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Bobette Wolski
Bond University, bwolski@bond.edu.au

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Abstract
By the mid-1980s, the civil justice system in many common law jurisdictions was reportedly 'in crisis', crippled by excessive delay, cost and complexity in proceedings and out of reach of ordinary people. During the next two decades, law reform commissions and other agencies were charged with identifying problems with the civil justice system and with making recommendations for its improvement. These bodies seemed to be in 'universal agreement as to the nature and severity of the problems afflicting the common law civil justice systems' and they appear to have produced proposals that have much in common. Many reforms were implemented as a result of their efforts - the majority of the recommendations resulted in procedural reform achieved by legislation, rules of court and practice directions. Not unexpectedly, many reform agencies identified legal education as a factor contributing to the perceived crisis and made recommendations for change (and indeed, separate enquiries conducted into the state of legal education made similar recommendations). Reform agencies recognised that the system of civil litigation and the attitudes and skills of legal professionals (and law graduates) are inextricably linked. Legal education had to respond to and facilitate reform if reform was to be sustained.

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REFORM OF THE CIVIL JUSTICE SYSTEM TWO DECADES PAST – IMPLICATIONS FOR THE LEGAL PROFESSION AND FOR LAW TEACHERS

BOBETTE WOLSKI*

Introduction

By the mid-1980s, the civil justice system in many common law jurisdictions was reportedly 'in crisis',[1] crippled by excessive delay, cost and complexity in proceedings[2] and out of reach of ordinary people.[3] During the next two decades, law reform commissions and other agencies[4] were charged with identifying problems with the civil justice system and with making recommendations for its improvement. These bodies seemed to be in 'universal agreement as to the nature and severity of the problems afflicting the common law civil justice systems'[5] and they appear to have produced proposals that have much in common. Many reforms were implemented as a result of their efforts - the majority of the recommendations resulted in procedural reform achieved by legislation, rules of court and practice directions. Not unexpectedly, many reform agencies identified legal education as a factor contributing to the perceived crisis and made recommendations for change[6]

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* Associate Professor of Law, Bond University, Gold Coast, Australia.

1 See, eg, Gerard Brennan, 'Key Issues in Judicial Administration' (1997) 6 *Journal of Judicial Administration* 138, 139.

2 Lord Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) [1] (hereafter cited as 'Access to Justice, Interim Report').

3 See, eg, Brennan, above n 1, 139.

4 For details of the law reform commissions, parliamentary committees, government-appointed bodies and independent agencies involved in this task, see the citations provided by the Australian Law Reform Commission (ALRC), *Managing Justice: A review of the federal civil justice system*, Report No 89 (2000) [1.77] (hereinafter referred to by the Commission's reference 'ALRC 89').

5 R Sackville, 'Reforming the Civil Justice System: The Case for a Considered Approach' in H Stacy and M Lavarch (eds), *Beyond the Adversarial System* (1999) 39. These reforms were not confined to common law jurisdictions although that is the focus of this article. Indeed, the problems at which the reforms were aimed, that of cost, delay and insufficient access to justice were regarded as universal: see ALRC 89, above n 4, [1.69]-[1.96].

6 ALRC 89, above n 4, [1.51] and [1.184].

(and indeed, separate enquiries conducted into the state of legal education made similar recommendations).[7] Reform agencies recognised that the system of civil litigation and the attitudes and skills of legal professionals (and law graduates) are inextricably linked. Legal education had to respond to and facilitate reform if reform was to be sustained.[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.[9]

This article provides a comparative analysis of civil justice reforms in common law jurisdictions in the two decades since the mid-1980s, with an emphasis on the earlier 'access to justice' reforms, and it examines the implications of those reforms on the role of legal professionals and for law schools attempting to formulate a responsive curriculum.

The article is in four parts. It begins by identifying perceived problems with the 'traditional' system of civil justice in common law jurisdictions. The second part discusses the major recommendations and reforms made in respect of the civil justice systems in Australia,[10] England (and Wales),[11] and to a lesser extent, the United

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7 See, eg, Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987) Vol 1 (hereinafter cited as 'the Pearce Report'); The American Bar Association, *Legal Education and Professional Development – An Educational Continuum, Report of The Task Force on Law Schools and the Profession: Narrowing the Gap* (1992) (hereinafter cited as 'the MacCrate Report'); and the Lord Chancellor's Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training* (1996) [2.4] and [4.13] (hereinafter cited as 'the ACLEC Report').

8 ALRC 89, above n 4, [2.89].

9 Generally see 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 Wilfrid Prest and Sharyn Roach Anleu (eds), *Litigation: Past and Present* (2004) 96 and 115.

10 ALRC 89, above n 4.

11 Lord Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) (hereafter cited as 'Access to Justice, Final Report').

States.[12] Part three examines the impact of these developments on the roles played by legal professionals, with an emphasis on legal practitioners (rather than judges). An attempt is made to identify the new roles and thus the 'new' or additional knowledge, skills and values required of legal professionals as a result of reform activity. This part also examines the role played by law schools in preparing students for legal practice. The fourth part of the article examines the ways in which legal education has responded to date to the challenges presented by civil justice reform. It also identifies limitations on the ability of the legal education system to affect necessary changes. The conclusion arrived at here is that legal education, at least at undergraduate level, has not changed sufficiently to sustain and support civil justice reform.

Before proceeding to identify the problems targeted by reform agencies, it is appropriate to sound a note of caution on the subject of 'crises' in civil justice systems.

When is a 'crisis' a crisis?

One of the most influential of the critics of the state of the civil justice system was Lord Woolf who claimed that the system in the United Kingdom was so beset by problems of cost, delay and complexity[13] that the cumulative effect constituted 'a denial of access to justice'.[14] This was not, however, a matter on which there was universal agreement. Zander labelled Lord Woolf's propositions as unsubstantiated 'cliches'.[15] The investigation conducted by the Australian Law Reform Commission also did 'not support the crisis theory'.[16] 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'.[17] However it is described,

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12 See the many reports referred to in ALRC 89, above n 4, [1.76]-[1.77].

13 Access to Justice, Interim Report, above n 2, [1].

14 Ibid [13].

15 Michael Zander, 'Why Lord Woolf's Proposed Reforms of Civil Litigation Should be Rejected' in Adrian A S Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure: Essays on Access to Justice* (1995) 81.

16 ALRC 89, above n 4, [1.48]. 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 Prest and Anleu, above n 9, 125.

17 D A Ipp, 'Reforms to the Adversarial Process in Civil Litigation – Part I' (1995) 69 *The Australian Law Journal* 705, 705.

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'.[18] As Bamford notes, the perception, whether or not it was soundly based, was real and acted as a 'catalyst for procedural change'.[19]

It has also been said that the 'claims concerning rising litigation rates are not necessarily founded on fact'.[20] Quite the opposite appears to be the case - there is evidence that, far from there being a litigation explosion early this century, there has been a decrease in the number of lodgments received by courts (or at least, no significant increase in litigation) in civil jurisdictions in Australia, the United Kingdom and the United States.[21] Some authors have claimed that calls for reform were made without questioning the existence of a crisis.[22] Galanter asserted that the last round of reforms aimed at tort law had 'little to do with modifying the adversarial character of legal institutions and practices. Instead, they are directed at reducing accountability and curtailing access and remedies'.[23] Nonetheless, reforms in civil liability for torts were pushed through.

Problems with the civil justice system

Lord Woolf had identified three key interrelated problems facing the civil justice system in England and Wales: delay, cost and complexity.[24] The same problems were

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18 Sackville, above n 5, 35.

19 David Bamford, 'Litigation Reform 1980-2000: A Radical Challenge?' in Prest and Anleu, above n 9, 148.

20 Wright and Melville, above n 9, 96.

21 Sharyn Roach Anleu and Wilfrid Prest, 'Litigation: historical and contemporary dimensions' in Prest and Anleu, above n 9, 7; Bamford, above n 19, 147; Weisbrot and Davis, above n 16, 125. For a discussion of the position in the United States, see Marc Galanter, 'A World Without Trials?' (2006) *Journal of Dispute Resolution* 7, 13. For information on filings in the United Kingdom, see Robert Dingwall and Emilie Cloatre 'Vanishing Trials?: An English Perspective' (2006) *Journal of Dispute Resolution* 51, 68-69.

22 See, eg, Anleu and Prest, above n 21, 11.

23 M Galanter, 'Dining at the Ritz: Visions of Justice for the Individual In the Changing Adversarial System' in Stacy and Lavarch, above n 5, 123.

24 Access to Justice, Interim Report, above n 2, Ch.3, [1]. These same defects had been identified as early as 1974 by the British Section of the International Commission of Jurists' (ICJ) which concluded that the system of civil litigation in England and Wales 'is too slow, too expensive, too cumbersome and too formalistic': *A Justice Report, Going to Law: A Critique of English Civil Procedure*, Council of Justice, British Section of the International Commission of Jurists (1974) [75] (hereafter cited as 'the ICJ Justice Report').

identified with the civil justice systems in the United States[25] and Australia.[26] These problems were attributed in large part to a number of characteristics[27] of the common law adversarial system. The system was, said its critics:

> *Overly dependent on party-control of the 'conduct, pace and extent of litigation'*.[28] 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'.[29]
>
> *Designed along the lines of trial by battle.* The system encouraged a strongly adversarial approach, one which 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'[30] and 'the perceived need to leave no stone unturned'.[31] With 'no effective control of [the parties'] worst excesses',[32] adversarialism is unrestrained. Lack of control by the court enabled tactical maneuvering[33] and procedural skirmishing[34] by opponents. Lord Woolf asserted that the 'main procedural tools for conducting litigation efficiently had each become subverted from their proper use.'[35] He singled out for attention: pleadings which fail to state the facts as required and to establish the issues in the case; sham defences;[36] witness statements which may be used to obscure witness evidence, rather than to clarify it;[37] excessive discovery

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25 The problems were discussed at the 1975 Pound Conference in the United States and articulated by Justice Warren Burger in 'Isn't There a Better Way?'(1982) 68 *American Bar Association Journal* 274.

