reflect ‘the expectation that parties have considered resolving the matter outside the court process prior to commencing litigation’: see A Strategic Framework for Access to Justice, above n 5, 165.

206 See, eg, LCA’s Model Rules rr 16.2 and 16.3.

207 Solicitors’ Rules: LCA’s Model Rules r 16.1; NSW r 23 A. 35; Qld r 16. Barristers’ Rules: ABA Model Rules rr 35-40; NSW rr 35-40; Qld rr 37-44.

208 See, eg, LCA’s Model Rules r 16.3.

209 See, eg, Barristers’ Rules: ABA’s Model Rules r 42; NSW r 41; Qld r 37.


211 Law Council of Australia, Guidelines for Lawyers in Mediation (March 2007).

212 No definition of civil or commercial disputes is provided.

213 Introductory Note, Law Council of Australia, Guidelines for Lawyers in Mediation (March 2007).
issues’ — confidentiality and good faith.\(^{214}\) Prior to the release of this set of guidelines, one of the most comprehensive statements of ethics for legal representatives in mediation was that promulgated by the New South Wales Law Society (*Professional Standards for Legal Representatives in a Mediation*) in 1993.\(^{215}\) However, the only provision drafted in the language of a binding rule in the New South Wales Law Society’s Standards is the one dealing with confidentiality.\(^{216}\)

The relevant publications do not provide a complete set of ethical ‘rules’ or ‘principles’. For the most part in Australia, the conduct of legal representatives in negotiation and mediation is governed by the ‘general’ law of lawyering\(^{217}\) (and by the terms of relevant contracts, such as those of an Agreement to Mediate entered into by the parties). This is undoubtedly the case for mediation in Australia since both the Solicitors’ Rules and the Barristers’ Rules have now defined ‘court’ to include arbitrations and mediations.\(^{218}\) This is an ad hoc and thoughtless way with which to deal with mediation, a process which is premised on different objectives, goals and values, and which arguably needs its own rules.\(^{219}\) Still, it may be an advance on the position in the United States where it has been left to scholars to argue ‘that the same ethical obligations of candor that a lawyer owes to a judge are owed to a mediator’.\(^{220}\) In fact, a number of scholars in the United States and Australia argue that participants in mediation owe a higher standard of candour to the mediator and to each other than that owed to a court of law.\(^{221}\) Issues such as these do not seem to have been considered by professional bodies in Australia.

While there are no separate standards of conduct for legal representatives in negotiation, and only partial ‘codes’ for legal representatives in mediation, there appears at first

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\(^{214}\) Law Council of Australia, *Guidelines for Lawyers in Mediation* (March 2007), ss 2.1 and 2.2.


\(^{217}\) Regard must also be paid to provisions such as section 52 of the *Trade Practices Act 1974* (Cth) and similar State Fair Trading legislation which prohibit misleading and deceptive conduct. See Warren Pengilley, “‘But You Can’t Do That Any More!’ – The Effect of Section 52 on Common Negotiation Techniques” (1993) 1 *Trade Practices Law Journal* 113.


\(^{220}\) Bruce E Meyerson, ‘Telling the Truth in Mediation: Mediator Owed Duty of Candor’ (1997-1998) 4 *Dispute Resolution Magazine* 17, 17-18. Also see Kovach who argues that the common threshold standard for truthfulness in negotiation (set out in Rule 4.1 of the *American Bar Association Model Rules of Professional Conduct* (2004)) is too low a standard for mediation: Kimberlee K Kovach, ‘Ethics for Whom? The Recognition of Diversity in Lawyering Calls for Plurality in Ethical Considerations and Rules of Representational Work’ in Bernard and Garth, above n 169, 57, 61. She argues that ‘[t]he current rule clearly should not be the standard in mediation, a process that is dependent upon the direct and truthful exchange of communication’: Kovach, 61.

\(^{221}\) See, eg, Carrie Menkel-Meadow, ‘Ethics and Professionalism in Non-Adversarial Lawyering’ (1999-2000) 27 *Florida State University Law Review* 153, 167-168. Many authors also argue for higher standards of candour and fairness in negotiation than are imposed on lawyers in the litigation context, see, eg, Rubin, above n 172, 589; Schwartz, above n 172, 671; and Parke, above n 170, 226.
glance to have been a proliferation of codes of conduct for mediators (generally) and lawyer mediators (specifically). Separate and/or supplementary ethical standards or guidelines have been developed for lawyer mediators by the LCA,222 most Law Societies and Bar Associations,223 and other third party accreditation organisations such as IAMA (whose membership is not restricted to lawyers).224 However, on closer inspection, it is apparent that these ‘codes’ are either non-binding or only partial statements of appropriate behaviour. For instance:

1. The LCA’s Ethical Guidelines for Mediators225 are non-binding. They are ‘offered in the hope that they will serve an educational function and provide assistance to individuals, organisations and institutions involved in mediation’.226

2. The New South Wales Law Society’s Revised Guidelines for Solicitors who act as Mediators227 contain only three compulsory provisions (those dealing with impartiality, confidentiality and termination of the process).228

3. The rules introduced by the Australian Bar Association are binding on its members. However, there are only two rules229 and they cover only two issues: conflicts of interest and confidentiality.

4. The Professional Conduct Rules of the Law Society of Western Australia230 contain a single rule (with various sub-rules) in relation to mediation. Although binding on its members, the rule is not comprehensive. For example, the sub-rule dealing with confidentiality consists of 14 words. This rule has not been retained in the Draft Practitioner’s Conduct Rules.231

A similarly patchy approach has been adopted in the United States. There the American Bar Association Model Rules of Professional Conduct 2004 now make explicit reference to the role of lawyer neutrals with new Rule 2.4. The rule simply acknowledges that lawyers can be mediators and requires them to advise non-represented parties that they are not representing the parties.232

At a time when lawyers are involved in mediation more than ever before,233 the professional bodies have not provided adequate rules for their members.234

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222 Law Council of Australia, Ethical Guidelines for Mediators (February 2006). They are intended to serve as a general ethical and practical framework for the practice of mediation (Introductory Note).

223 See for example, ABA Model Rules, Rules Regulating Barristers as Mediators rr 117-118.

224 IAMA stands for the Institute of Arbitrators and Mediators Australia. As its name suggests, it also accredits arbitrators. Also see the Standards of Conduct for Mediators promulgated by the Association of Conflict Resolution, one of the largest mediator organisations in the US.

