The way forward.
Quality control for lawyers

Management of Deceased Estates by Lawyer /Executors.

Submission to the Queensland Law Reform Commission on uniform ascendancy laws within Australia.

By Diarmuid Hannigan.

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The current state of regulatory standards on the legal industry, with regards to the mechanisms it uses to manage ascendancy within Australia, should be a major concern for all people who reside in Australia.

The law and the legal profession have fallen behind the gallop of the advancement of community expectations with regards to accountability and the level of service. The current legislation pertaining to the accountability of executors and trustees who are responsible for the management of the assets of loved ones, who have passed away, is almost non existent and is only accessible to the financially privileged. The expectations of the law and those employed to work it, by the current generation of beneficiaries of deceased estates, has changed dramatically during the past twenty years. In general this generation of beneficiaries is better educated, better informed, and has access to a far greater amount of information than any generation before.

A large number of people within this community are being adversely affected by unscrupulous professionals whose main purpose is to make money for themselves from these family assets.

The laws pertaining to ascendancy are formulated on the English classis principles of privilege. One is born into privilege or through some chance of fate one ascends to it, through one`s achievements in life.

Obviously privilege, always having the upper hand in the decision making processes, assures its own perpetuation by setting the rules of membership to the club of privilege. To question privilege and to request accountability of it is to question the master with the cane. Fortunately through the advancement of our society, the master with the cane has

been questioned in our education system and within our society the master is now accountable and he has lost his cane.

If we believe that these changes are a good thing for our community, why have we not requested the legal profession, who are in a position of privilege and stem mostly from the privileged within our community, to be accountable for their actions?

The laws pertaining to client confidentiality between the client and the lawyer/executor, empower the lawyer after the death of the client. They permit the lawyer to rack up costs against deceased estates, without showing accountability to the beneficiaries, who may be the children of migrant women. To see these Australian families being abused by unaccountable lawyers, who are privileged as individuals and as a group is abhorrent. This situation of unaccountable privilege can go unchecked within our current legal system, if the beneficiaries are foolish enough to become engaged in the legal process, which favours the unaccountable lawyer. This has been experienced by my own family.

When my sister, the family appointed executor, requested a letter from the co executor/lawyer, which set out the terms of the trust, in which my quarter share of the estate was placed, he refused to present her with a copy of this letter from my late mother claiming it is privileged information. The result has created a financial loss to my mother's family of at least $110,000 and an emotional cost of a split family, with the matter remaining unresolved.

When one considers this to be a first generation migrant family, without an extended family network in Australia, you can only imagine the devastation he has wreaked.

Possibly my mother's worst nightmare. It can be compared to the ancient rituals of cruelty; rituals that involved taking something of value from a family for use by the ruling group of the day. If one regards inheritance as the accumulated resource of a genetic line and there is a misappropriation of

such an accumulated resource, by a legal system that leaves self interested lawyers unaccountable for their actions, then it is the system that is damaging the development of families in our new nation Australia. The laws in these matters restricting the open exchange of information between the legal profession, other executors, trustees and beneficiaries after a person has died, favour the legal profession and act against the interests of the beneficiaries (consumers).

These laws have seen a great deal of debate within the legal profession. This debate is easily resourced from the internet and clearly shows the need for legislators to set standards and definitions for the legal profession in order to stop the financial abuse of estates by lawyers.

The legal fraternity has had this on the table since 1992. It is currently being discussed in Queensland and so far they have decided that a will does not have to have "will" written on the back in two inch high letters. When will the Governments of Australia require total accountability from lawyer/executor's, when it has taken twelve years to work out this incredibly perplexing and complex issue? Please excuse my cynicism but there are limits!

The findings of the Queensland Law Reform Commission were due by the end of 2006 as yet they are still not finalised. Presently the review of Australian Acendancy Laws has not set measurable standards to ensure accountability from lawyer/executors who act for deceased estates.

A joint Federal Government Committee has made a thorough report on the Legal Profession and how it behaves in the Federal Court with particular reference to family law matters. Please refer to: Managing Justice: A review of the federal civil justice system. Report No 89.

This report contains reference to many of the pertinent issues that I have encountered with the lawyer/executor of my mother's estate. The committee covers the issues of dispute and its relationship to costs. It recommends a re-education of the legal fraternity and the creation of a set of

standards. Hopefully these standards would be able to identify behaviour by legal professionals that is in the financial benefit of the legal professional rather than in the interest of creating a better future for the families they are working for.