26 Australian Institute of Judicial Administration, *Delays and efficiency in civil litigation* (1985) (commonly cited as 'the Cranston Report' after its chair).

27 The authors of the ICJ's Justice Report identified these characteristics as 'system defects' and the root cause of the problems: see the ICJ Justice Report, above note 24, [76].

28 Access to Justice, Interim Report, above n 2, [5].

29 Access to Justice, Final Report, above n 11, [2]. Also see the ICJ's Justice Report, above n 24, [153].

30 G L Davies, 'The reality of civil justice reform: why we must abandon the essential elements of our system' (Paper presented at the 20th Australasian Institute of Judicial Administration Annual Conference, Brisbane, 12-14 July 2002), 6.

31 Ibid, 7.

32 Access to Justice, Interim Report, above n 2, [5].

33 Davies, above n 30, 7.

34 Access to Justice, Interim Report, above n 2, [36].

35 Ibid, [8].

36 Ibid.

37 Ibid, [9].

> pursued without regard for economy, efficiency and relevance;[38] the use of and approach to expert evidence which resulted in the involvement of too many, too 'eminent' witnesses subject to partisan pressure;[39] and 'the repeated use of interlocutory hearings to ensure that the opposing side fulfills the requirements of the rules, or use of those rules in tactical skirmishing to delay the progress of the case'.[40] A less harsh version of this criticism is that a lack of discipline in the conduct of proceedings resulted in failure to progress cases efficiently.[41]
>
> *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.[42] As a consequence, much of the work of opposing lawyers had to be duplicated.[43]
>
> *Too heavily dependent on an 'all-embracing trial'*.[44] 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.[45]
>
> *Formalistic, inflexible, complex*.[46] This characteristic can itself be traced to a number of different sources including complicated rules of court, the existence of separate procedures and jurisdictions of various courts in a judicial hierarchy, procedural distinctions which applied to different types of cases, the variety of ways of instituting proceedings, 'multiplicity of practice directions', and 'obscure and uncertain' substantive law.[47]

Although not a system defect, some authors believed that the problems were attributable to lawyers who had the capacity and willingness to exploit weaknesses in the system and the incentive to complicate litigation. Zuckerman asserted that it

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38 Ibid, [10].

39 Ibid, [11].

40 Ibid, [41].

41 Ibid, [36]. For more examples of 'adversarial excesses', see Ipp, above n 17, 728.

42 The ICJ Justice Report, above n 24, [85]-[87].

43 Davies, above n 30, 7.

44 The ICJ Justice Report, above n 24, [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 17, 709.

45 Davies, above n 30, 7; and the ICJ Justice Report, above n 24, [77]-[99].

46 The ICJ Justice Report, above n 24, [76]. On the complexity of litigation, see G L Davies, 'Fairness in a Predominantly Adversarial System' in Stacy and Lavarch, above n 5, 103.

47 Access to Justice, Interim Report, above n 2, [44].

was this incentive, rather than the complexity of the procedural system, which caused excessive costs.[48] Although he fell short of accusing lawyers of deliberately complicating litigation, Davies agreed that labour intensity on the part of lawyers was the main reason the system was so costly.[49]

Two decades of reform

The goals of reform

With the procedural problems summed up in terms of excessive 'delay, cost and complexity', the various reform bodies published extensive lists of recommendations aimed at making the civil justice system quicker, more cost effective, less complex and overall, more accessible.[50] Recommendations were aimed at, inter alia:

- 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.

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48 A A S Zuckerman, 'Lord Woolf's Access to Justice: Plus ça change…' (1996) 59 *The Modern Law Review* 773, 773. Also see, eg, D A Ipp 'Opportunities and Limitations for Change in the Australian Adversary System' in Stacy and Lavarch, above n 5, 83 who comments that 'As long as costs are defined by the length of time spent on the case, advocates are effectively rewarded for delay, ineptitude and obstructionism'.

49 Davies, above n 30, 7.

50 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 4, [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 4, [1.155]. Lord Woolf's recommendations covered case management, rules of court, procedure and evidence: see Access to Justice, Interim Report, above n 2, Chs.6 and 7. Also see Access to Justice, Final Report, above n 11, [9].

- Facilitating determination of the real issues in dispute between the parties.
- Making litigation less complex.
- Streamlining the gathering of expert evidence.
- Ensuring efficient use of judicial and administrative resources.

Most reform bodies, including the Australian Law Reform Commission, were guided by two additional goals in formulating their recommendations for reform. In the words of the Australian Law Reform Commission, it was time to:

> 1. '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'.[51]
>
> 2. 'place the onus on the legal profession to develop professional practice standards which promote ethical behaviour and professional responsibility'.[52]

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

Reform initiatives

1 The duty to advise and consider alternatives to litigation

The professional practice rules in many jurisdictions now require practitioners to inform clients and potential litigants about alternatives to litigation.[53] In some jurisdictions, a similar obligation is imposed by legislation and rules of court on lawyers and other service providers. For example, family law practitioners in Australia are obliged to:

1. Provide clients with information about non-court based family services and the court's processes and services (which includes a variety of processes alternative to litigation);[54]

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[51] ALRC 89, above n 4, [1.154].

[52] Ibid, [1.154].

[53] In Australian jurisdictions, see eg, Solicitors' Rules: Law Council of Australia's (LCA's) Model Rules r 12.3; NSW r 23A.17A; NT r 10A.3; Qld r 12.3; SA r 12.2; and Vic 12.3. Barristers' Rules: Australian Bar Association (ABA) Model Rules r 17A; ACT r 17A; NSW r 17A; NT r 17A; Qld r 18; SA r 6.5; and WA r 17A.

[54] *Family Law Act 1975* (Cth) s 12E. Family Court officials in Australia are also obliged to provide information about non-court based family services and the court's processes and services 'on the first occasion the person deals with a registry of the court' (s 12F). Non-

2. Advise clients, as early as practicable, 'of ways of resolving the dispute without starting legal action'; and
3. 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'.[55]

Provisions such as these are aimed at modifying the pre-litigation behavior of potential litigants (and their lawyers).

2 Pre-action procedures and protocols

Pre-action protocols have been established in many jurisdictions. These are essentially procedural requirements which apply before the commencement of proceedings (in this way, they are unique and have been described as 'a significant extension to the reach of procedural law').[56] The pre-action protocols operating under the *Civil Procedure Rules 1998* (UK) provide a good example. The aims of the protocols[57] are to encourage 'more pre-action contact between the parties', 'better and earlier exchange of information', 'better pre-action investigation by both sides', 'to put the parties in a position where they may be able to settle cases fairly and early without litigation', and 'to enable proceedings to run to the court's timetable and efficiently, if litigation does become necessary'.[58]

The protocols set out 'a reasonable procedure' for the parties to follow to avoid litigation. The procedure would normally include the following steps:[59]

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 economically and without court proceedings.

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court based family services includes 'family dispute resolution', defined by s 10F as 'a process (other than a judicial process)'.

55 *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.

56 Bamford, above n 19, 160.

57 There is a series of protocols for specific types of cases such as Personal Injury claims and Construction and Engineering disputes.

58 *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 11, [9].

59 *Civil Procedure Rules 1998* (UK), Practice Direction - Pre-action Conduct, Pre-action Protocol for Personal Injury Claims, [3.1]-[3.15].

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.[60]

Similar requirements have been introduced in some Australian state courts. 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.[61] The court is prohibited from hearing an application unless the applicant files, with the application, a 'genuine effort' certificate, that is, a certificate from an appropriate dispute resolution service provider[62] stating that the parties have 'make a genuine effort to resolve' the dispute by family dispute resolution. Additionally (commencing July 2004), the *Family Law Rules 2004* (Cth) establish pre-action procedures similar to those mentioned above for all cases.[63] Anyone considering the commencement of proceedings must first give a copy of the pre-action procedures to the other prospective parties, make enquiries about dispute resolution services, invite the other parties to participate, and make a 'genuine effort' to resolve the dispute.[64]

In all cases in all jurisdictions, where proceedings are commenced, the court can take non-compliance with the rules and in particular, non-compliance with the requirements of pre-action protocols into account when making orders about case management and costs.[65]

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, which had been articulated by relevant reform bodies as a platform for reform initiatives, are captured in an 'overriding objective

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60 *Civil Procedure Rules 1998* (UK), Practice Direction - Pre-action Conduct, Pre-action Protocol for Personal Injury Claims, [2.16]-[2.17].

61 *Family Law Act 1975* (Cth), s 60I.

62 From 1 July 2007 to 30 June 2008, this requirement only applied to people lodging a new application for a parenting order. As from 1 July 2008, all persons applying for a parenting order – irrespective of whether previous applications have been made – are required to attend family dispute resolution first.

63 *Family Law Rules 2004* (Cth), r 1.05 and Sch. 1, Pt. 1 for financial cases and Pt 2 for parenting cases.

64 *Family Law Rules 2004* (Cth), r 1.05 and Sch. 1 Pt. 2.3(1).

65 In the case of the *Civil Procedure Rules 1998* (UK), see r 44.3(5)(a). Also see the *Family Law Rules 2004* (Cth), eg. Sch. 1, Pt. 1.2(3).

