Law Council
OF AUSTRALIA

Inquiry into Financial Technology and Regulatory Technology

Senate Select Committee on Financial Technology and Regulatory Technology

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is particularly grateful for the expertise of the Corporations Committee of the Business Law Section in assisting to develop this submission.

Executive Summary

1. The Law Council of Australia welcomes the opportunity to make a submission to the Senate Select Committee on Financial Technology and Regulatory Technology (**the Committee**).

2. The COVID-19 pandemic has dramatically altered the economic and financial environment in Australia and has impacted significantly on its Financial Technology (**FinTech**) and Regulatory Technology (**RegTech**) sectors.

3. The Law Council is particularly interested technological solutions and relevant regulatory changes that have been (or should be) implemented in response to the COVID-19 pandemic which are enabling Australian businesses and other organisations to continue. As the peak body for the Australian legal profession, the Law Council is also interested in the impacts of the pandemic on the legal profession and any regulatory initiatives that have been effective or lacking to support this sector.

4. To this end, the Law Council has focussed its submission on key regulatory shifts that have utilised technology in the current climate, as well as COVID-19 related measures that have had an impact on the legal profession. As articulated within this submission, the Law Council has put forward the following recommendations:

   - Improving the ability to sign and execute documents (including deeds) electronically, where appropriate and with the necessary dialogue and consultation (including with the legal profession), should remain a priority law reform area.
   - Consideration should be given to withdrawing requirements for witnessing execution of documents, or improving the ability to witness, and attest to witnessing, the execution of documents electronically.
   - Consideration should be given as to the possibility of harmonising, where possible, e-signature (and e-witnessing) processes across the states and territories, not just in cases of emergency, given that commercial and personal transactions regularly cross jurisdictional boundaries.
   - Section 127 of the *Corporations Act 2001* (Cth) (**Corporations Act**) should be amended to make it clear that electronic execution of company documents is contemplated by this provision, including when a company executes a deed.
   - The Australian Government should encourage all government agencies to accept electronically executed documents (including deeds) and encourage the states and territories to do the same.
   - Temporary authorisation for company meetings required under the Corporations Act to be held virtually under appropriate circumstances, 'using one or more technologies that give all persons entitled to attend a reasonable opportunity to participate without being physically present in the same place', should be maintained with the necessary safeguards.
   - Measures taken by the Australian Securities and Investments Commission (**ASIC**), Australian Prudential Regulation Authority (**APRA**) and the Australian Competition and Consumer Commission (**ACCC**) to enable swift provision of financial advice, streamline reporting requirements, and enable cooperation between firms to help meet the challenges posed by the crisis, should be regularly reviewed and their ongoing appropriateness assessed in an open and transparent way, with the necessary consultation.
   - The implications for auditors should be considered in any measures affecting reporting requirements, so as not to introduce additional regulatory risk for auditors.

- The Australian Government should clearly define 'essential services' to include services including those provided by the legal sector.
- The JobKeeper scheme and any future workplace subsidies of a similar nature should explicitly account for special purpose entity structures.
- The effectiveness of the JobKeeper scheme should be examined in detail, including by reference to its delivery of equitable and fair outcomes and its provision of adequate financial support.

Introduction

5. On 12 June 2020, the Law Council received an invitation to provide evidence to the Committee's inquiry into the current state of Australia's FinTech and RegTech sectors (**the Inquiry**). The Law Council has specifically been asked to comment on how technological solutions and relevant regulatory changes implemented in response to the COVID-19 pandemic are enabling Australian businesses and other organisations to survive, as well as any barriers that are preventing this from occurring. The Committee Secretariat cited the following examples of recent initiatives in this area:

    (a) changes to regulations under the Corporations Act enabling companies to hold annual general meetings (**AGMs**) online and allowing company officers to sign documents electronically; and

    (b) measures taken by regulators such as ASIC, APRA and the ACCC to enable swift provision of financial advice, streamline reporting requirements, and enable cooperation between firms to help meet the challenges posed by the crisis.

6. The Committee also stated it is interested specifically in the impacts on the legal profession and any initiatives the Law Council considers to be relevant in the area.

7. The COVID-19 pandemic has dramatically changed the economic and financial environment in Australia and has impacted significantly on the FinTech and RegTech sectors. The Law Council welcomes the interest shown by the Committee to highlight the medium and long-term supports needed for the corporate and legal sectors, with an emphasis on solutions that government and the private sector can quickly deliver.