I have included some extracts which I feel are relevant and leave you with the question. If it is good enough for the Federal Court please can you tell me why it should not also apply to the treatment of grieving family members in

Australia by the legal profession when dealing with their own inheritance?.

Managing Justice: A review of the federal civil justice system. Report 89.

This report raises issues regarding the following aspects of legal process within Australia. These issues are relevant to the way lawyer/executors are currently allowed to manage deceased estates. The concerns raised in this report although of a general nature can be used as a guide for formulating better controls on the management of deceased estates by the legal profession, They are pertinent to the methods used by the lawyer/executor of my mother's estate and illustrate how far out of touch he and his firm are with contemporary models of our legal process. The report discusses the following:

- General issues – practice, procedure and case management.
  Alternative dispute resolution
  Legal practice and model litigant standards.
  Adversarialism
  Regulation and discipline
  Overservicing
  Conduct during negotiation
  Education and training

- Education and training and accountability
- Recommendations

General issues – practice, procedure and case management.

Alternative dispute resolution

Most litigation and review matters are resolved without a hearing through direct negotiations between parties, conciliation, mediation and other processes. In 1996, then Chief Justice Sir Gerard Brennan said that the full-scale trial can no longer be regarded as the paradigm method of dispute resolution, even for complex disputes involving subjects of high value. Alternative means of dispute resolution, conducted pursuant to the private

> agreement of the parties, can be expeditious, flexible and tailored to particular needs. [18]

In the case of my mother's estate the lawyer/executor and his firm have always directed the matter towards the full scale trial as the only method to resolve the dispute that their decision making process has created. At no point was there any mention of using an alternative dispute process.

The access to Justice Advisory Committee report noted that:

ADR can make a very positive contribution to access to justice because it offers, in its various forms, an inexpensive, informal and speedy means of resolving disputes, the outcomes are those which the parties themselves have decided and are not imposed on them.[19]

> Government and industry ombudsmen, regulatory commissions, internal review, and complaints mechanisms are all additional, effective dispute resolution arrangements for matters in the federal civil justice system. In promoting multi-faceted dispute resolution, the federal Attorney-General has stated that the government firmly believes that mediation and alternative dispute resolution should be the norm rather than the exception. [20]

It should be noted that a cultural shift to embrace alternative dispute resolution as an integral feature of the civil justice

system is already afoot in the legal profession. "ADR processes can provide better outcomes, more effective settlements, the preservation of ongoing relationships between disputants and allow complex compromises, bargains and trade-offs on matters ancillary to the dispute."[21] The lawyer/executor and his firm have ignored the ADR process whilst managing my mother's estate. The result being, money wasted by lawyers on their fees instead of going to the needs of family members and the destruction of family relationships. They have steadfastly clung to the traditional adversarial model of legal practice and in so doing have destroyed my mother's family.

The lawyer/executor was nominated by my mother to assist her family. His role should have been to act as a facilitator and neutral advisor to her family after her death. Instead he and his firm have taken the role of advocate and by doing so have benefited through increased legal fees.

> While the context of legal practice has changed, the paradigm reflected in the traditional rules of legal ethics is rooted in an earlier era and assumes a smaller, more provincial, generalist legal profession and a civil justice system in which litigation is the dominant mode of dispute resolution. The Commission recommends that the profession evaluate and elaborate the practice rules, directed to the full array of advisory and representational roles undertaken by lawyers, and provide additional guidance on the meaning and application of the standard in commentary appended to, or supplementing, the rules. Such rules and commentary should deal with the competing and changing roles and responsibilities of lawyers, for example, as advisers, advocates, negotiators, and, within ADR processes, as neutrals facilitating, or representatives for parties participating in, such processes. This would provide guidance to practitioners dealing with distinctive issues and dilemmas not covered
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> by general practice rules. Some of these issues have been taken up by the profession. The Commission recommendations endorse and are intended to promote such initiatives.[22]

The rules pertaining to how lawyer/executors manage deceased estates need to be specific to this role. The rules must prevent lawyer/executors and any lawyers advising them from using partisan tactics against the bereaved family, as has been the case in the instance of my mother's estate.

The following comments by the commission are pertinent to the behaviour of the lawyer/executor in the management of my mother's estate.