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 *Civil Procedure Rules 1998* (UK) proclaim the overriding objective of the legislation and rules to be to enable 'the court to deal with cases justly'.[66] 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'.[67] 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 way'.[68] 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.[69]

4 Costs orders against legal practitioners

(a) Vexatious Proceedings

Legal practitioners owe their clients a number of duties including a duty of representation, a duty to act on instructions and a duty to continue to act but these duties are, and always have been, subject to overriding duties to the court and to the administration of justice.[70] In furtherance of these last mentioned duties, legal practitioners have an obligation to filter out unmeritorious claims – they should refuse to represent a client where they believe that the client's case is frivolous or vexatious. Although wide statutory definitions are now given to proceedings of this type,[71] vexatious proceedings are commonly understood to be those that are instituted to harass or annoy another party. All courts have power to strike out claims of this nature and to penalise a party and/or the party's lawyer for wasted costs.[72]

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66 This concept is given more meaning by the *Civil Procedure Rules 1998* (UK), rule 1.1(2) which provides that, dealing with a case justly includes 'so far as is practicable', 'ensuring that the parties are on an equal footing', 'saving expense', ensuring that a matter is dealt with 'expeditiously and fairly (amongst other things).

67 *Uniform Civil Procedure Rules 1999* (Qld), r 5(1). The Rules were created by the *Supreme Court of Queensland Act 1991* (Qld).

68 *Uniform Civil Procedure Rules 1999* (Qld), r 5(3). Also see *Civil Procedure Rules 1998* (UK) r 1.3 (created by the *Civil Procedure Act 1997* (UK)).

69 *Uniform Civil Procedure Rules 1999* (Qld), r 5(4).

70 *Giannarelli v Wraith* (1988) 165 CLR 543.

71 See, eg, *Vexatious Proceedings Act 2005* (Qld) s 3 and schedule of definitions.

72 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. In some jurisdictions, this power

What of the client who has a case which the practitioner assesses to be 'difficult' or even 'hopeless'?

(b) Hopeless cases

In the United Kingdom, the Privy Council recently confirmed that the court has inherent jurisdiction to award costs against legal practitioners (solicitors and barristers) in some cases, but it cautioned against the use of costs sanctions for lawyers who pursue 'hopeless cases'.[73] According to the Privy Council, the jurisdiction should only be invoked where there has been a serious dereliction of the practitioner's duty to the court. The fact that a practitioner pursues a hopeless case without appreciating its hopelessness (or brings a case where the viability of points depends upon unresolved questions of fact) does not necessarily amount to a serious dereliction of the practitioner's duty.

In arriving at this conclusion, judges have had to accommodate and resolve the tension between two sometimes competing principles which underpin our legal system. The first is that 'a party is entitled to have a practitioner act for him or her even in an unmeritorious case'.[74] In the words of Lindgren J: 'lawyers must be at liberty, without fear of intimidation, to undertake cases that appear to have little prospect of success'.[75] In practical terms, the courts do not want to discourage practitioners from taking on difficult cases. In *Orchard's* case, the lawyer involved took on a difficult case for a client who wished to pursue it in the court. The court held that 'It is not the solicitor's duty to impose a pre-trial screen through which a litigant must pass before he can put his complaint or defence before the Court'.[76]

On the other hand (and this is the second of the two principles which the court is required to take into account), 'lawyers must not commence a proceeding

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is now to be found in statute. See for example, 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. This legislation repealed the *Vexatious Litigants Act 1981* (Qld) which could have been difficult to invoke. The classic example of legislative intervention to prevent the bringing of baseless claims is provided by United States Rule 11 of the *Federal Rules of Civil Procedure*. In the United Kingdom, see *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'.

[73] *Harley v McDonald* [2001] 2 WLR 1749, [67].

[74] *White Industries v Flower & Hart* (1998) 156 ALR 169, 236 (Goldberg J).

[75] *Cook v Pasminco (No.2)* (2000) 107 FCR 440, [65] (Lindgren J).

[76] See *Orchard v South Eastern Electricity Board* (1987) 1 QB 565, 572 (Donaldson J).

irresponsibly, in particular, without any, or any proper, consideration of the question whether the proceeding has any prospect of success at all'.[77]

The point at which these competing interests have been accommodated is in finding that it is not enough for a practitioner to simply institute or continue proceedings on behalf of a client where the client has no or substantially no prospect of success (so that the mere fact that a claim fails or a defence does not succeed is not enough). To invoke the court's jurisdiction to make a costs order, the practitioner must 'unreasonably' initiate or continue those proceedings.

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.[78]

Further, the courts have held that a practitioner's action will be unreasonable where he or she has an ulterior purpose in instituting the proceeding, such that the practitioner's actions amount to an abuse of process. This was found to be the case in *White Industries v Flower and Hart*[79] where proceedings had been instituted to delay an inevitable outcome (namely, bankruptcy) and to achieve a breathing space. In *White Industries v Flower and Hart*, the plaintiff's solicitors were ordered to pay the defendant's costs on an indemnity basis.[80]

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[77] *Cook v Pasminco (No.2)* (2000) 107 FCR 440, [65] (Lindgren J).

[78] See Bill Pincus and Linda Haller, 'Wasted costs orders against lawyers in Australia' (2005) 79 *Australian Law Journal* 497, 504 and cases examined therein.

[79] (1998) 156 ALR 169.

[80] In two other recent Australian cases, the courts have found that the actions of the practitioners concerned constituted an abuse of process and awarded costs against them: see *Levick v Deputy Commission of Taxation* [2000] FCA 674; and *Cook v Pasminco (No.2)* (2000) 107 FCR 440.

In *Levick v Deputy Commission of Taxation*,[81] the Full Court of the Federal Court of Australia agreed with views expressed earlier by Goldberg J in *White Industries v Flower and Hart*.[82] In accepting Justice Goldberg's views, the court held that:

> …unreasonable conduct must be more than acting on behalf of a client who has little or no prospect of success. There must be something akin to abuse of process; that is, using the proceeding for an ulterior purpose or without any, or any proper, consideration of the prospects of success.[83]

If there is any doubt as to the nature of the practitioner's conduct, it would seem that in many jurisdictions, the practitioner is to be given the benefit of the doubt. This was the view expressed by the English Court of Appeal in *Ridehalgh v Horsefield*[84] (where the lawyer had to present, on instructions, a case which he regarded was bound to fail). The court emphasised 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. A practitioner can act in the first, but cannot lend her or his assistance in the second. The court observed: 'It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it'.[85]

(c) Proceeding instituted 'without reasonable prospects of success'

The common law position described above has been modified in some jurisdictions. 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'.[86] The provision of legal services without reasonable prospects of success 'is capable of being unsatisfactory professional conduct or professional misconduct'.[87] The practitioner cannot file court documentation (and the court cannot accept the documentation) in such a matter unless the practitioner certifies 'that there are reasonable grounds for believing (on the basis of provable facts and a reasonably arguable view of the law) that the claim

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81 *Levick v Deputy Commission of Taxation* [2000] FCA 674, [44].
82 *White Industries v Flower & Hart* (1998) 156 ALR 169, 236.
83 *Levick v Deputy Commission of Taxation* [2000] FCA 674, [44].
84 *Ridehalgh v Horsefield* [1994] Ch 205.
85 *Ridehalgh v Horsefield* [1994] Ch 205, 234.
86 *Legal Profession Act 2004* (NSW), s 345(1).
87 *Legal Profession Act 2004* (NSW), s 347(1).

or the defence (as appropriate) has reasonable prospects of success'.[88] This is an ongoing duty and a practitioner should cease to act for a client if, at any time, he or she subsequently concludes that there is no reasonable prospect of success. In addition to possible disciplinary action, lawyers and practices which institute proceedings 'without reasonable prospects of success' may be ordered to indemnify any party (other than the party for whom the services were provided) against the costs of the proceedings.[89]

These amendments were part of the New South Wales' government's reforms to civil liability litigation, a move designed to deter the bringing of unmeritorious personal injuries claims and to discourage legal practitioners from lending their assistance to the bringing of such claims. The provisions had a controversial and problematic beginning. Some authors argued that the new provisions in New South Wales would stop developments in the law.[90] There has been a series of cases since the 2002 enactment concerned with clarifying the meaning (and parameters) of the provisions, especially the phrase 'without reasonable prospects of success'. In *Degiorgio v Dunn (No 2)*[91] Barrett J held that without reasonable prospects of success equates to 'so lacking in merit or substance as to be not fairly arguable'.[92] Justice Barrett conceded that the legislation imposed a more demanding standard on lawyers than previously had been the case.[93] However it has been said that this standard will permit a range of views that could reasonably be entertained and that the scope for penalty under this provision, by way of costs order or disciplinary sanctions 'are reserved for cases that clearly fall outside that range'.[94] The New South Wales Court of Appeal in *Lemoto v Able Technical Pty Ltd*[95] adopted the 'fairly arguable' test proposed in Degiorgio. The court considered 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"'.[96] The duty also applies to lawyers defending clients in civil claims for

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88 *Legal Profession Act 2004* (NSW), s 347.

89 *Legal Profession Act 2004* (NSW), s 348.

90 See Pincus and Haller, above n 78, 499 for a discussion of these views.

91 *Degiorgio v Dunn (No.2)* (2005) 62 NSWLR 284.

92 *Degiorgio v Dunn (No.2)* (2005) 62 NSWLR 284, [28] (Barrett J).

93 *Degiorgio v Dunn (No.2)* (2005) 62 NSWLR 284, [26] (Barrett J).

94 *Lemoto v Able Technical* (2005) 63 NSWLR 300, [132] (McColl JA, with whom Hodgson and Ipp JJA concurred).

95 *Lemoto v Able Technical* (2005) 63 NSWLR 300, [132].

96 *Lemoto v Able Technical* (2005) 63 NSWLR 300, [132] citing *Medcalf v Mardell* (2003) AC 120, 139.

damages – they too should be hesitant to act for a client motivated by the desire to buy time or to create leverage for settlement.[97]

While lawyers should not be penalised for taking on difficult matters,[98] 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'.[99] Walmsley, Abadee and Zipser note that, while these provisions are not completely new, 'the legislative sanction now provided may strengthen the resolve of courts to make such orders in the appropriate circumstances'.[100] Costs orders against practitioners may become increasingly common as the court pushes towards more efficient case management.