225 The Law Council of Australia, Ethical Guidelines for Mediators (February 2006).

226 Introductory Note, Law Council of Australia, Ethical Guidelines for Mediators (February 2006).


228 Boulle, above n 216, 483.

229 ABA Model Rules rr 117-118.

230 The Law Society of Western Australia Professional Conduct Rules, July 2008 Revision.

231 Draft Practitioner’s Conduct Rules for WA, above n 179.


233 Ross asserts that lawyers dominate ADR in general and mediation in particular: Ross, above n 145, 508 and 516.
Despite recommendations for reform, the rules remain unchanged in many other respects. With the possible exception of the draft rules presently being considered in Western Australia, the rules continue to emphasize the primacy of the duty to the client. They contain strong unequivocal statements of obligation to ‘advance and protect the client’s interests to the best of the [practitioner’s] skill and diligence’. (In the case of the Solicitors’ Rules, this statement appears twice).

Again, with the possible exception of the draft rules under consideration in Western Australia, the rules still do not contain explicit statements about the duty owed to the administration of justice. The non-binding general introductory statements to the rules (statements of general principle, objects sections, or preambles) refer to ‘obligations in relation to the administration of justice’ but the rules themselves do not. For example, the preamble to the Barristers’ Rules states that the rules are made in the belief that: ‘The administration of justice is best served by reserving the practice of law to those who owe their paramount duty to the administration of justice’. The rules which follow do not match the expectations set out in this initial statement. In neither set of Model rules is there a rule which says ‘Practitioners owe a duty to the administration of justice’ or words to that effect. Neither set of Model rules contains an express statement to the effect that the duty to the administration of justice prevails when there is a conflict between that duty and the duty to a client.

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234 The National Alternative Dispute Resolution Advisory Council (or NADRAC) has not developed ethical guidelines for mediators. The Practice Standards for Mediators Operating Under the National Mediator Accreditation System are not ethical standards, although several of the practice standards provide instruction on areas of practice likely to have ethical implications. The influence of these Standards are evident in the ‘obligations’ imposed on Family Dispute Resolution Practitioners by the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth). The obligations cover security of records, termination of the process, prohibition on giving legal advice where the practitioner is not also a legal practitioner, and conflict of interest: seeregs 15, 29 and 30.

235 See Draft Practitioner’s Conduct Rules for WA, above n 179, r 2.1 which provides ‘A practitioner’s duties to the Court and the administration of justice are paramount and prevail to the extent of inconsistency with any other duty, including but not limited to all duties to the practitioner’s client’.

236 See, eg ABA Model Rules r 16.

237 The first category of rules in the Solicitors’ Rules is that pertaining to ‘relations with clients’ (r 1.1). The category of rules headed ‘ advocacy and litigation rules’ also begins with a statement of the duties owed to the client (rr 12.1-12.4).

238 See Draft Practitioner’s Conduct Rules for WA, above n 179, r 2.1.

239 It has long been recognised that a legal practitioner is an officer of the court. This status is now given a statutory foundation: see, eg, Legal Profession Act 2004 (NSW) s 33; and Legal Profession Act 2007 (Qld) s 38. The courts have repeatedly held that, as officers of the court, practitioner’s owe an ‘overriding’ or ‘paramount’ duty to the court rather than the client: Giannarelli v Wraith [1988] HCA 52, [12]; and Rondel v Worsley [1969] 1 AC 191, 227. Also see Corones, Stobbs and Thomas, above n 122, 88; and Dal Pont, above n 151, 373.

240 This is made clear by, eg, the Introduction of the LCA’s Model Rules.

241 See the Introduction of the LCA’s Model Rules.

242 See the Object section, Victoria and Queensland Solicitors’ Rules.

243 See the Preamble of the ABA Model Rules.

244 Preamble, ABA Model Rules rr 1 and 3.

245 Compare the Draft Practitioner’s Conduct Rules for WA, above n 179, r 2.1. Also see the comments to the Solicitors’ Code of Conduct 2007 (UK) which provide that, if there is a conflict between the duty to the
circumstances in which there is a conflict (with the exception of rule 14 mentioned below). Rule 1 of the Barristers’ Rules, which essentially requires that practitioners exercise independent forensic judgments, seems protective of practitioners rather than instructive for practitioners.\textsuperscript{246} Surely a passing mention in an introductory clause rather than the ALRC had in mind when it recommended that the duty to the administration of justice be made explicit.

The Commission also recommended that the rules make more explicit the ethical obligations of candour owed by a legal practitioner to the court.\textsuperscript{247} This has not been done.\textsuperscript{248} The Solicitors’ Rules contain a statement of general principle which informs practitioners that they should ‘act with competence, honesty and candour’ in their dealings with the court\textsuperscript{249} but the statement is non-binding and vague, and not followed up by specific rules. The rules themselves provide a very limited obligation of candour. Practitioners must not knowingly mislead or deceive the court;\textsuperscript{250} they have a positive obligation to inform the court of any relevant binding authority and legislative provisions of which the practitioner is aware\textsuperscript{251} but there is no obligation to disclose adverse facts (although a practitioner cannot assert facts which he or she knows to be false or misleading)\textsuperscript{252} and no obligation to ‘correct an error in a statement made to the court by the opponent or any other person’.\textsuperscript{253}

A distinction must be drawn between the duties of candour owed to the court and the duties of candour owed to one’s counterpart. With respect to the latter, the rules in common law jurisdictions are still clearly premised on a closed adversarial system. The relevant provisions are very broad but three guidelines emerge from the rules in Australia (these are similar to those in a number of other jurisdictions):\textsuperscript{254}

1. A practitioner cannot knowingly, by some positive act or statement, lie or misrepresent her or his client’s position. The rules speak to actions, not omissions. The rules do not prohibit ‘silence’, unwillingness to present a client’s case or refusal to make an offer to settle. Rules 4.1 and 1.6 of the American Bar

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\textsuperscript{247} ALRC, above n 2, [3.92].

\textsuperscript{248} Even the Draft Practitioner’s Conduct Rules presently under consideration in Western Australia simply repeat the old rules: see Draft Practitioner’s Conduct Rules for WA, r 31.

\textsuperscript{249} LCA’s Model Rules, statement of general principle, advocacy and litigation rules.