There were relatively few complaints from litigants whom the Commission surveyed, concerning lawyers' conduct in their cases. However, in general submissions to the Commission the following complaints were made concerning practitioner conduct:

- fostering or encouraging litigation for financial benefit
- abandoning clients when the money runs out
- pressuring a client to accept a result that does not meet the client's needs or desires
- failing to act on the client's instructions
- competitive strategies to win the case at expense of efficacy and equity
- frustrating the client and the legal process by conduct designed to maintain conflict, lack of understanding or sympathy for the client's specific situation
- failure to inform the client about the progress or status of the case
- abuse of subpoenas controlling, obstructing or discouraging communication between disputants
- delays in correspondence lacking relevant knowledge of issues or facts
- ignorance of ADR processes.

A number of submissions to the Commission criticised lawyers' `win at all costs' attitudes. The majority of complaints in submissions concerned practitioners dealing with family law matters. This is not surprising given the high level of emotion and distress inherent in this jurisdiction. It is difficult to distinguish cases in which there was a genuine grievance concerning inappropriate practice standards from those in which the litigant was simply aggrieved at the case outcome.[23]

In the case of my mother's lawyer and his firm. They have displayed eight out of nine of the above characteristics.

It is difficult to distinguish cases in which there is genuine grievance concerning inappropriate practice standards because the legal profession has refused to adopt quality standards, refuses to be accountable and refuses to allow an outside perspective on its management processes. This makes it extremely difficult for anybody to make a lawyer accountable.

Adversarialism

The commission identified the following concerns regarding the adversarial system used by the legal profession. I have raised these concerns to The Victorian Law Institute, The Victorian Legal Ombudsman, both state and federal attorneys regarding the actions of the lawyer/executor and his firm when dealing with my mother's estate and all are powerless to act as the laws within Australia do not cover the areas of my concern.

> Many submissions from individual litigants, corporations and consumer groups expressed the view that the adversarial system was unsuitable for many types of disputes, particularly family law disputes, because it was concerned with `winning at all costs', exacerbated conflict, victimised the poor and less powerful and left children out of the process. The adversarial nature of proceedings in the Family Court promotes antagonism between litigants and can have the effect of greatly expanding the duration of litigation. By its very nature, the adversarial culture suggests winners and losers.[24]

This is especially so when the winner is the lawyer/executor and his law firm because they can extract fees from deceased estates by utilising adversarial techniques to damage the financial wellbeing of the beneficiaries (family) of the estate. The lawyers are the winners, the beneficiaries are the losers.

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> There were a number of complaints by litigants, overwhelmingly in the family law area, that lawyers were unaccountable, went `for the jugular', wanted to `score points', exacerbated or encouraged disputes, enjoyed winning as a `personal contest against other lawyers', didn't use ADR sufficiently, and were overly motivated by profit.[25]

In my family's case the lawyer/executor failed to use ADR and created a dispute which has allowed his firm to charge $38,000 in legal fees to the estate.

> Lawyers' education, professional training and on the job training were regarded as contributing to this prevailing adversarial culture. It also was suggested that many law students have an `adversarial focus' or `mindset' or at least a strong sense of competitiveness before they begin law school. In chapter 2 the Commission pays particular attention to legal and judicial education as a critical part of changing and improving legal culture and thus legal practice and dispute resolution.[26]

I have attempted to discover the recent training the lawyer/executor has undertaken in the areas of mediation and dispute resolution. I have received the following correspondence from his firm regarding this issue.

Date (14 12 2007)

> Mr. **** ***** does not have any further qualifications in the area of Mediation or Alternative Dispute Resolution,
>
> However I point out that he is a legal practitioner with over forty years experience in practice and extensive in family succession planning. As legal practitioners, we have Continual Professional Development obligations which are duly met. These are onerous for those of us (including myself) who are accredited specialists.

> The NRMA stated the culture of general legal practice encourages adversarial legal relationships because lawyers are trained to protect their clients' own

> interests and generally take a defensive rather than a cooperative attitude towards another party. Our impression is that the culture of the legal profession and particularly, of litigators, is adversarial as the culture in litigation, is to distrust the opposing party and not to divulge information or openly discuss matters for fear that it may prejudice their clients' interests in a latter hearing. The behaviour of the profession is often directed towards ensuring their clients' position is not prejudiced in the event of a hearing, rather than working cooperatively towards settlement of a matter.[27]

The lawyer/executor managing my mother's estate is the client and a lawyer from his firm is representing him and he is the one who has decided to create a dispute. By understanding their motivation I can understand their lack of cooperation and defensive attitude towards my mother's children. In the matter concerning my mother's estate the real client is dead. The client has become the

lawyer/executor as he steps into my mother's position when she died. He is defended by his firm. It is in the interests of both these parties not to divulge information and behave in an uncooperative manner as this will create disputes and more money in fees and charges.