Scope of Law Council's response

8. The Inquiry's Issues Paper notes that FinTech 'refers to the technology or businesses that enable, enhance and disrupt traditional financial services'.[1] It represents an 'umbrella' for inquiry into a variety of sectors which draw upon technology and innovation, including agriculture, medical, high-tech manufacturing, mining and minerals, and energy.[2]

9. As understood in the Issues Paper, RegTech refers to 'the use of new technology in regulatory monitoring, reporting, and compliance'.[3] A RegTech company may, for example, offer businesses software-as-a-service to assist in efficient and cost-effective compliance with regulations.[4]

10. Finally, the terms LegalTech ('technological solution[s] created for lawyers in law firms, businesses or corporations to help them simplify and automate their own operations')

[1] Senate Select Committee on Financial Technology and Regulatory Technology, 'Issues Paper' (undated) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Financial_Technology_and_Regulatory_Technology> ('*Issues Paper*') 11.
[2] Ibid 2, 15.
[3] Ibid 11.
[4] Issues Paper n 1.

and LawTech (technological solutions which 'aim to bring law to small business and people directly by enabling them to self-serve') will also be used.[5]

11. Noting the Law Council is the peak representative body for the national legal profession, this submission is confined to considering the barriers to, and application of, FinTech, RegTech, and technological innovation, with a particular emphasis on legal and regulatory policy matters arising from the COVID-19 pandemic. It also suggests focal points for broadening the Inquiry to a discussion of LegalTech and LawTech.

Technological solutions in times of crisis

Electronic execution of documents

12. As the Law Council has explained in its recent submission to the Senate Select Committee on COVID-19's inquiry into the Australian Government's response to the COVID-19 pandemic (**COVID-19 Inquiry submission**), it has been particularly difficult for members of the legal profession and their clients to sign and witness documents during lockdown.[6]

13. The Law Council has commended the temporary measures introduced to assist persons and companies to meet their obligations under the Corporations Act to execute documents, by allowing documents to be in electronic form, and to be executed using electronic means (or e-signatures).[7] Improving the ability to sign and execute documents electronically, where appropriate, ought to remain a priority law reform area. Recent experience of the bushfires of the summer of 2019/2020 and, more recently, the COVID-19 pandemic, illustrates that this issue will re-surface during future natural disasters, arises often in regional, remote and rural (**RRR**) areas and may in some instances be key in keeping pace with modern global business practises.

14. However, the Law Council still recommends consultation on reform in this and similar areas, with the complexity of some of the emergency measures implemented raising concerns as to compliance by legal practitioners, and possible liability for noncompliance, which may have been able to be addressed by brief consultation on the formulation of the determination.[8] In this regard, this is not intended as criticism – it is recognised that the fundamental legislative principles and usual mechanisms of consultation and oversight are not necessarily followed to the same degree, in emergency situations, as they would be in the usual legislative process. It does mean, however, that there is a need for further dialogue should these emergency responses be continued beyond the immediate threat posed by the COVID-19 pandemic to ensure that any technical issues identified in the emergency determinations can be addressed.

15. There is an important interplay with state and territory legislation that is seen as contributing to the efficacy of execution of documents. The Law Council notes the potential for inconsistency between jurisdictions, as states and territories develop innovative ways to ensure matters such as contract execution can proceed despite lockdown measures. An important issue for this Inquiry to consider is the possibility of

[5] The Law Boutique, 'Is There a Difference Between LawTech and LegalTech?' (7 December 2018) <https://medium.com/@thelawboutiquelondon/is-there-a-difference-between-lawtech-and-legaltech-68f776d5ab98>.
[6] Law Council of Australia, *Submission to the Inquiry into the Australian Government's response to the COVID-19 pandemic* (15 June 2020) ('*Submission to COVID-19 Inquiry*') 14.
[7] See, for example, *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* ss 6-7.
[8] Ibid.

harmonising, where possible, e-signature processes across the states and territories, not just in cases of emergency, given that commercial and personal transactions regularly cross jurisdictional boundaries. Absence of that uniformity, through the period of the COVID-19 pandemic, has significantly hampered the efficacy of emergency reforms.