\textsuperscript{250} Solicitors’ Rules: LCA’s Model Rules r 14.1; NSW r 23; Qld r 14.1. Barristers’ Rules: ABA Model Rules r 21; NSW r 21; Qld r 23.

\textsuperscript{251} See, eg, LCA’s Model Rules r 14.6; and ABA Model Rules r 25.


\textsuperscript{253} LCA’s Model Rules r 14.3.

\textsuperscript{254} LCA’s Model Rules rr 18.1-18.3 and ABA Model Rules rr 51-53. Also see the rules dealing with ‘advocacy’ in all Australian jurisdictions.
Association Model Rules of Professional Conduct 2004 (and commentary) prohibit a practitioner from making a false statement of a material fact or law, but specifically provide that a statement as to an acceptable settlement of a claim is not a statement of a material fact. In other words, there is nothing unethical under the American Bar Association Rules about misrepresenting matters pertaining to negotiation strategy such as the amount a client is willing to accept by way of settlement. Some authors are scathing of these rules. They assert that the rules condone certain forms of deception in negotiation (including puffery) and allow lawyers to misrepresent bottom lines and general intentions about settlement without risk of violating ethical standards. In the case of the Solicitors’ Rules in Australia, rule 28.1.2 also appears to allow puffery and misstatement as long as such statements do not ‘grossly’ exceed ‘the legitimate assertion of the rights or entitlement of the practitioner’s client’.

2. If a practitioner makes a statement about a client’s case, which he or she subsequently learns to be false, the practitioner is under a duty to correct the statement. A practitioner is not under a duty to correct an opponent where the opponent is acting on the basis of a mistaken belief that something is true or false – that is, there is no duty to correct an opponent’s misunderstandings, misconceptions or false assumptions.

3. A practitioner has no affirmative duty to inform an opposing party of relevant facts and documents, subject to any requirements imposed by substantive law and relevant legislation. Each party (and his or her representatives) has a duty to conduct their own legal research and factual investigations. There is no duty to assist one’s opponent in any way. Burns reaches the same conclusions about the rules governing this issue in the United States. He concludes that ‘[t]here is generally no requirement that a lawyer inform a negotiating partner of any fact, however clear it is that the negotiator would want to know that fact, would profit from knowing it, or suffers from major misunderstanding of that fact’.

In Australia, no more cooperation between practitioners is required now than was the case under previous rules of conduct. If the Draft Practitioner’s Conduct Rules presently under consideration in Western Australia are any indication, change will not be forthcoming in the near future.

And despite the fact that practitioners are now required to ensure that proper and responsible use is made of the court process and privilege, as Boon points out, they still

255 American Bar Association Model Rules of Professional Conduct 2004 (and commentary) rr 1.6 and 4.1.
256 Bordone calls it a ‘euphemism for lying’: Bordone, above n 135, 13. Also see Christopher M Fairman, ‘Why We Still Need a Model Rule for Collaborative Law: A Reply to Professor Lande’ (2006-2007) 22 Ohio State Journal on Dispute Resolution 707, 716.
257 The LCA’s Guidelines for Lawyers in Mediations (6.2 Offers and settlement) also seems to make allowance for puffing.
258 Burns, above n 218, 695.
259 See the Draft Practitioner’s Conduct Rules for WA, above n 179, r 20.1 which requires, in certain circumstances, that a practitioner draw a mistake or oversight to the attention of the opponent ‘unless doing so might prejudice the practitioner’s own client’.

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have ‘wide discretion in deciding what investigations to conduct, what evidence to present in court proceedings and how to conduct the case’.

The rules in Australia do not deal with ‘specific practice problems’ such as whether and to what extent to encourage and assist claims that have little or no merit. They also fail to explicitly proscribe manipulative discovery tactics.

Finally, Australian jurisdictions have not adopted the ‘rule-comment’ format as recommended by the ALRC, but it is worth noting that the complaint about rules being too general still persists in those jurisdictions which have adopted the ‘rule-comment’ format. Adoption of such an approach alone is not a solution to overly general rules.

As the push for adoption of national uniform rules of conduct continues in Australia, we might be mindful of the tendency (and perhaps the necessity) towards the adoption of general (and minimum) requirements in order to gain consensus of multiple stakeholders.

**IV Legal Education**

**A Problems**

Many people have debated whether lawyers exacerbate controversy or help to prevent it from arising. Doubtless, they do some of each. But everyone must agree that law schools train their students more for conflict than for the gentler arts of reconciliation and accommodation. This emphasis is likely to serve the profession poorly. … Over the next generation, I predict, society’s greatest opportunities will lie in tapping human inclinations towards collaboration and compromise rather than stirring our proclivities for competition and rivalry.

Many reform agencies identified legal education as a factor contributing to the perceived crisis in the civil justice system. Separate enquiries conducted into the state of legal education made similar findings (and similar recommendations).
1 Overemphasis on Substantive Law

Legal education has traditionally been centred on substantive law. Many commentators, Bok amongst them, were concerned that this feature of legal education, with its emphasis on the study of legislation and appellate cases, focused students on parliament and courts as the central law making and dispute resolution institutions and that it presented litigation as the dominant dispute resolution process. Students were taught ‘to view adversarial litigation as the fundamental aspect of legal practice’. This skewed view of legal practice was reinforced by the prevalence of mooting as a curricular or extra-curricular activity. Legal education emphasized rights and obligations rather than interests and needs and it focused on winning through conflict and legal combat rather than problem-solving through collaboration and cooperation. The ALRC was also concerned that ‘without substantial and repeated consideration of ethical and social justice issues students lack exposure to alternative views which enable them to question prevailing adversarial legal culture’. It moderated its remarks, noting that these criticisms ‘may be directed more at past practices in legal education rather than contemporary legal education’. The Commission overstated the case for law schools.