> In the Woolf Report, much of the blame for `adversarial excesses' in the system was laid at the feet of lawyers and their clients. Lord Woolf saw judicial case management as the solution to inhibit the worst of `excessively adversarial' conduct by parties and their legal advisers. Case management can be effective in limiting overservicing, tactical play and litigation excesses. To be effective, case management requires the cooperation, or at least compliance, of lawyers and litigants.[28]

Since the lawyer/executor and the lawyer who is acting for him, stand to make financial gain, it is impossible to obtain cooperation without quality standards that make lawyers and their firms accountable to the beneficiaries of deceased estates.

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> It is important to distinguish between the adversarial system itself and behaviour of lawyers or their clients described as `adversarial'. Much of the behaviour characterised as excessive adversarialism is probably unsatisfactory professional conduct or professional misconduct. It is not a necessary part of the adversarial system. Professional practice rules allow parties to compete vigorously as adversaries while ensuring maintenance of ethical standards. They also encourage negotiation and settlement. Changes are necessary to the substance of rules to militate against the pressures to `win' at all costs. Certainly such conduct can conflict with countervailing pressures to resolve disputes quickly, effectively and in a cost efficient manner. [29]

It is all very well to say it but when will the legal profession act in the interests of the people who consume their services rather than in their own self interest.

> With respect to the arrangements for such regulatory bodies, a number of submissions to the Commission were concerned with a lack of adherence to and enforcement of the professional practice rules. Certain submissions observed that the disciplinary systems protected the legal profession rather than the complainant.[30]

Never a truer word was written. It is obvious when one analyses the history of the legal profession whose members are mainly drawn from the privileged classes within our society; the born to rule mentality prevails. The legal professional associations advocate self-regulation and continue to resist outside input. They maintain the right to be judge and jury of themselves. The community is more enlightened and realises that this protects lawyers and allows the profession to remain unaccountable to the public interest.

> It is important that members of the public feel that their complaint will be dealt with in a fair and

> unbiased manner. However much professional associations may endeavour to do this, complaints handling by the legal profession gives the perception that the system is run by and for lawyers. Non-lawyer participation in disciplinary systems is one method of providing a measure of independence and accountability to ensure public confidence in such systems. This principle is now well accepted, and has been introduced in varying degrees in all of the States and Territories.[31]

The problem in Victoria is that The Victorian Law Institute strongly defends its right to autonomy. The laws pertaining to the disciplining of lawyers do not deal with their inappropriate combatative behaviour or adversarial tactics; their inefficient processes and their desire to exploit these

advantages over consumers in order to create litigation which will make them more money. This is particularly offensive when applied to deceased estates that are poorly managed by lawyer/executors who only have their own self interest at heart, who are prepared to damage families to eternity for their own financial gain, as is all too evident in the matter of my mother's estate.

> Recommendation 17. Federal courts and tribunals should develop rules to require practitioners and parties to certify to the best of their knowledge and information, that any allegations, claims and contentions contained in pleadings or forms presented to the court or tribunal are supported by evidence.[32]

If this recommendation were in place with regard to the management of deceased estates by legal professionals, the lawyer/executor would have been duty bound to provide his notes of the construct of the will and the letter written to him by my mother which he maintains sets out her wishes, as evidence to the beneficiaries and to the executor to support his position.

Overservicing

> Another aspect of questionable practitioner conduct raised in some submissions to the Commission concerns overservicing, which refers to practitioners providing services above and beyond what is required for the efficient and effective conduct of a matter. The reasons for this may include financial incentives (that is, the desire to run up costs), inexperience and concern about possible negligence actions. Practitioners tend to see concern about negligence actions as the primary cause of overservicing[33].

The practitioner managing my mother's estate has justified his expensive actions on more than one occasion through concerns of possible negligence actions. He claims that if he had distributed the estate according to the family's wishes he

could have been made liable by my children at a later date. He repeated this process during the return of the family heirlooms fiasco.