5 Increasing Court Control - Case Management Schemes

> I believe that there is now no alternative to a fundamental shift in the responsibility for the management of civil litigation from litigants and their legal advisers to the courts.[101]

Lord Woolf spoke of this shift as one requiring a total change of philosophy, one which meant 'that litigants must accept that, once they commence proceedings, they no longer have sole and unfettered control over the way in which they take the case forward'.[102]

A number of case and hearing management techniques have been implemented in all the major trial courts in relation to all cases.[103] These schemes are in essence coordinated mechanisms for court control. With them, we have seen the related emergence of the 'managerial judge' (involving not just procedural and operational changes, but cultural and attitudinal changes amongst the judiciary and judicial staff).

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97 Pincus and Haller, above n 78, 498. Generally see Nicholas Beaumont, 'What are reasonable prospects of success?' (2004) 78 *Australian Law Journal* 812, and Ainslie Lamb and John Littrich, *Lawyers in Australia* (2007) 232-236.

98 Lamb and Littrich, above n 97, 234.

99 *Lemoto v Able Technical* (2005) 63 NSWLR 300, [124].

100 Stephen Walmsley, Alister Abadee and Ben Zipser, *Professional Liability in Australia* (2nd ed, 2007) 453.

101 Access to Justice, Interim report, above n 2, Ch 4, [4].

102 Ibid, Ch 4, [3].

103 These procedural changes have been ongoing since the early 1970s.

(a) Main goals

The main aims of case management schemes are to:[104]

1. Give courts more responsibility for ensuring efficient management and progression of cases.
2. Eliminate delay between commencement of proceedings and their final determination beyond that reasonably required for interlocutory activities necessary for the fair and just determination of issues in dispute.
3. Ensure that a case is prepared at a much earlier date.
4. Expedite settlement (where settlement is possible).
5. Increase the number of cases that settle overall by ensuring that parties have the information they need to negotiate productively at an earlier date.
6. Ensure proportionality of costs, that is, to ensure that the costs of proceedings to the parties are proportionate to the importance and complexity of the subject matter in dispute.

(b) Key features

Case management schemes differ in detail (they are usually contained in rules and practice directions of the court)[105] but they 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 (including adverse costs orders but at the more extreme end, removal of a case from the active list or even, the forced hearing of a case when a party is not ready to proceed).[106]
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

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[104] See eg, *Civil Procedure Rules 1998* (UK), r 1.4(1).

[105] 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 S et al, *Civil Procedure: Commentary and Materials* (2nd ed, 2002) 31.

[106] See eg Supreme Court of Queensland Practice Direction 4 of 2002, [4.3].

involved (the court attempts to adopt procedures in reasonable proportion to the importance and complexity of matters and to identify urgent or complex, potentially problematic cases early so that they may be targeted for high-level court supervision).[107]

4. Pressure for early listing of cases for hearing.
5. Maintenance of strict control of adjournments to reduce delay and discourage unnecessary court appearances.
6. Procedures requiring early exchange of documents and information between the parties and a narrowing of the issues in dispute.
7. Requirements for lawyers to disclose information to clients about costs and the progress of cases.
8. 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 (including expert witnesses) that a party may call, limit the time to be taken in giving evidence, require written submissions from the parties and require the parties to provide witness statements.[108]

If an issue arises as to the relative weight to be given to court efficiency and the interests of the parties in an individual case, it seems that courts in Australia will favour the interests of the parties where to do otherwise would result in an injustice. In *Queensland v JL Holding Pty Ltd*,[109] the High Court of Australia, in a joint judgment by Dawson, Gaudron and McHugh JJ, stated that 'the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim'.[110]

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[107] See eg the provision for assigning cases to different tracks provided by the *Civil Procedure Rules 1998* (UK), r 26.1.

[108] See, for example, *Uniform Civil Procedure Rules 1999* (Qld), r 367 for a list of the court's supervisory powers. In New South Wales, see *Uniform Civil Procedure Rules 2005* (NSW) r 2.3 (created by the *Civil Procedure Act 2005* (NSW)). For the Federal Court of Australia, see the *Federal Court Rules* O 10.

[109] (1997) 189 CLR 146.

[110] (1997) 189 CLR 146. The court overturned a decision of the trial judge not to grant leave to amend pleadings on case management grounds.

A predominate feature of all case management regimes is the consideration given to use of ADR procedures.[111]

6 Institutionalisation of ADR processes

In the United Kingdom, by virtue of rule 1.4(2)(e) of the *Civil Procedure Rules 1998* (UK), active case management includes 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure'. In its list of case management goals, the Australian Law Reform Commission (ALRC) also emphasised 'the need for a range of options to be made available for the resolution of disputes, including processes outside the formal civil justice system'.[112]

While the ALRC spoke of ADR procedures outside the formal justice system, a range of these procedures is also available within the doors of the courthouse. The courts have in fact been adding ADR procedures to their dispute resolution regimes for some time. The Family Court of Australia added counselling, mediation and arbitration services to those that it offered to disputants as early as 1991.[113] The Federal Court of Australia also added mediation and arbitration at about the same time.[114] State courts have been using mediation, on a compulsory basis, for even longer.[115]

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[111] There are no standard or universally accepted definitions of the various dispute resolution processes which are available to parties. In Australia, the National Alternative Dispute Resolution Advisory Council (NADRAC) published a definitions paper in an effort to establish some uniformity in terminology and these definitions are now routinely used in official publications, see NADRAC, *Alternative Dispute Resolution Definitions* (March 1997, reprinted March 2000). A further discussion paper on ADR Terminology was issued by NADRAC in 2002. The papers, and NADRAC's current glossary of common terms, are available on http://www.nadrac.gov.au (viewed 30 October 2008).

[112] ALRC 89, above n 4, [1.154].

[113] The processes have undergone several name changes since their incorporation. At one time, they were referred to as 'Primary Dispute Resolution' (or PDR) methods: see the *Family Law Act 1975* (Cth), Pt III. In January 2000, the Family Court renamed its counselling, conciliation and mediation services as 'mediation. In 2007, the Family Court's services were again renamed, this time to 'family dispute resolution', defined in s 10F of the *Family Law Act 1975* (Cth) as 'a process (other than a judicial process)'.

[114] See *Federal Court Rules* O 10 r1(2)(g) and O 72.

[115] Mandatory mediation was introduced by statute and rules of court in the Victorian Supreme and County Courts (Supreme Court rule 50.07 and County Court rule 50.07 respectively), in the Western Australian Supreme Court for matters on the Expedited List (Supreme Court Rules, Order 31A) and in the Queensland Supreme Court for matters on

The courts in Australia now make extensive use of ADR and in particular, mediation. Matters can be diverted to ADR before proceedings are commenced or filed (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.[116]

Other jurisdictions make similar provision.[117] There are ancillary provisions to facilitate the conduct of mediation. For example, rule 26.4(1) of the *Civil Procedure Rules 1998* (UK), provides that 'a party may, when filing the completed allocation of questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means'.

There are some notable differences between jurisdictions in the way in which (or the extent to which) parties are *encouraged* to settle their disputes by processes such as mediation. The majority of courts in Australia have the power to refer parties to mediation with or without the parties' consent.[118] For example, section 53A of the *Federal Court of Australia Act 1976* (Cth) provides:

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the Commercial Causes 'A' List (pursuant to Supreme Court Practice Direction No 4 of 1987).

[116] See Supreme Court of Queensland Practice Direction 1 of 2005, Court of Appeal, Part C. Mediation at the appellate level 'appears to be institutionalised' in some overseas jurisdictions such as the US and Canada: R W Rack, 'Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation' (2001-2002) 17 *Ohio State Journal on Dispute Resolution* 609, 611, and generally see K M Scanlon, 'A Case for Judicial Accountability: When Courts Add a Settlement Detour to the Traditional Appellate "Path"' (2001-2002) 17 *Ohio State Journal on Dispute Resolution* 379.

[117] 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.

[118] 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 D Spencer and M Brogan, *Mediation: Law and Practice* (2006) 272-304.

> (1) Subject to the Rules of Court, the Court may by order refer the proceedings in the Court, or any part of them or any matter arising out of them, to a mediator or an arbitrator for mediation or arbitration, as the case may be, in accordance with the Rules of Court.
>
> (1A) Referrals under subsection (1) to a mediator may be made with or without the consent of the parties to the proceedings. However, referrals to an arbitrator may be made only with the consent of the parties.

Courts in Australia and the United States are willing to make a mediation referral order over the objection of a party.[119] Hunter et al assert that 'there is in Australia a clear judicial preference in favour of mediation orders even if one or more parties objects to the order'.[120] In *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd*,[121] the trial judge ordered the parties to attend mediation before the defence had been filed, despite the parties' desire to wait. The more common approach of the court is to adjourn applications for mediation orders until further information (such as expert reports and financial information) has been exchanged by the parties.

A different view is taken by the court in England on the matter of mandatory referral to mediation. The English Court of Appeal in *Halsey v Milton Keynes General NHS Trust* and *Steel v Joy*[122] has expressed the view that although the court will encourage the parties to use mediation and other forms of ADR, the parties should not be ordered to attend mediation against their will. In both cases, the court had to consider the cost consequences of a refusal by the successful party to agree to mediation. The court is quite firm in asserting that its role 'is to encourage not to compel'.[123] The court accommodates and facilitates participation in ADR but does not order it over the objection of the parties. The court in *Halsey's* case listed the

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[119] See eg, *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. In all of the cases, mediation was ordered over the opposition of at least one of the parties. For a discussion of the position in the US, see Brazil, above n 117, 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.

[120] Hunter et al, above n 119, 55.

[121] [2004] FCA 516.

[122] [2004] 1 WLR 3002.