2 Lack of Attention to Skills, Ethics and Values

Until relatively recently, little attention was given in law schools to the teaching and learning of a range of skills. The ALRC concluded that the attention given to professional skills (and to ethics and professional responsibility) was ‘insufficient’. The only skills that had secured a place at law school during the period under review were those associated with legal research, legal writing, and legal analysis. These skills have

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267 ALRC IP 20, above n 119, [11.24].
269 Bok, above n 4, 582.
270 Ibid [11.16].
271 ALRC 89, above n 2, [1.51]; and ALRC DP 62, above n 152, ch 3.
traditionally been taught at law school\textsuperscript{276} for they have long been considered to follow ‘quite properly from general university aims in educating students’.\textsuperscript{277} It also happens that law schools teach these skills, to some extent at least, as a ‘by-product’ of the teaching of substantive law subjects.\textsuperscript{278}

The traditional focus of law schools’ skills programs is reflected in the following quote from Bok (who was addressing the problem in law schools in the United States). He said:

\begin{quote}
The hallmark of the curriculum continues to be its emphasis on training students to define the issues carefully and to marshal all of the arguments and counterarguments on either side. Law schools celebrate this effort by constantly telling students that they are being taught ‘to think like a lawyer’. But one can admire the virtues of careful analysis and still believe that the times cry out for more than these traditional skills. As I have tried to point out, the capacity to think like a lawyer has produced many triumphs, but it has also helped to produce a legal system that is among the most expensive and least efficient in the world.\textsuperscript{279}
\end{quote}

Until relatively recently, legal ethics was not part of the law degree. Study in ethics and professional responsibility was undertaken as a ‘practice subject’ after graduation and prior to admission to practice. Fortunately a course in ethics is now a compulsory part of the LLB,\textsuperscript{280} but arguably, matters of ethics and professional responsibility still receive inadequate attention in the undergraduate law degree.

3 \textit{Traditional Teaching and Learning Methodology – Overreliance on Lectures}

Traditional law school teaching methodology was also questioned for fostering combativeness and the importance of winning. For example, Menkel-Meadow claims that

\begin{quote}
the traditional classroom fosters adversariness, argumentativeness, and zealotry, along with the view that lawyers are only the means through which clients accomplish their ends – what is “right” is whatever works for this particular client or this particular case.\textsuperscript{281}
\end{quote}

The methodology was also criticised for pitting students against each other, resulting ‘in lawyers who think of themselves first and others (clients) second; who have limited self-

\textsuperscript{276} The MacCrate Report, above n 266, 267.
\textsuperscript{277} The Pearce Report, above n 266, [2.133] and [1.61].
\textsuperscript{279} Ibid [1.61].
\textsuperscript{280} At the present time, students at Australian Law Schools are required to study 11 areas of substantive law as part of their LLB. The required subject areas are known as the “Priestley 11”, after the Hon Justice L J Priestley, Chairman of the Law Admissions Consultative Committee (1992), which recommended adoption of the areas of academic study as a uniform minimum standard. The required subjects are: Criminal Law and Procedure, Torts, Contracts, Property, Equity, Company Law, Administrative Law, Federal and State Constitutional Law, Civil Procedure, Evidence, and Professional Conduct (including basic Trust Accounting).
awareness” and ‘who are very uncomfortable with the emotional aspects of legal issues facing their clients or arising in the lawyer-client relationship itself’.

Traditionally, law school has relied on large group lecture methods. This method may be acceptable for transmitting blocks of legal information but it is far from ideal when it comes to imparting higher order learning objectives, which law schools would soon be called upon to do.

**B Recommendations for Reform**

1 **Calls to Move Beyond Substantive Law**

To be certain, students require a core knowledge and understanding of the law but relevant reform agencies recommended that law schools move away from content-focused education which requires students to know (and more optimistically, to master) large bodies of substantive law and move towards outcome-focused education which emphasises what students should be able to do as a result of their studies. The ALRC suggested that, accompanied by a commitment to facilitating ‘lifelong learning’ for professionals, the best preparation that law school can give its students is ‘one which promotes intellectual breadth, agility and curiosity; strong analytical and communication skills; and a (moral/ethical) sense of the role and purpose of lawyers in society’.

Similar recommendations were made in the United Kingdom, where it was suggested that legal education should aim to develop students’ capacities in intellectual integrity, independence of mind and contextual knowledge (which involves an appreciation of the law’s social, economic, political, philosophical, moral and cultural contexts), in addition to core knowledge, legal values and professional skills. Ideally, students would be exposed to a range of ethical and social justice issues, and to comparative law and interdisciplinary perspectives.

2 **Calls to Expand Skills Programs (in the Context of Ethics and Values)**

There have been widespread recommendations for the expansion of skills teaching in the law curriculum. In Australia, the Pearce Committee urged expansion in the areas of oral expression and legal advocacy, drafting, negotiation and interpersonal skills. The

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283 Ibid 767.
285 Ibid 32. Also see the ACLEC Report, above n 266, [1.15].
286 ALRC 89, above n 2, [2.89]. This view was recently endorsed in the Stuckey Report, above n 284, 56.
287 The ACLEC Report, above n 266, [2.4].
289 In the US, see the MacCrate Report, above n 266, 138-141. In the United Kingdom, see the ACLEC Report, above n 266, [1.19] and [2.4]. In Australia, see the Pearce Report, above n 266, [1.144]-[1.145] and [2.193] and ALRC 89, above n 2, [1.184]. Generally, see Bobette Wolski, ‘Why, How and What to Practice: Integrating Skills Teaching and Learning in the Undergraduate Law Curriculum’ (2002) 52 Journal of Legal Education 287.
290 The Pearce Report, above n 266, [1.61] and [2.195].
MacCrate Report in the United States listed ten generic skills namely: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counselling, negotiation, litigation and ADR, organisation and management of legal work and recognising and resolving ethical dilemmas.  

Arguably today’s lawyers must broaden their repertoire of skills and competencies beyond those identified in these early reports. Procedural reform in particular has impacted the role of legal practitioners. If law graduates are to work competently and ethically within the new civil procedure regime, law schools should also attempt to impart skills and theory in the following areas (it is acknowledged that there is some overlap in the matters on this list and the one articulated in the MacCrate Report):  

1. Time and financial management.  
2. Case preparation.  
3. Selection of relevant materials.  
4. Selection of cases suitable for ADR.  
5. Mediation and case appraisal.  
6. Assessment of the potential for success in mediation.  
7. Risk analysis and assessment.  
8. The giving of early advices on evidence.  
9. The giving of advice on prospects of success and the likely outcome of litigation.  
10. The ability to respond to client concerns about litigation and in particular, about the costs of litigation.  

Additionally, law graduates must acquire new skills and ways of approaching problems that will enable them to practise law in a more cooperative way. Ideally, law schools should make room in their curricula for the teaching and learning of skills and attitudes associated with:  

- Non-court based problem-solving.  