> It is to the general benefit of society and the administration of justice that lawyers discourage unmeritorious suits and seek the early resolution of disputes. Determining whether settlement or compromise is a realistic alternative requires objective evaluation and the application of a lawyer's professional judgement and experience to the circumstances of the case. The client must then be advised of the advantages and drawbacks of settlement versus litigation. Due to the uncertainty, delay and expense inherent in the litigation process, it is often in the client's interests that a matter be settled. On the other hand, because a lawyer's role is that of an advocate rather than adjudicator, going to trial is justified if the client so instructs and the matter is meritorious. In addition to conventional legal process, a lawyer should consider alternative dispute resolution.[34]

In the case of my mother's estate the lawyer/executor takes on the role of client. He can therefore advocate on behalf of the client who is dead, to waste the estate on

legal fees that he can charge to the estate. In other words he can decide to rob the grave in front of the beneficiaries and nobody can prevent him in Victoria or it seems in Australia. I don't think he would like to use alternative dispute resolution and it is difficult for a person who has intentionally created a dispute to then go and propose conciliation of that dispute when they are motivated by financial gain.

> Recommendation 18. The Law Council of Australia should ensure that national model professional practice rules include a clear indication of accepted standards of conduct and practice in relation to advising and assisting clients in matters, including
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> standards that practitioners shall, as early as possible, advise clients of relevant non-litigious avenues available for resolution of the dispute which are reasonably available to the client. Such rules should apply equally to barristers and solicitors.[35]

If this recommendation were applied to my mother's estate the letter would have been attached to the will. The lawyer/executor would have been obliged to inform the executor (my sister) of his concerns of an imminent dispute. The lawyer/executor would have had to accept the family contribution to the process to resolve the dispute that he himself had contributed to creating by omitting vital parts of the process. This would have ensured access to information by all of the beneficiaries of the estate.

> Practitioners play a vital role in negotiating and settling matters, yet professional practice rules traditionally have provided little or no guidance on the conduct expected of practitioners in this context. This is of particular importance given that, to be most effective for the client, the approach to negotiation may require partisan tactics and behaviour.[36]

This is not necessarily the case when dealing with a bereaved family. Partisan tactics and behaviour by a

lawyer/executor can only benefit the lawyer as the client is dead.

> The Professional Conduct Rules of the Law Society of Alberta give detailed rules and commentary about the lawyer's duty to seek a resolution of a dispute in accordance with the client's instructions, rules, and accompanying commentary. The rules are as follows

1. A lawyer must not lie to or mislead an opposing party.

In my family's case the lawyer/executor misled the beneficiaries by refusing to supply important information.

2. If a lawyer becomes aware during the course of a negotiation that

(a) the lawyer has inadvertently misled the opposing party, or

(b) the client, or someone allied with the client or the client's matter, has misled an opposing party, intentionally or otherwise, or

(c) the lawyer or the client, or someone allied with the client or the client's matter, has made a material representation to an opposing party that was accurate when made but has since become inaccurate, then (subject to confidentiality) the lawyer must immediately correct the resulting misapprehension on the part of the opposing party.[37]

In my case the material representation was inaccurate from the outset. (That is his advice to my to my mother pertaining to my company's financial position and how it would impact upon my own financial position.) The lawyer/executor has ignored this fundamental point.

> The Law Council commented in its submission that the term `good faith' was too unclear and unrealistic and that a rule prohibiting `misleading or deceptive' conduct was more appropriate. The Commission continues to prefer the `good faith' standard. Such a standard is clarified in case law and in legislation,

> and addresses the broader issues associated with negotiation. It is important that parties do not mislead or deceive their opponents in negotiation, it is also important that they genuinely seek a compromise and act in good faith. The commentary should provide a practical explanation of what is required to act in good faith in these circumstances.[38]

In my case the lawyer/executor has not acted in good faith. He is aware that his decision has destroyed a family and has harmed my mother's children and her grandchildren emotionally and financially. This is not an act of good faith. He states that it was my mother who made "the mess" but he advised her and wrote her will, which omitted vital parts of process to create an even bigger mess.

> Recommendation 19. The Law Council of Australia should ensure that national model professional practice rules provide guidance, by way of explanatory commentary, on expected standards of conduct and practice of practitioners negotiating any civil matter on behalf of a client. Where practitioners negotiate on behalf of a client, the rules should require that practitioners act in `good faith'. The commentary to the rules should include a practical explanation of what is meant by acting in good faith in these circumstances. The commentary also should emphasise the practitioner's obligation to inform the client of every offer of settlement from the opposing party and to obtain explicit approval from the client before communicating an offer or acceptance to an opposing party.[39]

If this recommendation were in place the lawyer/executor of my mother's estate would have had to provide the beneficiaries with information such as the hidden letter and the notes of the construct of the will. This action would have prevented him from destroying my mother's family, extorting $32,000 of unnecessary fees from the

estate and creating irreparable emotional and financial damage to my mother's family.