[123] [2004] 1 WLR 3002, [11].

following matters as relevant in its decision *not* to deprive the successful party of its costs on the grounds that it had refused to mediate:[124]

- The nature of the dispute: the court recognises that not all disputes are appropriate for mediation.
- The merits of the case: the party's belief in the strength of its case is also relevant to whether or not it was justified in refusing to mediate. If a party believes that its case is watertight, it might be sufficient to justify a refusal to mediate.
- Other attempts at settlement: if a party has already made previous attempts at settlement and these were unsuccessful, the court is more likely to consider a refusal to mediate justified.
- Relative costs of mediation: if the costs of the mediation are disproportionally high (as compared to the costs of litigation) a party might be justified in refusing to mediate.
- Delay: a party might be justified in refusing to mediate when the suggestion to mediate is made only shortly before trial, when substantial costs have already been incurred.
- Prospects of success: the court will take into account whether mediation had a reasonable prospect of success.

The courts in Australia have also indicated that they will take factors such as 'reasonable potential for success in mediation' into account in deciding whether or not to refer a matter to mediation.[125]

7 Increased strategic importance of offers of settlement

The costs associated with litigation have always been an incentive to settle. Litigation is an expensive exercise even for the successful party as there is a considerable gap between that party's real expenses and those which he or she might recover from the unsuccessful party by way of a costs order.[126] In addition, 'all of the major courts have

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[124] [2004] 1 WLR 3002, [16]-[27]. Also see D Spencer, 'Costs sanctions against parties refusing to mediate' (May 2005) *Law Society Journal* 62.

[125] Spencer and Brogan have prepared a useful table of cases with a summary of the reasons why the court did or did not make a mandatory mediation order: above n 118, 306-311.

[126] 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. However, this rule has

rules providing for payments into court, or offers of compromise, or both … and courts have long had the power to use a costs order to penalise parties who fail to accept certain settlement offers'.[127] The offer of compromise system has replaced or been used to supplement the payment in system in many jurisdictions.[128] While costs orders are still discretionary, the possible consequences of failure to accept an offer of compromise are set out in the rules of court. Generally, where an offer is made by the plaintiff and not accepted by the defendant, a plaintiff may be entitled to recover costs if judgment for the plaintiff is equal to or better than the offer. Where a defendant makes an offer which is not accepted by the plaintiff and the plaintiff obtains a judgment that is not more favourable to the plaintiff than the offer to settle, the court may order the plaintiff to pay the defendant's costs for the period after the offer was served. Generally, the rules adopt a differential principle in respect of offers of compromise made by plaintiffs (who may recover on an indemnity basis) and offers of compromise made by defendants (the general provision being that they may recover costs on a standard basis).[129]

In *Maitland Hospital v Fisher (No 2)*,[130] 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 the joint judgment delivered by Kirby P, Mahoney JA and Samuels A-JA, the court argued that it (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. The court stated:[131]

> 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*

been modified in many US jurisdictions by the adoption of an 'offer of judgment rule' which shifts responsibility for legal fees 'to an offeree who refused his opponent's offer to settle and did not do better at trial': see Edward F Sherman, 'From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice' (1997-1998) 76 *Texas Law Review* 1863, 1868.

127 Hunter et al, above n 119, 24-25.

128 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 utilised by defendants. The new scheme allows offers of compromise to be made by both parties. See Hunter et al, above n 119, 24-27.

129 See, eg, *Uniform Civil Procedure Rules 1999* (Qld), rr 360 and 361 and *Civil Procedure Rules 1998* (UK) Part 36 r 36.14.

130 (1992) 27 NSWLR 721 (CA).

131 (1992) 27 NSWLR 721,722 (CA).

> *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).

It is not necessary for an offer of settlement or compromise to comply with the rules of court. The matter is in the discretion of the courts and they will use their powers to encourage consideration of reasonable offers to settle. Courts in Australia are prepared to recognise 'Calderbank offers',[132] although the parties are nonetheless encouraged to use the offer of compromise rules whenever possible.

8 Streamlining the process of collecting and evaluating expert evidence

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.[133] Parties to litigation often shopped around for experts who would give favourable evidence, called a number of experts to give evidence on the same point (in an attempt to outgun the opponent), and disclosed expert evidence late in the trial process.

The Australian Law Reform Commission's recommendations on this issue are typical of those made by reform agencies. It recommended development of:[134]

- Guidelines that emphasise that the primary obligation of an expert is to the court or tribunal, rather than the client.
- Procedures to encourage the parties to agree jointly to instruct expert witnesses.
- Procedures which provide for the proper and early exchange of expert reports.
- Procedures for pre-hearing conferences between experts.

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[132] A '"Calderbank offer" is a mechanism which emerged in England for the making of an offer of settlement. The mechanism was discussed by the Court of Appeal in *Calderbank v Calderbank* [1976] Fam 93. The offer, which is made by letter, is said to be made 'without prejudice, save as to costs'. It must be kept secret until the court comes to consider the issue of costs, at which point, the letter can be used as a ground for arguing that the offeree should pay the offeror's costs 'from the date of rejecting the offer if the offeree fared no better than the offer at trial'. Generally, see Anthony Lo Surdo, 'What makes a Calderbank letter effective' (2004) *Law Society Journal* 58.

[133] See eg, ALRC 89, above n 4, [6.74]-[6.122].

[134] ALRC 89, above n 4, [6.74]-[6.122].

- With leave of the court, a requirement that expert witnesses prepare for and answer questions prior to hearing.

Most of these 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'.[135] The parties may jointly appoint an agreed expert to prepare a report on an issue or, in default of agreement a party may ask the court to appoint an expert.[136] 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.[137]

Expert evidence is given by way of written report.[138] Disclosure of reports relatively early in the proceedings is made a precondition of their admissibility at trial.[139] An expert is cross-examined at trial only if the opposite party requests it.[140] Consequently, the circumstances in which an expert attends the trial and gives oral evidence are limited.

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.[141]

The rules of court in many other jurisdictions also permit the court to appoint an expert to report to the court on a matter before it, where a question for expert opinion arises. The appointment may be made by the court on its own motion as well as on the application of a party.[142] The expert's report is provided to the court, which then

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135 *Uniform Civil Procedure Rules 1999* (Qld), r 423.

136 In some jurisdictions, the court can order the parties to engage a joint expert: see *Uniform Civil Procedure Rules 2005* (NSW), r 31.37.

137 *Uniform Civil Procedure Rules 1999* (Qld), r 429D.

138 *Uniform Civil Procedure Rules 1999* (Qld), r 427; and *Uniform Civil Procedure Rules 2005* (NSW) r 31.21.

139 *Uniform Civil Procedure Rules 1999* (Qld), r 429; and *Uniform Civil Procedure Rules 2005* (NSW) r 31.28.

140 *Uniform Civil Procedure Rules 1999* (Qld), r 427.

141 *Uniform Civil Procedure Rules 1999* (Qld), r 429B; also see *Uniform Civil Procedure Rules 2005* (NSW), rr 31.24 and 31.26 which provide for the issue of a joint report from such a conference.

142 *Uniform Civil Procedure Rules 2005* (NSW), r 31.46. Also see the *Federal Court Rules*, 0 34 rule 2.

furnishes a copy to the parties. The parties are usually not prevented from calling their own expert witnesses on the topic, if they give reasonable notice of the intention to do so to the other party.

9 Increased control of procedural devices

Over a period of time, more stringent rules have been established to govern those 'procedural tools' which, according to Lord Woolf, had become subverted from their proper use. In particular, reform was aimed at curbing 'adversarial excesses' (such as tactical denials in pleadings, voluminous and unnecessary discovery, 'protracted and combative interlocutory disputes'),[143] and ultimately at reducing the amount of work undertaken by lawyers.[144]

Some of the more significant changes to the rules of procedure were in relation to:

> *Pleadings*: more elaborate pleadings are required than was previously the case. Parties must plead all material facts on which they intend to rely at trial (sufficient so that the other party is not taken by surprise at trial).[145] There is a list of specific matters, for instances, claims in relation to negligence and damages, which must be pleaded with particularity.[146] When it comes to denials in pleadings, it is no longer sufficient for a party to make a blanket denial (to the effect that he or she 'denies each and every allegation made by [the other party]'). The parties must instead 'make positive allegations thereby preventing one party from merely putting the other to proof on an issue'.[147] The rules with respect to 'non-admissions' have also changed. 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. The rules now permit 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.[148]
>
> *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',[149] so limiting the volume of material exchanged between

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143 Ipp, above n 48, 80.

144 Davies, above n 30, 7.

145 *Uniform Civil Procedure Rules 1999* (Qld), r 149; and *Uniform Civil Procedure Rules 2005* (NSW) r 15.1. Also see O 11 r 10 and O 12 of the *Federal Court Rules*.

146 *Uniform Civil Procedure Rules 1999* (Qld), r 150.

147 Davies, above n 30, 7. See for instances, *Uniform Civil Procedure Rules 1999* (Qld), r 157.

148 See eg, *Uniform Civil Procedure Rules 1999* (Qld), r 166.

149 See eg, *Uniform Civil Procedure Rules 1999* (Qld), r 211(1).

the parties. Interrogatories are allowed only with the court's leave and the number of interrogatories permitted is restricted.[150]

Interlocutory applications: the court has the power (and inclination) to impose cost penalties on parties who are 'obstructionist' in the interlocutory stages of a proceeding. A party (or the party's lawyer) will pay for failing to comply with procedures such as requests for further and better particulars and discovery. In a similar manner, the court may penalize 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).

10 Reducing the Complexity of Litigation

There is nothing new about the claim that legal proceedings are incomprehensible and complicated. Many people would argue that they remain so today. Nevertheless, a number of initiatives have been taken to simplify procedures (and to reduce the costs of litigation).