16. In this regard, the Law Council notes two broad areas in which, after lockdown measures are ended, there should be a more permanent solution formulated for the electronic execution of documents – one, of course, being the execution of documents by companies, and the other being execution and witnessing of documents by individuals.

17. In relation to the execution of documents by companies, prior to the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (**Emergency Determination**), the South Australian Supreme Court decision of *Bendigo and Adelaide Bank v Pickard* [2019] SASC 123 (***Pickard***) had made it clear that companies cannot rely on section 127 of the Corporations Act for company officers to execute documents electronically. Further, the case made it clear that (absent reform) deeds cannot be executed electronically under section 127. The Court decided that section 127 contemplates a 'single, static document' and this means that section 127 cannot be used to execute an electronic document. The *Pickard* decision may not necessarily reflect the intent of the legislature but it does represent the law and if followed it will continue to have a material adverse cost for Australian business, and for no apparent purpose. It is also at odds with common practices in some parts of the market, which creates the potential for systemic risk. This concern could be overcome by relatively simple amendments to section 127 to make it clear that electronic execution is permitted, including when a company executes a deed.

18. The need for clear and express words is particularly important to authorise the electronic execution, witnessing and attestation of deeds, to overcome common law principles that otherwise would require 'wet ink' signatures on hard copy documents (known as the '*paper, parchment or vellum'* principles) and to put efficacy of execution beyond doubt. Legal practitioners have been divided as to the efficacy of the emergency Determination, resulting in some firms refusing to give 'due execution' opinions on electronically signed documents and deeds, and a continued insistence on 'wet ink' signatures.

19. Execution by individuals of 'simple' contracts, rather than deeds, does not strictly require law reform. However, electronic execution of deeds by individuals and by non-companies, such as sporting clubs or charities and foreign entities signing Australian law documents (generally a matter of State or Territory law) does require reform. The various (and inconsistent) formal (and in some cases archaic) State-by-State requirements mean that electronic execution of deeds is at worst impossible, and at best fraught with danger. The Law Council's Business Law Section notes that Victoria is an exception,[9] but this only assists for transactions subject to Victorian law as the proper law of execution. The Business Law Section has also noted that New South Wales (**NSW**) has sought to put in place clear authorisations for execution of deeds by individuals,[10] however the NSW provisions (and the emergency regulations introduced

[9] The *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020* (**Victorian Regulation**) made under the *Electronic Transactions (Victoria) Act 2000*.

[10] See, *Conveyancing Act 1919* (NSW) s 38A, which states that: "A deed may be created in electronic form and electronically signed and attested in accordance with this Part." However a witness must be physically present and must sign the same document as the signatory. The *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020 (NSW)* (**NSW Regulation**) was introduced as an emergency measure, under the *Electronic Transactions Act 2000 (NSW).* Significantly, the NSW Regulation

during the COVID-19 pandemic) arguably do not make it clear that witnesses can provide electronic *attestation* to execution of a deed. According to the Law Council's Business Law Section, there is market feedback to suggest some reluctance to accept documents executed under the NSW regulations.

20. There have also been concerns that state and territory government agencies have not consistently accepted registration of electronically executed documents (whether deeds or otherwise) during the COVID-19 period.

21. The ability to execute deeds electronically matters, because commercial and financial transactions often require the execution of a deed by an individual – and this has a material impact on the costs and efficiency of doing business, affecting not only large corporations, but also small to medium enterprises and sole traders. Deeds of guarantee, restraint deeds, deeds of assignment of intellectual property, powers of attorney, shareholders deeds, sale and purchase deeds, some transfer instruments and accession deeds are typical examples. Almost countless commercial and financial transactions are now undertaken remotely rather than requiring physical presence to transact. Such is the impact of technology.

22. In addition, it is a matter of some debate as to whether State legislation is needed to support the efficacy of execution and witnessing by individuals of corporate documents under the Corporations Act. The *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW), for instance, only relates to execution of documents by individuals.