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291 The MacCrate Report, above n 266, 138-141.  
294 Most skills cannot be clearly categorised in this manner, but rather overlap to a significant extent.  
- Expanding the issues of a problem (rather than narrowing them).
- Creativity.\(^{297}\)
- Openness and sensitivity to clients.
- Addressing the needs and interests of clients and other parties.
- Questioning and listening.
- Practical judgment.
- Co-operation.
- Coalition and team building and management.\(^{298}\)
- Reflection.

Skills associated with reflection and self-analysis may be the most important of all.\(^{299}\) Many studies have stressed the importance of teaching students how to learn so that they may become lifelong learners.\(^{300}\) If students are to become lifelong learners, they need to develop the ability to reflect on their work and to evaluate it by engaging in critical self-analysis. As discussed later, it is difficult to accommodate this type of learning experience in a large lecture format.

In addition, many lawyers are now involved in mediation, either as the mediator or as a party representative. They require a far greater understanding of, and competence in, mediation than was foreshadowed by the MacCrate Report. This was recognised by the recently commissioned Taskforce on Access to Justice, which expressed the view that ‘[l]awyers being admitted to practise should be equipped with the skills to guide a client through a dispute resolution process and understand the major ADR processes’.\(^{301}\) It

\(^{297}\) As to whether (or not) creativity is teachable, see Carrie Menkel-Meadow, ‘Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?’ (2001) 6 Harvard Negotiation Law Review 97.

\(^{298}\) This list is not exhaustive. There have been a number of sweeping changes to the structure of legal practice in the last twenty years that are beyond the scope of this paper: see, eg, those described by Weisbrot, above n 292, 267-268. In order to function in legal practice today, practitioners also need ‘business’ skills including those associated with strategic planning, marketing, information technology, delegation and supervision, accounting and so on: generally see Gary A Munneke, ‘Legal Skills for a Transforming Profession’ (2001-2002) 22 Pace Law Review 105. In particular, in relation to new technologies and delivery of legal services, see Richard Susskind, The End of Lawyers? Rethinking the Nature of Legal Services (2008).


\(^{301}\) A Strategic Framework for Access to Justice, above n 5, 171. The Taskforce did not make clear who was responsible for this.
recommended that steps be taken to ensure that the criteria for admission to practice reflect ‘the importance of a practical knowledge of ADR’.

Reform agencies also stressed the need to teach ethics and professional responsibility, ‘pervasively and continuously’ throughout the duration of undergraduate legal studies. Arguably, ‘students need regular and consistent exposure to legal ethics issues over the entire duration of their undergraduate studies’. As Rhode argued, they need this exposure, ‘not as a substitute for, but as a supplement to separate coursework specifically focused on ethics’. And as I have argued elsewhere, legal ethics is not just about rules of professional conduct. For instance, when examining duties owed to the court, students should be exposed to, and given opportunity to question, broader issues of professional responsibility such as those pertaining to:

- the advocate’s role in the legal system and in society;
- the issue of who, in the lawyer/client relationship, chooses which issues to run and which to ignore;
- the question of whether or not an advocate needs to believe that right and justice is on the client’s side; and
- whether or not a court is the appropriate forum for the matter at hand.

Law schools also have an obligation to impart to their students a critical understanding of personal and professional values. The MacCrate Report was one of the first to attempt

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302 Ibid.
304 See, eg, the ACLEC Report, above n 266, [1.19] and [2.4]; ALRC 89, above n 2, [2.89] and [1.184]; Cownie, above n 292, 171; and the Stuckey Report, above n 284, 60-67.
307 Deborah L. Rhodes, ‘Ethics by the Pervasive Method’ (1992) 42 Journal of Legal Education 31, 50. Also see O’Shea, above n 292, 272 who argues for the formal integration of ‘values’ and ‘ethics’ into the teaching of all the core ‘black letter’ subjects.
308 Wolski, above n 270, 48.
309 Ibid.
to articulate the ‘fundamental professional values’ which should be instilled in law students in preparation for practice. It included the values of:

- providing competent representation to clients;
- striving to promote justice, fairness, and morality;
- maintaining and striving to improve the profession; and
- professional self-development.

More recently, the importance of teaching values has been emphasised by the Stuckey Report. In addition to the values mentioned above, the Stuckey Report stressed ‘the lawyer’s obligations to truth, honesty, and fair dealing; the responsibility to improve the integrity of the legal system’, a commitment to ensuring equal access to justice for all persons, and sensitivity and effectiveness with diverse clients. If civility and collegiality have been lost, as is sometimes claimed, these values might also be cultivated in our students (and reinforced in professional practice rules).

3 The Need to Change Teaching and Learning Methodology

Many of the reports drew upon general changes taking place in higher education and called for the use of adult learning techniques (such as experiential learning and problem-based learning), greater diversity in methods, a shift from teacher-centred to student-centred forms of learning (in which students take active responsibility for their own learning) and more ‘concern for the development in students of a capacity for “life-long learning”’. With this in mind, the Access to Justice Taskforce recently expressed the view that undergraduate law degrees should include opportunities for access to clinical legal education and opportunities to undertake pro bono work in community and Indigenous legal services or similar organisations.

C Reform Initiatives

1 Substantive Law – It Still Dominates

On any view, ‘substantive law still dominates law school teaching and curriculum in Australia’. There is little room in the curriculum for coverage of theoretical issues and

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311 This formulation of values is drawn from the MacCrate Report which has been widely endorsed in Australian law schools: see the MacCrate Report, above n 266, 140-141; and Robert MacCrate, ‘Keynote Address – The 21st Century Lawyer: Is There a Gap to be Narrowed?’ (1994) 69 Washington Law Review 517, 523. The same formulation can be found in the preamble of the American Bar Association Model Rules of Professional Conduct (2004).
312 The Stuckey Report, above n 284, 60-67.
313 Ibid 125.
315 See references, above n 128.
316 Webb and Maughn, above n 275, xxii-xxiii and 11-19; the MacCrate Report, above n 266, 259.
318 Weisbrot, above n 292, 269.
interdisciplinary subjects. Keyes and Johnstone lament the general absence, not only of skills, but also of ‘ethics, theory, attitudes and values, interdisciplinary perspectives on law, or the international aspects and implication of law and legal practice’. Thornton also argues that we continue to focus on basic doctrine in the absence of contextual and social background, reflection, and critique. Essentially, law school is still not exposing students to those alternative views ‘which enable them to question prevailing adversarial legal culture’. Unfortunately, any move to reduce substantive content is likely to face resistance from many academic staff (who perceive that subjects are already content-crowded) and from some students who are aware of the increasing volume of substantive law and the need to specialise and who demand more electives to satisfy that need.