It has been suggested that greater judicial involvement 'in getting cases ready for hearing is a step towards clarifying the processes for litigants'.[151] More concrete are the following changes:

- 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 judicial hierarchy (rather than a separate set of rules for each court as previously existed),[152] and there are only two different forms of initiating proceedings (rather than the four procedures which previously existed).[153]
- The large extensions in the jurisdiction of lower and intermediate courts.
- Provisions for simplified procedures in all cases in the Magistrates' Court and creation of the Small Debts and Small Claims Courts;

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150 See eg, *Uniform Civil Procedure Rules 1999* (Qld), r 229.

151 D Williams, 'Changing Roles and Skills for Courts, Tribunals and Practitioners' in Stacy and Lavarch, above n 5, 5.

152 *Uniform Civil Procedure Rules 1999* (Qld), r 3; *Uniform Civil Procedure Rules 2005* (NSW), r 1.5.

153 See eg *Uniform Civil Procedure Rules 1999* (Qld), r 8 and *Uniform Civil Procedure Rules 2005* (NSW) r 6.2 respectively and in the UK, *Civil Procedure Rules 1998* r 2.1(1) (which provides that the rules apply in the County Courts, the High Court and the Civil Division of the Court of Appeal). There is only one form of initiating proceedings in the Federal Court of Australia – an application: see *Federal Court Rules,* O 4 r 1.

- The tailoring of court procedures to the types of matters involved (so that, for example, there are special procedures for personal injury cases and for commercial cases); coupled with the creation of special lists (so that, for example, there is a special list for complex cases and for cases requiring urgent attention);
- An extension of proceedings for summary dismissal of cases (plaintiffs and defendants alike can apply for summary judgment);[154]
- Provisions requiring judges to dispense with the rules of evidence, and to take evidence by telephone, video link or other means; [155]
- Provisions for decisions without a hearing;[156]
- Provisions expanding the jurisdiction of registrars.[157]

There has also 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'.[158] This trend was in part driven by the need to reduce the volume of matters headed for court. Some authors have pointed out that '*in quantitative terms*, the superior courts no longer occupy (if they ever did) the central role in dispute resolution',[159] with so many matters being diverted to tribunals, ADR processes and institutional bodies such as industry complaints and ombudsman schemes and other consumer protection authorities. Despite these trends, the centrality of the role of courts and in particular, intermediate and superior courts, is acknowledged[160] and it is thus on the procedures of the courts that this article has focused.

Implications for the future for legal practitioners and law schools

A comparative analysis of the major civil justice reforms in Australia, the United Kingdom and the United States reveals that similar changes have been made in all jurisdictions. This was to be expected given that the same problems had been identified. Over a period of time, slight differences in approach have emerged. In the

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154 See eg, *Uniform Civil Procedure Rules 1999* (Qld), rr 292 and 293.

155 See eg, *Uniform Civil Procedure Rules 1999* (Qld), r 392.

156 See eg, *Uniform Civil Procedure Rules 1999* (Qld), Ch 13 Part 6.

157 See eg, *Uniform Civil Procedure Rules 1999* (Qld), Ch 12; and *Uniform Civil Procedure Rules 2005* (NSW), r 1.10.

158 Sackville, above n 5, 59.

159 Ibid 41.

160 Ibid 59. Sackville referred only to superior courts. However, given the huge increase in jurisdiction of the District Courts in all jurisdictions, it is appropriate to include them.

United Kingdom, the courts are more hesitant than their Australian and United States counterparts to order parties to mediation over an objection of the parties.

Courts in the United Kingdom also appear to be more cautious in imposing cost sanctions on practitioners but ironically they have abolished the advocate's traditional in-court immunity for negligence.[161] This last mentioned development is ironic given that the immunity was designed to protect advocates who are required to 'exercise the forensic judgments called for during the case independently' of the desires of the client and the instructing solicitor,[162] and to prevent satellite litigation by 'unhappy' litigants. In Australia, the court has retained the immunity[163] but appears more willing to impose costs sanctions on those who institute and continue proceedings in circumstances which constitute an abuse of its processes.

The role of legal practitioners throughout the common law world has changed. One would expect changes in legal education to follow, given that one of the primary goals of undergraduate legal education is 'to introduce students to basic competencies required in legal practice'.[164] An examination of patterns of change in legal education in Australia, the United Kingdom and the United States reveals similar trends and similar problems and limitations.

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[161] *Arthur J S Hall & Co (A Firm) v Simons* [2000] 3 WLR 543, discussed by Walmsley, Abadee and Zipser, above n 100, 426-428. The immunity has also been abolished in New Zealand: *Lai v Chamberlain* [2003] 2 NZLR 374.

[162] In Australian jurisdictions, see the Solicitors' Rules: LCA's Model Rules r 13.1; ACT r 18.1; NSW r 23 A; 18; NT r 17.3; Qld r 13.1; SA r 13.1; Vic r 13. Also see the Barristers' Rules: ABA Model Rules r 18; ACT r 18 ; NSW r 18; NT r 18; Qld r 20; SA r 3.9; Vic r 16 ; WA r 17.

[163] *D'Orta-Ekenaike v Victoria Legal Aid & Anor* [2005] HCA 12.

[164] See, eg, Mary E Keyes and Michael J Whincop, 'The Moot Reconceived: Some Theory and Evidence on Legal Skills' (1997) 8 *Legal Education Review* 1, 13. Also see the Pearce Report, above n 7, [1.144]-[1.145]; John de Groot, 'Acquiring Basic Legal Skills And Knowledge: What And Where?' (1994) 12 *Journal of Professional Legal Education* 1, 1; John H Wade, 'Legal Skills Training: Some Thoughts On Terminology and Ongoing Challenges' (1994) 5 *Legal Education Review* 175, 189; and William Twining, *Law in Context: Enlarging A Discipline* (1997) 194. In the US, there appears to be explicit focus on preparation of law graduates for the practice of law. For instance, Stuckey and his associates urged law schools to embrace in their mission statements 'a commitment to prepare students to practice law effectively and responsibly in the contexts they are likely to encounter as new lawyers': Roy Stuckey et al, *Best Practices for Legal Education: A Vision and A Road Map* (2007) 28 (hereinafter 'the Stuckey Report'). Elsewhere, the report speaks of the need to develop in our students 'professional competence', where 'Competence requires the integrative application of knowledge, skills and values': Ibid 43 and 44.

The changing roles of legal practitioners

While judges take on the burden of case and hearing management (and become used to taking a more active hands-on role in the pre-trial processes of litigation),[165] the behaviour and practices of members of the legal profession in the lead up to and the conduct of a trial has had to change.

At one end of the spectrum, legal practitioners are expected to advise clients of the full range of options, both legal and non-legal, available to them to solve problems. Midway along this continuum, practitioners have had to alter both their attitude and approach to case preparation including the gathering and exchange of expert evidence. At the other end of the spectrum, practitioners need to become highly skilled risk assessors charged with assessing the appropriateness of cases for ADR, the likelihood of success in ADR, and the likely outcome of litigation (and this last, if the decision in *Maitland Hospital v Fisher (No 2)*[166] is any indication, they must do with a great deal of precision). Practitioners are also charged with weeding out the more speculative of their cases.

In addition to broadening their repertoire of skills, lawyers must reorient their attitude and approach to contentious matters from that of hired gun or zealous advocate to that of co-operative problem-solver, for it is argued that a new ethos of co-operation pervades or ought to pervade legal practice. Justice Ipp went so far as to assert that a new ethos of co-operation amongst lawyers was required 'as otherwise reforms will not be successful'.[167]

Most of the responsibility for shaping the attitudes and skills of lawyers falls to law schools for they have students in their care for the longest period of formal legal education and they have them at their most formative stage. So then, law teachers must not only teach their students about the reforms to procedural law, but also inform and hopefully instill in students 'the spirit, ethos and ethic of the changes'.[168] Of course, law schools have to teach a great deal more than procedural law.[169]

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[165] Judges must be prepared to use the additional powers afforded to them under case management schemes for it was noted, in the early days of reform that '…if excessive latitude is given to practitioners, reform will come to naught': Ipp, above n 48, 81.

[166] (1992) 27 NSWLR 721, 722 (CA).

[167] Ipp, above n 48, 81.

[168] C Sampford and S Condlin, 'Educating Lawyers for Changing Process' in C Sampford, S Blencowe and S Condlin (eds), *Educating Lawyers for a Less Adversarial System* (1999) 184-185.

[169] University law schools have multiple interest groups, missions and emphasis: See eg, Fiona Cownie, 'Alternative Values in Legal Education' (2003) 6 *Legal Ethics* 159, 161 (the author

Challenges for law teachers in formulating a responsive curriculum

There is growing awareness of the importance of teaching skills, values and professional responsibilities in the law school curriculum, in addition to substantive and procedural knowledge. The question to be answered now is *what* skills, values, and professional responsibilities should be taught?

1 Integration of new skills, values and attitudes

Numerous efforts have been made to identify the skills required by competent lawyers for the purpose of formulating a responsive curriculum. Numerous lists have been generated as a result of these efforts.[170] The list furnished in the MacCrate Report was one of the early most influential lists. It included skills in areas such as problem solving, legal analysis and reasoning, legal research, factual investigation, communication (both oral and written), counselling, negotiation, litigation and ADR, and the ability to recognise and respond appropriately to ethical dilemmas.[171]

In addition to the skills mentioned in the MacCrate Report, if legal 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

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notes that there are many views on the proper nature and purpose of the university law school). Also see the Stuckey Report, above n 164, 28; William M Sullivan, Anne Colby, Judith W Wegner, Lloyd Bond, Lee S Shulman, *Educating Lawyers: Preparation for the Profession of Law* (2007) 13; and Andras Jakab, 'Dilemmas of Legal Education: A Comparative Overview' (2007) 57 *Journal of Legal Education* 253 (where the author concludes that different countries have adopted different solutions to the issues of goals, content and methodologies). Yet despite the diversity, there is wide agreement that law programs should include a mix of knowledge, skills, ethics and values: see eg, the Stuckey Report, above n 164, 49. In the UK, see the ACLEC Report, above n 7, [2.4]. In Australia, see the recommendations contained in the Pearce Report, above n 7, [1.61] and [2.195] and in ALRC 89, above n 4, Recommendation 2, Ch 2.