23. Each Australian State or Territory has different requirements for the execution of deeds, but generally they must be witnessed, which is more difficult online and the witness must also attest to having witnessed for execution to be complete. In this context, an individual's inability to execute a deed remotely is a material impediment and an unnecessary one with no sound policy justification. Whilst the purpose of the witnessing requirement was originally to protect against fraud, electronic execution is, by definition, less liable to fraud, given the digital record that is necessarily created by any form of electronic execution. Hence, consideration should be given to completely dispensing with witnessing where technology can provide robust evidence of due execution. The recent COVID-19 emergency measures demonstrate a recognition of the problem by most states and territories and a willingness to respond with law reform, although the lack of uniformity in approach is mildly disappointing.

24. The Law Council asks the Inquiry to give consideration as to whether these concerns could be resolved by the Commonwealth alone through the exercise of power under various heads of Constitutional power. To avoid any risk of unconstitutionality, however, the Law Council recommends that the Commonwealth be encouraged to seek consistency across jurisdictions given that commercial and personal transactions regularly cross jurisdictional boundaries.

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at sections 2(2)(b) and 2(3) does not specify whether the witness can electronically sign the document/a copy of the document.

Recommendations

- **Improving the ability to sign and execute documents (including deeds) electronically, where appropriate and with the necessary dialogue and consultation (including with the legal profession), should remain a priority law reform area.**
- **Consideration should be given to withdrawing requirements for witnessing execution of documents, or improving the ability to witness, and attest to witnessing, the execution of documents electronically.**
- **Consideration should be given as to the possibility of harmonising, where possible, e-signature (and e-witnessing) processes across the states and territories, not just in cases of emergency, given that commercial and personal transactions regularly cross jurisdictional boundaries.**
- **Section 127 of the Corporations Act should be amended to make it clear that electronic execution of company documents is contemplated by this provision, including when a company executes a deed.**
- **The Australian Government should encourage all government agencies to accept electronically executed documents (including deeds) and encourage the states and territories to do the same.**

Online company meetings

25. On 20 March 2020, ASIC published guidance on the legal status of 'hybrid' (physical location and online facilities) and virtual (conducted solely online) AGMs. It articulated a 'no action' position on non-compliance with parts of the Corporations Act that may prevent AGMs being held online.[11]

26. On 6 May 2020, ASIC's 'no action' position was rendered redundant by the Emergency Determination. The Emergency Determination temporarily allows company meetings required under the Corporations Act to be held virtually, 'using one or more technologies that give all persons entitled to attend a reasonable opportunity to participate without being physically present in the same place.'[12] This has clear benefits, with the necessary safeguards.

27. After the Emergency Determination came into force, ASIC gave guidance on its operation, including by clarifying that it overcame existing impediments to online meetings.[13] ASIC also advised of its ongoing project of observing hybrid and virtual meetings with a view to providing further guidance if required, and gave guidance on using virtual technology.[14] If companies do not elect to use virtual meetings, they may also benefit from ASIC's 'no action' position in respect to delays in holding an AGM,[15]

[11] Australian Securities & Investments Commission, *20-068MR Guidelines for meeting upcoming AGM and financial reporting requirements* <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-068mr-guidelines-for-meeting-upcoming-agm-and-financial-reporting-requirements/#attached>.
[12] Determination n 7, s 5.
[13] Australian Securities & Investments Commission, *ASIC guidelines for investor meetings using virtual technology* <https://asic.gov.au/about-asic/news-centre/news-items/asic-guidelines-for-investor-meetings-using-virtual-technology/>.
[14] Ibid.
[15] Australian Securities & Investments Commission, *20-113MR ASIC to further extend financial reporting deadlines for listed and unlisted entities and amends 'no action' position for AGMs* (Media Release, 13 May 2020) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-113mr-asic-to-further-extend-financial-reporting-deadlines-for-listed-and-unlisted-entities-and-amends-no-action-position-for-agms/>.

although this 'no action' position only operates in relation to proceedings by ASIC and not to claims by other parties. It does not prevent a breach of the Corporations Act occurring.

28. The Law Council considers that the Corporations Act, and most corporate constitutions, do not permit virtual meetings to be held, absent a clear legislative instrument. Further, the Law Council has concerns that 'hybrid' meetings raise the risk that shareholders or proxies participating via a video-link or web-service will not be regarded as having 'attended' the meeting, although they may have had a practical sense of participation. This can raise questions as to the validity of resolutions passed at those meetings.