2 Skills, Ethics, Values – Limited Integration

The need for curricular reform to accommodate skills, ethics and values has been recognised and is taking place but only in a fragmented and piecemeal way. At present, law schools struggle to incorporate, as a minimum requirement, those skill areas listed in the MacCrate Report. Focus remains on the traditional skills of legal research, legal writing, and legal analysis. Most schools have a mooting program (indeed, this is often the centre piece of a school’s skills program) which has the capacity to develop a range of skills. However, most moots take the form of appellate moots – focusing, yet again, on adversarial litigation.

While many law schools teach the theory and principles of ADR, training in interviewing, negotiation, mediation and even trial advocacy tends to be optional rather than compulsory, available only in limited enrolment electives and extracurricular activities. When it occurs, teaching in these skill areas tends to be ad hoc rather than systematic.

In Australia, Johnstone and Vignaendra concluded that:

Most law schools appear tentative about the way in which they have developed their approaches to teaching legal skills, and arguably have not devoted enough resources to working out how to approach skills teaching in the context of an academic law program, or to

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320 Keyes and Johnstone, above n 319, 541.
322 Lack of exposure to alternative views was identified by the Australian Law Reform Commission as a factor contributing to the prevailing adversarial legal culture: ALRC IP 20, above n 119, [11.24].
324 For a discussion about the emergence of legal sub-specialities, see Sackville, above n 2, 56.
325 Wolski, above n 270, 44.
326 Wolski, above n 289, 289-291. In relation to the teaching of ADR, see Sourdin, above n 268, 1.
mapping and embedding skills teaching within the curriculum so that students are exposed to skills teaching incrementally, and can develop their skills over time in increasingly complex situations.\textsuperscript{327}

The position is no better in the United Kingdom\textsuperscript{328} and the United States.\textsuperscript{329} Matasar concluded that in law schools in the United States, skills training in counselling, negotiation, ADR, and problem solving was ‘spotty’ leaving ‘much room for improvement.’\textsuperscript{330} In his opinion, the treatment given by law schools to the skills of factual investigation and organisation and management of legal work rated a ‘D’ (where ‘A’ was the highest grade).\textsuperscript{331}

Most law schools now offer a discrete compulsory unit in legal ethics but it is often taken very late in the degree program. It is sometimes given only half the weight or credit given to substantive law subjects. Schools are a long way from teaching ethics and values ‘pervasively and continuously’\textsuperscript{332} and incrementally across the law curriculum.\textsuperscript{333} When legal ethics is taught, schools struggle to cover more than basic rules of professional conduct.

3 Teaching and Learning Methodology – But Minor Changes

Teaching methodology in law schools has changed very little in the last twenty-five years. Despite ‘the current drive towards more active learning in higher education’\textsuperscript{334} law schools in all jurisdictions remain heavily dependent on large group lectures.\textsuperscript{335} Many law schools attempt to supplement lectures with smaller group seminars and tutorials.\textsuperscript{336} While these methods may be useful to impart knowledge to students, they are far from ideal when it comes to teaching and learning skills, values and ethical issues. These goals are best achieved through experiential learning techniques (including clinics), not lectures


\textsuperscript{328} In the United Kingdom, Boon concluded that ‘a coherent programme of skills at the undergraduate stage is currently lacking’: Boon, above n 314, 169. Also on the position in the United Kingdom, see Grimes et al, above n 275, 45-46; and Webb and Maughan, above n 275, xix-xxvi. More recently, see Alisdair A. Gillespie, ‘Mooting for Learning’ (2007) 5 Journal of Commonwealth Law and Legal Education 19, 19.

\textsuperscript{329} In the United States, Matasar concluded that although many significant changes have taken place in legal education since the MacCrate report was published, law schools ‘still must make significant improvements if they wish to give every student a complete preliminary education in each of the skills and values set forth in the SSV [Statement of Skills and Values]’: Matasar, above n 310, 408.

\textsuperscript{330} Ibid 410-411.

\textsuperscript{331} Ibid 411.

\textsuperscript{332} See references, above n 305 and 306.

\textsuperscript{333} In the UK, see Webb, above n 305, 285-286. For the position in Australia, see Puig, above n 306, 30; and Michael Robertson, ‘Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective’ (2005) 8 Legal Ethics 222, 237. Robertson notes that despite the rhetoric, change has not been profound. Many problems associated with the traditional model (of teaching ethics) have not been addressed: Robertson, 239.

\textsuperscript{334} Boon, above n 292, 35.

\textsuperscript{335} The ‘large lecture method is once again favoured because of the pressure to transmit basic doctrine’: Thornton, above n 321, 486; and Keyes and Johnstone, above n 319, 552.

\textsuperscript{336} Even small group tutorials are threatened: Thornton, above n 321, 486; and Keyes and Johnstone, above n 319, 552.
and tutorials. However, experiential learning is resource intensive. Schools struggle to incorporate experiential learning and in particular, clinical courses, into the curriculum in a systematic and coordinated way.

Weisbrot succinctly sums up the current state of development in most law schools:

Although the elective programs at modern law schools have expanded enormously and become ever more specialized, and clinical electives are now available, the nature of the core curriculum, the dominance of doctrine, and the basic approach to pedagogy have changed very little.

If law schools are to expose students to a wider variety of less traditional skills and a range of values and professional attitudes and move away from the more traditional methods of teaching, they will need resources. Lack of resources has been repeatedly singled out as one of the biggest problems facing law school. Lack of resources is not of course the only factor impeding change. Teachers may have to overcome some inertia and embrace change, just as legal practitioners are required to do.

V CHANGING THE BEHAVIOUR AND ATTITUDES OF LAWYERS

A The Importance of Professional Practice Rules and Legal Education

Norms relevant to the legal profession can be found in a variety of sources including legislation governing the practice of the law, general legislation, relevant cases on

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337 Boon notes that ‘Among those addressing the issue of how to teach ethics there is almost universal agreement that clinical courses provide the most effective vehicle’: Boon, above n 292, 60. For more on the potential benefits of clinic and simulation courses, see generally Stuckey, above n 296, 827; and Sullivan et al, above n 305, 28.