[170] See, eg, the Pearce Report, above n 7, [2.194]-[2.195]; the MacCrate Report, above n 7, 139; Rob Guthrie and Joseph Fernandez, 'Law Schools in the 21st Century: Not just training legal practitioners' (2004) 29 *Alternative Law Journal* 276, 278; David Weisbrot, 'Taking Skills Seriously: Reforming Australian legal education' (2004) 29 *Alternative Law Journal* 266, 271; and the Stuckey Report, above n 164, 56-57. Bell urges a cautionary note in pointing out that 'there is a plethora of lists of what counts as a skills, and these lists are very varied, and they betray different agendas': John Bell, 'Key Skills in the Law Curriculum and Self-assessment' (2000) 34 *The Law Teacher* 175, 176.

[171] See the MacCrate Report, above n 7, 138-140; and the Stuckey Report, above n 164, 56-57.

acknowledged that there is some overlap in the matters on this list and the one articulated in the MacCrate Report):[172]

1. Organisation and management (including time and financial management).
2. Case preparation.
3. Selection of *relevant* materials.
4. Selection of cases suitable for ADR.
5. Mediation and case appraisal (this is not to say that all students need to be trained to be mediators and case appraisers).[173]
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.

Law schools must also take steps to modify the (overly) adversarial traits of budding lawyers. Today's law graduates must acquire new skills and ways of approaching problems that will enable them to practise law in a more cooperative way. This means that ideally, law schools should make room in their curricula for the teaching and learning of skills associated with:

- Non-court based problem-solving.[174]
- Expanding the issues of a problem (rather than narrowing them).

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[172] Most skills cannot be clearly categorised in this manner, but rather overlap to a significant extent.

[173] For an excellent discussion on the reasons for teaching ADR in the law curriculum, see Judy Gutman, Tom Fisher and Erika Martens, 'Why Teach Alternative Dispute Resolution to Law Students? Part One: Past and Current Practices and Some Unanswered Questions' (2006) 16 *Legal Education Review* 125.

[174] Stuckey concludes that 'problem-solving is "the essence of what lawyers are supposed to do"': Roy Stuckey, 'Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses' (2006-2007) 13 *Clinical Law Review* 807, 810. Generally, see Carrie J Menkel-Meadow, 'When Winning Isn't Everything: The Lawyer as Problem Solver' (1999-2000) 28 *Hofstra Law Review* 905.

- Creativity.[175]
- Openness and sensitivity to clients (from a range of cultures).
- Addressing the needs and interests of clients and other parties.
- Questioning and listening.
- Receptivity.
- Practical judgment.
- Co-operation.
- Coalition and team building and management.[176]
- Reflection.

Almost all studies and reports into legal education and the legal profession emphasise the need to teach skills in the context of ethics,[177] values and professional responsibility.[178] The authors of the Stuckey Report summed up these goals in the single word 'professionalism' - where professionalism encompasses the formal rules of professional conduct, and in addition, awareness of and a commitment to the values, behaviours and attitudes expected of lawyers by the public and the 'best traditions' of the legal profession.[179] High on the list of 'professional rules' is the requirement to advise clients of alternatives to litigation. But knowledge of professional rules is not the whole of it.

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[175] 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.

[176] This list is not exhaustive. There have been a number of sweeping changes to the structure of legal practice in the last twenty years: see eg, those described by Weisbrot, above n 170, 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.

[177] For a definition of 'legal ethics teaching', see June Chapman, 'Why Teach Legal Ethics to Undergraduates?' (2002) 5 *Legal Ethics* 68. Also see Lawrence S. Krieger, 'The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness' (2005) 11 *Clinical Law Review* 425, 436.

[178] See, eg, the ACLEC Report, above n 7, [1.19] and [2.4]; the ALRC 89, above n 4, Recommendation 2, Ch 2; Cownie, above n 169, 171; and the Stuckey Report, above n 164, 60-67.

[179] The Stuckey Report, above n 164, 59.

Law schools also have an obligation to impart to students a critical understanding of personal and professional values (where values are the beliefs or principles that are important to an individual or to a group). Without attempting to be exhaustive, relevant values include 'the lawyer's obligations to truth, honesty, and fair dealing; the responsibility to improve the integrity of the legal system',[180] 'the obligation to promote justice; and the obligation to provide competent representation',[181] a commitment to ensuring equal access to justice for all persons, the obligation to professional self-development, and sensitivity and effectiveness with diverse clients.[182] If civility and collegiality have been lost, as is sometimes claimed,[183] these values might also be cultivated in our students. If new (and not so new) lawyers sometimes have difficulty prioritising their duties, law school must provide them with diagnostic aids for resolving any conflicts.

Reforms to legal education: progress to date

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. The more 'traditional skills'[184] of legal research, legal writing, and legal analysis are compulsory components of the curriculum at virtually all law schools[185] but they are often taught as a by-product of the teaching of

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[180] Ibid 125.

[181] Ibid.

[182] Ibid 66-67.

[183] Paul Lowell Haines, 'Restraining the Overly Zealous Advocate: Time for Judicial Intervention' (1989-1990) 65 *Indiana Law Journal* 445, 446; and Thomas M Reavley, 'Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics' (1989-1900) 17 *Pepperdine Law Review* 637, 638.

[184] MacCrate Report, above n 7, 267. These skills have traditionally been taught at law schools for they have long been considered to follow 'quite properly from general university aims in educating students': see the Pearce Report, above n 7, [1.61] and [2.133].

[185] On the position in American law schools, see Kristine Strachan, 'Curricular Reform in the Second and Third Years: Structure, Progression, and Integration' (1989) 39 *Journal of Legal Education* 523, 525; the MacCrate Report, above n 7, 240, 243, and 266-67; Wallace Loh, 'Introduction: The MacCrate Report - Heuristic or Prescriptive?' (1994) 69 *Washington Law Review* 505, 509; Nancy M Maurer and Linda F Mischler, 'Introduction to Lawyering: Teaching First-Year Students to Think Like Professionals' (1994) 44 *Journal of Legal Education* 96, 104-105; Susan L DeJarnatt, 'In re MacCrate: Using Consumer Bankruptcy as a Context for Learning in Advanced Legal Writing' (2000) 50 *Journal of Legal Education* 50. See Richard Grimes, Joel Klaff and Colleen Smith, 'Legal Skills and Clinical Legal Education - A Survey of Undergraduate Law School Practice' (1996) 30 *Law Teacher* 44, 52 and 58 with

substantive law subjects.[186] (As discussed shortly, the focus on substantive doctrine is itself problematic,[187] teaching students to view 'adversarial litigation' as the primary paradigm of legal practice.) Most schools have a mooting program (indeed, this is often the centre piece of a school's skills program). Most moots take the form of appellate moots – focusing, yet again, on adversarial litigation.[188]

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.[189] When it occurs, teaching 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 mapping and embedding skills teaching within the curriculum so that students are exposed to skills teaching

respect to law schools in the United Kingdom. On the position in Australian schools, see the Pearce Report, above n 7, [2.140] and [2.193]; John H Wade, 'Meet MIRAT: Legal Reasoning Fragmented into Learnable Chunks' (1990-91) 2 *Legal Education Review* 283; Dean Bell and Penelope Pether, 'Re/writing Skills Training in Law Schools - Legal Literacy Revisited' (1998) 9 *Legal Education Review* 113; and Celia Hammond, 'Teaching Practical Legal Problem Solving Skills: Preparing Law Students for the Realities of Legal Life' (1999) 10 *Legal Education Review* 191.

186 The Pearce Report, above n 7, [1.61].

187 Australian Law Reform Commission, *Review of the adversarial system of litigation: Rethinking the federal civil litigation system*, Issues Paper No 20 (1997) [11.24] (hereinafter ALRC IP 20).

188 The emphasis on appeal moots is found in law schools in all jurisdictions. In the UK, see A.T.H. Smith (ed), *Glanville Williams: Learning The Law* (12th ed, 2002) 194; and John Snape and Gary Watt, *The Cavendish Guide to Mooting* (2nd ed, 2000) 20. In Australia, see Marlene Le Brun and Richard Johnstone, *The Quiet Revolution – Improving Student Learning In Law* (1994) 307; and Terry Gygar and Anthony Cassimatis, *Butterworths Skills Series - Mooting Manual* (1997) 8. The position is the same in law schools in the US and Canada, see William H. Kenety, 'Observations on Teaching Appellate Advocacy' (1995) 45 *Journal of Legal Education* 582, 584; Lee Stuesser, 'Skills For The Masses: Bringing Clinical Skills To More Students At Less Cost' (1992) 10 *Journal of Professional Legal Education* 119, 126; and Alex Kozinski, 'In Praise of Moot Court – Not!' (1997) 97 *Columbia Law Review* 178, 178.

189 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. In relation to the teaching of ADR, see Tania Sourdin, 'To the bench or across the table?' (2007) *Lawyers Weekly* 1.

> incrementally, and can develop their skills over time in increasingly complex situations.[190]

The position is no better in the United Kingdom[191] and the United States.[192] Of most significance in the context of this article, 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'.[193] 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).[194]

Arguably law schools have made more progress with the incorporation of legal ethics into the curriculum. Most law schools now offer a discrete compulsory unit in legal ethics but they are a long way from teaching ethics and values 'pervasively and continuously'[195] and incrementally across the law curriculum.[196] Where legal ethics is taught, schools struggle to cover more than basic rules of professional conduct. Apart from education in strict ethical duties (duties to the court, to their client and to fellow practitioners), students receive little or no training 'except in the context of the

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[190] R Johnstone and S Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (AUTC) (2003) 161-612.