> The need for improved guidance on the proper conduct of lawyer-mediators and lawyers representing clients in ADR processes has been recognised in Australia and overseas. A number of professional associations have published rules or guidelines for the conduct of practitioners involved in mediation or arbitration but
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> the rules are not comprehensive and differ from state to state.[40]

The failure by The Victorian Law Institute to develop rules that are comprehensive in relation to the management of deceased estates by legal professionals has allowed the lawyer/executor of my mother's estate to behave in such an atrocious manner. When offered a mechanism to settle the matter, he refused point blank to do so.

Education and training

> As DP 62 stated, model litigant rules and dispute avoidance and management plans will be ineffective without appropriate education and training of agency officers involved in managing and resolving disputes. Officers, as well as legal representatives, need to be aware of the existence of the rules, and guided through the content of the rules. Adoption of a rule-commentary structure will assist this process, but specific education and training measures may be necessary to provide guidance relevant to the particular agencies and officers within the agency.[41]

The lack of appropriate training of the lawyer/executor is all too apparent in the case of my mother's estate. From the outset he has harboured a pending dispute. If he had received appropriate training he would have realised the importance of informing my mother of the implications of the dispute and the matter more likely than not would have been amicably resolved prior to her death.

> In DP 62, the Commission enumerated many problems with the existing system, including

> insufficient attention given to education and training for lawyers in professional skills, legal ethics and professional responsibility incomplete or inadequate statements of the ethics and standards of practice expected of lawyers examples of poor practice, tactical game playing, and non compliance with court and
>
> tribunal directions by lawyers, which lengthens proceedings and increases costs[42]

These problems were encountered by the beneficiaries of my mother's estate and apply to the lawyer/executor and his firm. They have been identified and resolved in other industries such as, finance, insurance and real estate. They have been resolved by quality standards in manufacturing and retailing for decades and form the basis by which these industries provide goods and services that benefit the community.

Education, training and accountability

> Chapter 2 is devoted to matters of legal, professional and judicial education, and judicial accountability. The Commission's view is that education plays an essential role at different stages in shaping the `legal culture', and in determining how well the civil justice system operates in practice. While it is of the utmost importance to get the structures, practices and procedures of civil justice right, systemic reform and the maintenance of high standards of performance also require a healthy professional culture -- one that values lifelong learning, takes ethical concerns seriously, and embraces a `service ideal'.
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> Accordingly, the Commission has developed a set of recommendations expressly intended to highlight the role and lift the standard of legal education in Australia. These include
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> - increasing the emphasis at university law schools on teaching legal ethics and professional responsibility, as well as professional skills such as dispute resolution

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- developing a regime for quality assurance of legal education programs and calling for another national discipline review
- ensuring the regular participation of legal practitioners in continuing professional development programs
- establishing an Australian Academy of Law to promote a more active collegial relationship
- among judges, lawyers, legal academics and law students, in aid of higher standards of conduct and learning
- establishing an Australian Judicial College, to enhance judicial studies federally and nationally
- ensuring appropriate education and training for members of federal review tribunals.[43]

Without education, training and accountability it is impossible to have a sustainable industry. The industry will inevitably collapse under its own weight of chaos. Our world moves at an ever increasing rate. All other industries within our society have chosen to incorporate education, training and accountability as long term strategies for their future well being. It is essential for our nation that the legal industry does so as well. The legal industry affects everything that we do and if it remains atrophied and tied to outdated principals of privilege, autonomy, self regulation and remains unaccountable it is to the detriment of our future as a nation.

Summary of recommendations

Recommendation 6.

> The federal Attorney-General should facilitate a process bringing together the major stakeholders including the Council of Chief Justices, the Law Council of Australia, the Council of Australian Law Deans, the Australasian Professional Legal Education Council, and the Australian Law

Students Association) to establish an Australian Academy of Law. The

> Academy would serve as a means of involving all members of the legal profession students, practitioners, academics and judges in promoting high standards of learning and conduct and appropriate collegiality across the profession.[44]

Wider industry consultation should be incorporated into this plan. The legal industry is the intelligence mechanism by which our society is run. Other industries are familiar with being accountable. Their experience and knowledge of the workings of accountability would make an invaluable contribution to the restructuring of the legal industry for our society.