339 Only a minority of law schools offer clinical courses and those that do, offer the opportunity on an optional basis to a minority of students. See eg, statistics given by Boon, above n 292, 63. This is also the case in Australian law schools where Robertson predicts that clinics ‘will continue to be rationed into the foreseeable future’: above n 333, 233. For further information on the position in Australia (and the resource problems associated with experiential learning and clinical courses), see Lyndal Taylor, ‘Skills Skills – Kind Inclusion and Learning in Law School’ [2001] University of Technology, Sydney Law Review (Legal Education in Australia: Current Issues and Developments) available online at http://www.austlii.edu.au/au/journals/UTSLRev/2001.

340 Weisbrot, above n 292, 269.

341 It is a long-standing argument that expansion of skills programs at law school is not feasible under present conditions of resource constraints: see Twining, above n 323, 189 (Twining asserted that the argument was ‘often greatly overstated’). On the financial position of law schools, see Eugene Clark, ‘Australian Legal Education a Decade After The Pearce Report’ (1997) 8 Legal Education Review 213, 222 and Brand, above n 338, 122-123.

342 Keyes and Johnstone, above n 319, 555.

343 For a definition of professional norms and discussion on the relationship between social norms and professional norms, see Boon and Levin, above n 144, 5-6.
tort, contract, equity and adjectival law; ‘decisions of the courts acting in their supervisory capacity over the profession’; and the rules of conduct promulgated by the professional bodies to which lawyers belong (in Australia, Law Societies and Bar Associations). Collectively, this law is referred to as the law of lawyering.

On a more general level, lawyers’ socialisation in relevant professional norms comes from legal education, colleagues and professional activities.

To date, the major reforms in the civil justice system have been brought about by changes in the Legal Profession legislation and legislation such as the Family Law Act 1975 (Cth), and by the exercise by the court of its supervisory powers over lawyers (as evidenced by the growing volume of rules of court and practice directions). Few reform initiatives have occurred as a result of changes to professional practice rules.

The importance of codes of conduct in influencing the behaviour of lawyers has been overlooked. The part played by legal education in shaping the professional attitudes and values of lawyers has also been underrated. In the discussion which follows, it can be seen that codes of conduct and education are connected in several important respects.

Codes serve as ‘a demonstration of the profession’s commitment to integrity and public service’. But they are not just exercises in public relations.

Codes of conduct serve a number of not-mutually exclusive purposes. They establish restrictions on behaviour. As a general matter, professional rules are binding on local

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344 See, eg, the Legal Profession legislation in Australia.
345 See, eg, Trade Practices Act 1974 (Cth) ss 51AA, 51AB and 51AC, s 52 and 74 in the case of the supply of services by a corporation and corresponding State and Territory legislation (the Fair Trading Acts or Sale of Goods Acts) for unincorporated professionals.
346 The Court has inherent and statutory jurisdiction to supervise and sanction lawyers. Statutory power is contained in legislation that regulates each court’s jurisdiction and procedure, such as the Supreme Court Act of a jurisdiction. For discussion on the foundation of these powers, see Nicolson, above n 151, 52; Haines, above n 128, 463; and Corones, Stobbs and Thomas, above n 122, 88-9.
347 On the issue of who make the rules, see above n 179. Since the rules have a statutory foundation, they are considered ‘a species of law’: Boon and Levin, above n 144, 7. Generally on the evolution of the rules, see Dal Pont, above n 151, 17 for the position in Australia; Boon and Levin, above n 144, 6-7 on the position in the UK; and for a discussion of the position in the US, see Nancy J. Moore, ‘Lawyer Ethics Code Drafting in the Twenty-First Century’ (2002) 30 Hofstra Law Review 923, 926.
348 Parker and Evans, above n 144, 3.
349 Nicolson, above n 151, 52.
350 Dal Pont, above n 151, 19; Nicola Higgs-Kleyn and Dimitri Kapelianis, ‘The Role of Professional Codes in Regulating Ethical Conduct’ (1999) 19 Journal of Business Ethics 363, 363, 365; Boon and Levin, above n 144, 6; and Leny E De Groot-Van Leeuwen and Wouter T De Groot, ‘Studying Codes of Conduct: A Descriptive Framework for Comparative Research’ (1998) 1 Legal Ethics 155, 165. The establishment of codes of conduct is recognised as a step in the process of professionalization and indeed, historically one of the functions of codes has been to ‘ward off interventions’ by state/government or other outside entity and to guard against ‘intrusion of external competitors into the prerogative of the profession’: De Groot-Van Leeuwen and De Groot, 166. In this regard, they have not been entirely successfully. Interestingly, codes of conduct for the legal profession have only developed relatively recently: see Boon and Levin, above n 144, 6-7 for the position in the UK and ALRC 89, above n 2. [3.42] for the position in Australia.
practitioners and interstate practitioners practising within the jurisdiction. The flip side of this is that lawyers can use codes ‘as a support system against improper demands’.\(^{351}\) Codes can ‘be used by lawyers to justify their actions as the professionally correct approach required in various situations’.\(^{352}\)

Codes also ‘express the profession’s own collective judgment as to the standards expected of lawyers’.\(^{353}\) These are the standards ‘by which the profession (and the professional) can be held to public account’.\(^{354}\) The rules provide a reference point for determining if there is cause for complaint about a practitioner, ‘in determining whether disciplinary proceedings should be commenced’ and ‘in the hearing of those proceedings before the professional body or tribunal’.\(^{355}\) The rules are also of ‘assistance in determining matters of misconduct before a court’.\(^{356}\)

Codes alert practitioners to the ethical issues likely to arise in various situations and provide them with guidance on appropriate action. Some commentators assert that lawyers look first to the codes of professional conduct for guidance when they are confronted with an ethical dilemma. According to Kovach, ‘Lawyers have demonstrated a need and custom of governance by a set of rules or standards’.\(^{357}\) If this is indeed the case, then it may be that the codes provide the most effective avenue via which reform agencies and professional bodies can effect change to the behaviour and attitudes of lawyers, if change is necessary. Professor Kovach emphasises that

In fact, rules are the most likely way in which to change lawyer conduct. Because of their emphasis on rights and objectivity, lawyers are more willing to change their behaviour to conform to a codified rule than to respond to a more intangible, subjective call for conduct.\(^{358}\)