29. The current Emergency Determination will expire in early November 2020, prior to the date by which many AGMs for listed companies must be held. The Law Council considers that if virtual meetings are held after the expiry of the Emergency Determination (even if the notice was despatched before expiry), the validity of the meeting is not assured.[16]

30. There have been a number of virtual and hybrid meetings held during the COVID-19 period (most with the benefit of the Emergency Determination). The Law Council is not aware of significant concerns arising as to the efficacy of this format of holding a meeting, with advances in technology platforms offering practical solutions to permit stakeholder engagement. Some anecdotes suggest the quality of discussion and efficiency of some meetings has been improved by the virtual platform.

Recommendation

- **The temporary authorisation for company meetings required under the Corporations Act to be held virtually under appropriate circumstances, 'using one or more technologies that give all persons entitled to attend a reasonable opportunity to participate without being physically present in the same place', should be maintained with the necessary safeguards.**

Streamlined reporting arrangements

31. ASIC has published 'Frequently asked questions' on its website outlining a range of measures it has taken to streamline financial reporting and audit requirements (as principally contained at Chapter 2M of the Corporations Act) in response to the COVID-19 pandemic.[17] Primarily, this is guidance on how to continue to meet ongoing obligations in the current circumstances.

32. Some reporting requirements have also been amended to respond to the pandemic. For example, ASIC extended the deadline for listed and unlisted entities to lodge financial reports under Chapters 2M and 7 of the Corporations Act by one month, for certain balance dates up to (and including) 7 July 2020 , and has extended deadlines for sending reports to members.[18]

[16] There are exceptions to this – for instance, if a meeting is convened by court order, the court would be able to authorise a virtual meeting.
[17] Australian Securities & Investments Commission, *COVID-19 implications for financial reporting and audit: Frequently asked questions (FAQs)* <COVID-19 implications for financial reporting and audit: Frequently asked questions (FAQs)>.
[18] Ibid. See, *ASIC Corporations (Extended Reporting and Lodgement Deadlines—Listed Entities) Instrument 2020/451* ss 5-6; *ASIC Corporations (Extended Reporting and Lodgement Deadlines—Unlisted Entities) Instrument 2020/395* ss 5-6.

33. Meanwhile, APRA has taken streamlining measures such as deferring its policy and supervision agenda for 2020 (concurrently delaying dates for prudential and reporting standards),[19] relaxing requirements for large capital buffers held by financial institutions, providing concessional capital and reporting treatment to banks which offer deferrals in loan repayment to customers, and changing reporting obligations for all authorised deposit-taking institutions and registered financial corporations.[20] APRA also temporarily suspended the issuing of new banking, insurance and superannuation licences.[21]

34. Finally, the ACCC has classed its COVID-19-related measures in two categories: 'authorising crisis collaboration between competitors', and establishing its *ACCC COVID-19 Taskforce* to respond to consumer and small business problems.[22] Examples of measures falling under the first category include the granting of interim authorisations to a number of sectors for conduct which might otherwise raise concerns under the competition provisions of the *Competition and Consumer Act 2010* (Cth),[23] for example, health agencies to jointly procure and distribute medical equipment and supplies.[24]

35. Whilst the Law Council makes no particular comment on the measures taken by these regulators, it commends the issuing of as much guidance as possible for affected stakeholder, and advises that each measure must be carefully and openly reviewed and its ongoing appropriateness assessed at regular intervals, with the necessary consultation.

Recommendations

- **The measures taken by ASIC, APRA and the ACCC to enable swift provision of financial advice, streamline reporting requirements, and enable cooperation between firms to help meet the challenges posed by the crisis, should be regularly reviewed and their ongoing appropriateness assessed in an open and transparent way, with the necessary consultation.**
- **The implications for auditors should be considered in any measures affecting reporting requirements, so as not to introduce additional regulatory risk for auditors.**

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[19] APRA, 'APRA announces new commencement dates for prudential and reporting standards' (Media Release, 16 April 2020) <https://www.apra.gov.au/news-and-publications/apra-announces-new-commencement-dates-for-prudential-and-reporting-standards>

[20] APRA, 'Changes to reporting obligations in response to COVID-19' (Letter, 1 April 2020) <https://www.apra.gov.au/changes-to-reporting-obligations-response-to-covid-19>. On engagement with the insurance and banking sectors around capital distribution and/or management see, also, Wayne Byres, 'Opening statement to Senate Select Committee on COVID-19 - May 2020' (28 May 2020) <https://www.apra.gov.au/news-and-publications/opening-statement-to-senate-select-committee-on-covid-19-may-2020>.