> Recommendation 7.
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> As a condition of maintaining a current practicing certificate, all legal practitioners should be obliged to complete a program of professional development over a given three year period. Legal professional associations should ensure that practitioners are afforded full opportunities to undertake, as part of this regime, instruction in legal ethics, professional responsibility, practice management, and conflict and dispute resolution techniques.45

This recommendation is critical to achieving a positive change. Our current legal system has a fundamental flaw, in that the law has been developed to rule over the people. The law in its current state is not there to serve the people or to be generated by the people. Re-education of the legal profession is essential in order that the legal industry can understand the true meaning of accountability and can develop in the best possible way in order to serve the community, rather than making money for itself.

Recommendation 17

> Federal courts and tribunals should develop rules to require practitioners and parties to certify to the best of their knowledge and information, that any allegations, claims and contentions contained in

> pleadings or forms presented to the court or tribunal are supported by evidence.[46]

This is plain old common sense. Why is it being allowed to occur today? This would prevent vexatious litigation and blackmailing by lawyers through legal process. This recommendation would have prevented the disaster created by the lawyer/executor in my mother's estate. This recommendation should be applied to every jurisdiction in Australia. It would also put some bad lawyers out of business. That would be a good step forward for Australia.

Recommendation 18.

> The Law Council of Australia should ensure that national model professional practice rules include a clear indication of accepted standards of conduct and practice in relation to advising and assisting clients in matters, including standards that practitioners shall, as early as possible, advise clients of relevant non-litigious avenues available for resolution of the dispute which are reasonably available to the client. Such rules should apply equally to barristers and solicitors.47

This recommendation is very important as it affects the process of giving and applying legal advice. It would make legal professionals more accountable for the advice they provide to clients and the outcomes of the advice.

Recommendation 19.

> The Law Council of Australia should ensure that national model professional practice rules provide guidance, by way of explanatory commentary, on expected standards of conduct and practice of practitioners negotiating any civil matter on behalf of a client. Where practitioners negotiate on behalf of a client, the rules should require that practitioners act in `good faith'. The commentary to the rules should include a practical explanation of what is meant by acting in good faith in these circumstances. The
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> commentary also should emphasise the practitioner's obligation to inform the client of every offer of settlement from the opposing party and to

> obtain explicit approval from the client before communicating an offer or acceptance to an opposing party.[48]

This recommendation would steer the legal profession towards a more humane approach to legal practice. It would incorporate values that are currently accepted by the wider community as decent forms of behaviour to one another when involved in the settlement of disputes.

Recommendation 20.

> The Law Council of Australia should ensure that national model professional practice rules include provisions relevant to the practice of lawyer-neutrals in ADR processes and lawyers acting for clients participating in ADR processes and should include a rule requiring practitioners to participate in `good faith' when representing clients participating in such processes.[49]

Lawyer/executors could be defined as lawyer neutrals and guidelines could be written to ensure they behaved as neutrals towards beneficiaries and family members of deceased estates.

Recommendation 21.

> Legal professional associations should develop national model professional practice rules focusing on issues of particular concern for family practitioners and practitioners representing children.[50]

Lawyer/executors should be made to follow family law guidelines as inheritance is traditionally a family concern.

Recommendation 27.

> The Law Council of Australia should ensure that national model professional practice rules include a
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> rule setting out the factors relevant to a determination of whether legal fees charged are reasonable. The American Bar Association model rule on reasonable fees should serve as a guide in drafting such a rule. The rule should explicitly state

that charging unreasonable fees could constitute unsatisfactory professional conduct and gross overcharging could constitute professional misconduct.[51]

Lawyer/executors should only be able to charge a fee appropriate to the level of legal work they are required to do for an estate. They should not be allowed to charge at a rate for their own specialised expertise in law, as has occurred in my mother's estate.

Towards uniform national professional practice standards

The Commission recommends that legal professional associations and regulatory bodies should give priority to developing and implementing national model professional practice rules, with special responsibility given to the Law Council of Australia to facilitate and coordinate this effort. There are no national professional practice rules currently in force, although the Law Council of Australia and the Australian Bar Association have model rules which they have sought to have adopted on a national basis. The Commission supports the development of a national profession and harmonised regulatory arrangements for legal practice, and encourages States and Territories to cooperate to facilitate this result.