Codes of conduct are all the more important because of their educational function. They play a central role in the education and inculcation of ethical values in lawyers.\(^{359}\) Nicolson concludes that the educational function of codes ‘in many respects is more significant than other sources of ethical socialisation’.\(^{360}\) Codes articulate professional values and ideals for members of the profession, as well as the public.\(^{361}\) They can assist in developing in practitioners, especially beginning practitioners, a sense of their basic commitments and professional responsibilities. As Nicolson observes, if some matters are

\(^{351}\) Higgs-Kleyn and Kapelianis, above n 350, 364.
\(^{352}\) Dal Pont, above n 151, 19.
\(^{353}\) Ibid. Also see Moore, above n 347, 935; and Boon and Levin, above n 144, 6.
\(^{354}\) Moore, above n 347, 924.
\(^{355}\) Dal Pont, above n 151, 19.
\(^{356}\) Ibid.
\(^{358}\) Kovach, above n 220, 62.
\(^{359}\) Nicolson, above n 151, 52, 66.
\(^{360}\) Ibid 53.
\(^{361}\) Boon and Levin, above n 144, 7; and Nicolson, above n 151, 53. Codes serve a number of other internal functions, eg, advancement of group cohesion: see Groot-Van Leeuwen and De Groot, above n 350, 164.
largely ignored in the rules or subject only to vague admonitions, it sends a particular message – perhaps the wrong message.\textsuperscript{362}

Nicolson correctly notes that legal ethics courses in our law schools largely focus on the codes.\textsuperscript{363} He continues:

This, and the fact that they provide the most comprehensive statement on professional legal ethics, incorporating many legislatively and judicially laid down norms, suggest that the codes are likely to constitute an important means of inculcating professional values and ideals. Once again, this means that the codes need to be critically evaluated in order to ascertain what message they are likely to convey to lawyers.\textsuperscript{364}

Of course, it may be impossible and undesirable to attempt to cover all the complexities of the many situations in which lawyers are involved in one or more codes of conduct.\textsuperscript{365} In Australian jurisdictions at least, the rules are not, nor were they intended to be, a comprehensive statement of professional obligations.\textsuperscript{366}

But no one argues that codes alone are sufficient. For instance, Kovach acknowledges that ‘change of conduct within the adversarial system is not likely to be affected by ethical rules alone’.\textsuperscript{367} She goes on to identify education as another key element.\textsuperscript{368}

The years spent at law school are the most formative for lawyers\textsuperscript{369} and it is there that the challenge of modifying adversarial traits and of educating for ethical legal practice begins.\textsuperscript{370} Almost thirty years ago Meltsner argued that ‘law schools present and transmit powerful norms of professional conduct. Legal education stimulates and reinforces changes in individual students as well as in the society which is subjected to the individual so transformed’.\textsuperscript{371}

B \textit{Disadvantages of Rules of Court and Legislation}

Can legislation and rules of court have the same impact on the attitudes and behaviour of lawyers? No, it cannot.

\textsuperscript{362} Nicolson, above n 151, 53.
\textsuperscript{363} Ibid.
\textsuperscript{364} Ibid.
\textsuperscript{365} See Nicolson, above n 151, 67-68 and Menkel-Meadow, above n 135, 451 for arguments against detailed codes of ethics. Haines argues that ‘the proliferation of rules decreases moral sensitivity and development, reduces flexibility, and discourages critical thinking. In effect, the lawyer enters a “simplified moral word” and becomes an “unreflective rule-follower”’. (footnotes omitted): Haines, above n 128, 460.
\textsuperscript{366} See, eg, Barristers’ Rules: ABA Model Rules r 9; NSW r 9; Qld r 10.
\textsuperscript{367} Kovach, above n 135, 619.
\textsuperscript{368} Ibid.
\textsuperscript{369} Sampford and Condlin, above n 132, 232. Both academics and governments recognise that change must necessarily begin even before students commence law school. It is within families, schools and other close communities that students are first socialised in the ways and means of dispute resolution: generally see Philip Ruddock, ‘Towards a Less Litigious Australia: The Australian Government’s ADR Initiatives’ (2004) 23 \textit{The Arbitrator & Mediator} 1.
\textsuperscript{370} Boon, above n 314, 164.
\textsuperscript{371} Michael Meltsner, ‘Feeling Like a Lawyer’ (1983) 33 \textit{Journal of Legal Education} 624, 624.
While some rules of court and practice directions require cooperation by lawyers with each other and with court officials and might engender in lawyers a more cooperative approach, there are disadvantages and limitations to the use of rules of court and practice directions to change the conduct and attitudes of members of the legal profession. These were concisely summed up by the ALRC in the following terms:

- rules of court apply to litigation only and not to the whole of legal practice, most of which is non-litigious
- it can be difficult for the court to ascertain relevant facts and to enforce such rules
- the United States experience suggests that such standards, when framed as rules of court, may be utilised as part of the battle of litigation
- it removes the onus from the profession to take these matters seriously and keep them under continuous review.  

Satellite litigation as a result of the new rules of court has also been experienced in the United Kingdom.  

VI CONCLUSION

The ALRC considered that the legal profession had an obligation to take professional practice matters seriously and to overhaul the professional practice rules. In its view:

Civil justice reform requires not more rules of court enshrining lawyers’ obligations to assist courts to deal justly with cases – as recommended by Lord Woolf – but commitment by the profession to evaluate, coordinate and elaborate its practice rules and disciplinary processes and to provide appropriate guidance on the rules in the form of commentary appended to the rules. Such rules and commentary should feature…the competing roles and responsibilities of lawyers as advisers, advocates, negotiators, and representatives within ADR processes and as neutrals facilitating such processes.  

The ALRC also asserted that it was time to ‘take education and training seriously, as an essential aspect of promoting a healthy legal culture and maintaining high standards of performance among lawyers, judges and tribunal members’. The Commission (and many other reform bodies) has emphasized the need for appropriate integration of skills, values and professional responsibilities within the undergraduate law degree.

Despite the recommendations for reform, changes in professional practice standards and legal education have been piecemeal and fragmented. If a change of lawyers’ fundamental attitudes and values is not made – through appropriate changes in practice standards and education – reform to the civil justice system may not be sustained over the long term.

372 ALRC 89, above n 2, [3.48].
374 ALRC DP 62, above n 152, [5.4].
375 ALRC 89, above n 2, [1.154].