[191] In the United Kingdom, Boon concluded that 'a coherent programme of skills at the undergraduate stage is currently lacking': Andrew Boon, 'History is Past Politics: A Critique of the Legal Skills Movement in England and Wales' (1998) 25 *Journal of Law and Society* 151, 169. Also on the position in the United Kingdom, see Grimes et al, above n 185, 45-46; and Julian Webb and Caroline Maughan (eds), *Teaching Lawyers' Skills* (1996) xix-xxvi.

[192] 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]': R A Matasar, 'Skills and Values Education: Debate About the Continuum Continues' (2002-2003) 46 *New York Law School Law Review* 395, 408.

[193] Ibid, 410-411.

[194] Ibid, 411.

[195] The Stuckey Report, above n 164, 74; Sullivan et al, above n 169, 126-161. In the UK, see Julian Webb, 'Developing Ethical Lawyers: Can Legal Education Enhance Access to Justice?' (1999) 33 *The Law Teacher* 284, 285-286. For the position in Australia, see G Villalta Puig, 'Legal Ethics in Australian Law Schools' (2008) 42 *The Law Teacher* 29, 30.

[196] Deborah L. Rhodes, 'Ethics by the Pervasive Method' (1992) 42 *Journal of Legal Education* 31, 50 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: at 239.

present adversarial system'.[197] It has been argued that lack of training in anything other than the traditional adversarial system encourages the very mindset that Davies highlighted as being problematic, that is, the adversarial mindset.[198]

On any view, 'substantive law still dominates law school teaching and curriculum in Australia'.[199] Many commentators argue that law schools concentrate *too much* on substantive content at the expense of skills (both generic, such as communication and team work,[200] and task specific, such as interviewing and negotiation). There is also little room in the curriculum for coverage of theoretical issues and interdisciplinary subjects.[201] 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'.[202] This criticism is not confined to legal education in Australia. Many aspects of the traditional model of legal education have been criticised in reports into legal education in the United States and the United Kingdom, in addition to Australia, in the last 35 years.[203] On the whole, law schools in many common law jurisdictions fail to expose students to alternative views 'which enable them to question prevailing adversarial legal culture'.[204]

Inherit limitations of law schools – attitudes and practices

If law schools are to find room in their curricula to expand their skills programs, to give adequate attention to values and professional attitudes, and to expose students to alternative ways of viewing clients' problems, they will have to sacrifice some

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197 G Reinhardt and Y de Fina, 'Procedural and Practical Reform: Consequences for the Practice of Law' in Sampford, Blencowe and Condlin, above n 168, 48.

198 Ibid.

199 Weisbrot, above n 170, 269.

200 Generic skills are used in a variety of contexts (including those that are non-legal in nature). Legal skills or task specific skills are a specialised version or adaptation of generic skills.

201 Mary E Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26 *Sydney Law Review* 537, 552; Weisbrot, above n 170, 269.

202 Keyes and Johnstone, above n 201, 541.

203 For a detailed discussion of relevant literature, see Keyes and Johnstone, ibid, 543-547. Also see Thornton who argues that we focus on basic doctrine in the absence of contextual and social background, reflection, and critique: Margaret Thornton, 'The Idea of the University and the Contemporary Legal Academy' (2004) 26 *Sydney Law Review* 481, 483.

204 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 187, [11.24].

existing content. Such a move, while welcomed by some, would face resistance from many academic staff (largely because of inertia, fear of the alternatives, and the not-unreasonable perception that subjects are already content-crowded)[205] 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 the need.[206]

Yet the weight of argument is in favour of change. Research into professional complaints made against legal practitioners shows that:

> One of the most striking conclusions was that very, very few of the complaints resulted from a poor understanding or misreading of doctrinal law; rather, the overwhelming run of complaints related to lawyering skills and professional behaviour, especially:
>
> - communication with clients (and to a lesser degree, communications with other lawyers, the courts and other regulatory authorities)
> - management of client relations and files (ensuring that matters progress towards resolution; maintaining full and accurate files, including appropriate file notes; billing records and practices; meeting deadlines, etc)
> - proper handling of funds held under trust and related accounts.[207]

As law schools struggle with what content to teach, at an even more fundamental level, they need to reconsider the *way* in which they teach what they teach. It may be time they changed basic methods of teaching with the aim of finding a more balanced way of imparting knowledge, skills and values within the core curriculum.

The core of the law degree is focused on substantive law, and in particular, case law.[208] It focuses on rights and obligations, rather than interests and needs; and it focuses on winning through conflict rather than problem-solving through collaboration. The emphasis on court rules and appellate judgments focuses on parliament and courts as the central law making and dispute resolution institutions and it presents litigation and trial as the dominant dispute resolution processes.[209]

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[205] Wade, above n 164, 189; and Twining, above n 164, 190. The increasing volume of case and statute law in substantive subjects has exacerbated the problem.

[206] For a discussion about the emergence of legal sub-specialities, see Sackville, above n 5, 56.

[207] Weisbrot, above n 170, 269, discussing trends in regulatory complaints made against lawyers in New South Wales.

[208] ALRC IP 20, above n 187, [11.24].

[209] Sourdin, above n 189, 2.

Students are taught, consciously or unconsciously 'to view adversarial litigation as the fundamental aspect of legal practice'.[210]

Adversariness and the importance of winning are also ingrained in students through traditional law school teaching methodology. Menkel-Meadow claims that:

> 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.[211]

Few teachers encourage their students to take a wider view of the client's problem (albeit that the client may be a hypothetical one), to consider what the client ought to do as a matter of 'being good' rather than what the client is permitted to do according to law. Few teachers ask students to take into account the client's relationships with others and the client's place in the world. Rarer still, are students asked to reflect on what they think is 'the right thing to do', and to consider their relationships and place in the world. Generally, there is not the luxury of time for such reflection.

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.[212]

The debate about what law schools should teach and how they should teach it, may ultimately, be a moot point for almost every alternative has resource implications.[213]

Resource Constraints

Skills (and values and ethics) teaching requires a substantial commitment of labour and resources, far more than is required for teaching traditional doctrinal courses.[214]

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[210] ALRC IP 20, above n 187, [11.24].

[211] Carrie J Menkel-Meadow, 'Can a Law Teacher Avoid Teaching Legal Ethics?' (1991) 41 *Journal of Legal Education* 3, 7.

[212] Weisbrot, above n 170, 269.

[213] Every teacher has the capacity to make small incremental changes in their teaching. However, whole scale systematic curricular change is driven, or stymied, by lack of resources.

[214] V Brand, 'Decline in the Reform of Law Teaching?: The impact of policy reforms in tertiary education' (1999) 10 *Legal Education Review* 122, 122-123; J Hunter, 'Teaching Plumbing With Periclean Ideals: Should It Be Done? Can It Be Done? Advocacy and Courtroom

The predominant view is that 'Most skills can only be learnt experientially'.[215] Skills and values cannot be taught effectively by lectures alone. However, laws schools in all jurisdictions remain heavily dependent on large group lectures.[216] Many law schools attempt to supplement lectures with smaller group seminars and tutorials.[217] While these are the primary methods used to impart knowledge, they are far from ideal when it comes to teaching and learning skills, values and ethical issues.

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 (with its emphasis on lectures and case books), they will need resources. Lack of resources has been repeatedly singled out as one of the biggest problems facing law school. Keyes and Johnstone referred to the resource problem as the 'most severe and the most difficult to overcome'.[218] Despite repeated calls for reform, the problem persists. While it persists, the ability of law schools to make substantial systematic change will be 'seriously undermined'.[219] Lack of resources is not of course the only factor impacting change. As already mentioned, teachers may have to overcome some inertia[220] and embrace change, just as legal practitioners are required to do.

Conclusion

As part of its proposals for reform, the Australian Law Reform Commission 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

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Scholarship' (1996) 30 *Law Teacher* 330, 349 and Julian Webb, 'Why Theory Matters' in J Webb and C Maughan (eds), *Teaching Lawyers' Skills* (1996) 46.

[215] Gordon Joughin and David Gardiner, *A Framework For Teaching And Learning Law* (1996) 82. More recently, see Roy Stuckey, 'Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses' (2006-2007) 13 *Clinical Law Review* 807, 809-810; Sullivan et al, above n 169, 28.

[216] The 'large lecture method is once again favoured because of the pressure to transmit basic doctrine': Thornton, above n 203, 486; and Keyes and Johnstone, above n 201, 552.

[217] Even small group tutorials are threatened: Thornton, above n 203, 486; and Keyes and Johnstone, above n 201, 552.

[218] Keyes and Johnstone, above n 201, 556. In the UK, ACLEC concluded that 'Perhaps the single most important obstacle to change is the shrinkage of public resources available for higher education in general and legal education in particular': the ACLEC Report, above n 7, [15].

[219] Keyes and Johnstone, above n 201, 556.

[220] Ibid, 555.

among lawyers, judges and tribunal members'.[221] If law schools are to respond in an appropriate way to the reforms which have taken place in the civil justice system (and more generally, to cope with the overwhelming goals of law school), more resources must be made available for the funding of skills, ethics and values teaching and learning in law schools and for teaching beyond the parameters of large group lectures. The reforms and changes needed to increase access to justice must start at the grass roots, in law schools.[222] Without this charge, reform in civil procedures - although significant - may not be sustained over the long term.

[221] ALRC 89, above n 4, [1.154].

[222] The real grass roots are our families, schools and other close communities. It is within these groups that students are first socialised in the ways and means of dispute resolution. Both academics and governments recognise that change must necessarily begin even before students commence law school: generally see Philip Ruddock, 'Towards a Less Litigious Australia: The Australian Government's ADR Initiatives' (2004) 23 *The Arbitrator & Mediator* 1.