While the context of legal practice has changed dramatically, the paradigm reflected in the traditional rules of legal ethics is rooted in an earlier era, and assumes a smaller, more provincial, generalist legal profession and a civil justice system in which litigation is the dominant mode of dispute resolution.

Accordingly, the Commission recommends the development of a number of new rules directed to the full array of advisory and representational roles undertaken by lawyers. For example, the Commission recommends that practitioners

> expressly should be obliged to act in good faith when engaged in negotiations or involved in ADR processes. Noting a range of concerns about the conduct of lawyers in litigation, raised in submissions, consultations and recent cases, the Commission also makes recommendations for the development of national model professional practice rules that expressly restrict lawyers from making any allegations not supported by evidence; increase the obligations imposed on lawyers to be candid with the court; and prohibit lawyers from encouraging or assisting litigation with little or no substance, and those practices intended as a stratagem to win time or harass an opponent. Certain of these issues have been addressed in recent amendments to New South Wales Bar Association Rules and the Commission commends and supports these changes.
>
> Finally, the Commission makes recommendations in relation to the content and presentation of practice standards. Australian legal professional associations generally provide a set of rules specifying ethical obligations. The Commission proposes that the rules be supplemented by commentary and explanation -- an approach favoured in several overseas jurisdictions. The Commission believes this would allow fuller exposition of the underlying purposes and spirit of the rules, the provision of examples from different practice areas, and assist in teaching legal ethics and professional responsibility at all levels. The Law Council of Australia is asked to convene a broadly based working group to develop this commentary.52

My question is when will all of these recommendations be implemented and when will lawyer/executors who

are currently unaccountable and have no standards controlling their behaviour or process be bought to account? This is an area of law that will impact on nearly every Australian at some time in their lives and needs urgent action by the legal profession.

I was very concerned to find the Victorian Government has not appointed a full time research officer to work with the

commission in conjunction with the legal fraternity and interested parties in improving the current legislation within Victoria. There is no money on the table to fund the development of this most important area of law, which affects the majority of us at some point of our lives.

Currently there are no mechanisms available to bring lawyer/executors who act inappropriately towards the estate to account, apart from litigation in The Supreme Court. The irony being, the lawyer/executor may draw his fees from the estate in his defence of any allegations of impropriety. Estimated cost of action $200,000.

There are no definitions to define inappropriate behaviour by lawyer/executors.
Let alone guidelines on how to:-

(1) Identify and prevent combative behaviour of lawyer/ executors.
(2) Create a conciliation process to prevent costly legal disputes.

The areas requiring tighter regulation of lawyer/ executor's include:-

Professionalism
The lawyer/executors professionalism should be accountable and verifiable to the beneficiaries of an estate.

Training
The lawyer/executor must have regular up-to-date certified training in Wills and Probate Administration.

Behaviour
The lawyer/executor should not be allowed to use combative behaviour or partisan tactics. The lawyer/executor must be conciliatory with the beneficiaries of the estate.

Information Exchange.
The lawyer/executor should make available all information the estate has in its possession to the beneficiaries as it is needed.

Costs.

Lawyer/executors should not be allowed to charge according to their professional standing but at a set fee nominated by the parliament. They may be allowed from time to time to charge for their status if the estate requires that type of specialised legal advice.

Work that can be done by the beneficiaries should be allowed when it is significantly cheaper, than if the lawyer/executor does it.

The lawyer must not be allowed to create disputes of his own making for his financial benefit with 100% of the beneficiaries of the estate unless he can show evidence to support his claims.

I have enclosed a history of a situation which I have personally been involved in that shows that the public are not protected by any type of consumer law when involved in lawyer/executor's in our family estates.

I would invite your comments and suggestions in this regard.

Yours Sincerely
Diarmuid Hannigan.

The question that needs to be asked. Is how far has the legal profession progressed towards implementing the recommendations contained within the report on Managing Justice: A review of the federal civil justice system. Report No 89?

What obstacles are arising in the implementation of these recommendations for improvement to our legal system?

Are the obstacles being created by the legal professionals themselves?

If so for what purpose are they resisting these positive recommendations for our community?

Is self interest getting in the way of change to our legal system that will benefit all Australians?

It appears from my own experience and that of my family that the recommendations have still a long way to go before we the consumers of the legal system will see a benefit. Is this because we are dealing with a very powerful group of self interested people who have control of our legal system and are determined to resist change no matter what the cost is to our community?