[21] APRA, 'APRA temporarily suspends the issuing of new licences' (Media Release, 8 April 2020) <https://www.apra.gov.au/news-and-publications/apra-temporarily-suspends-issuing-of-new-licences>.

[22] Rodd Simms, 'The very bad, and some good, from COVID-19'

[23] Rod Simms, 'Managing the impacts of COVID-19 disruption on consumers and business' (Gartner CEO Forum, 8 April 2020) <https://www.accc.gov.au/speech/managing-the-impacts-of-covid-19-disruption-on-consumers-and-business>.

[24] 'Private and public hospitals in NSW and Tasmania authorised to cooperate on COVID-19 response' (Media Release, 1 May 2020) <https://www.accc.gov.au/update/private-and-public-hospitals-in-nsw-and-tasmania-authorised-to-cooperate-on-covid-19-response>.

Challenges for the legal profession during the pandemic

Defining essential services

36. One barrier to the use of FinTech or RegTech in the legal sector during the COVID-19 pandemic has been uncertainty over whether legal services are defined as 'essential services'. During the initial COVID-19 response period, the Australian Government referred repeatedly to 'essential' services when naming services and businesses that were still permitted to operate despite lockdown measures being in force. With messages differing between jurisdictions, there has been a degree of confusion across many sectors, including the legal sector, as to what was or was not considered 'essential'.[25]

37. In the Law Council's view, it is impossible to delineate between the 'essential' and the 'non-essential' functions of the legal profession. The ongoing operation of Australian society is made possible by the advice, support and advocacy of legal experts who assist individuals and businesses alike in navigating the complex regulatory systems that underpin every aspect of civil life.[26] Such assistance is particularly crucial in times of uncertainty and crisis. Accordingly, the Law Council has submitted, consideration should be given to the role of the Australian Government in defining 'essential services' and in ensuring that critical sectors (including legal professionals) are able to continue to function, both during and after lockdown measures, with the requisite certainty.[27]

Recommendation

- **The Australian Government should clearly define 'essential services' to include services including those provided by the legal sector.**

JobKeeper and the legal profession

38. A further indirect barrier to technological innovation in the legal profession has been uncertainty around eligibility for the JobKeeper program, particularly for law firms operating under certain corporate structures.[28] This has posed difficulties for the legal sector, with many firms struggling to determine whether they are able to make use of the JobKeeper scheme.

39. In the Law Council's view, the JobKeeper scheme and any future workplace subsidies of a similar nature should explicitly account for special purpose entity structures to ensure that the legal (and other) sectors are not inadvertently excluded from coverage, or subject to uncertainty as to whether they are covered.[29]

40. In addition, the significant social welfare measures introduced by the Federal Government in response to the pandemic, in particular the JobKeeper scheme, have

[25] Gary Mortimer, 'What actually are 'essential services' and who decides?' (online, 31 March 2020) *The Conversation* <https://theconversation.com/what-actually-are-essential-services-and-who-decides-135029>. See, Submission to COVID-19 Inquiry n 8, 13.
[26] Submission to COVID-19 Inquiry n 8, 13.
[27] Ibid.
[28] See, Submission to COVID-19 Inquiry n 8, 10-11. The *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) sets out, amongst other things, which employers are eligible for the payment. As initially drafted, they did not recognise the nature of employment relationships within a corporate or other trading group in which there may be a service entity.
[29] Ibid.

sometimes resulted in unjust outcomes for both employees and employers.[30] The effectiveness of the JobKeeper scheme should be examined in detail, including by reference to its delivery (or not) of equitable and fair outcomes and its provision (or not) of adequate financial support.[31]

Recommendations

- **The JobKeeper scheme and any future workplace subsidies of a similar nature should explicitly account for special purpose entity structures.**
- **The effectiveness of the JobKeeper scheme should be examined in detail, including by reference to its delivery of equitable and fair outcomes and its provision of adequate financial support.**

LegalTech and LawTech: Key issues

41. On 13 September 2018, then-President of the Law Council, Morry Bailes, delivered the Opening Address to the Law Council's 'Legal Futures Summit' held in Sydney. Mr Bailes noted that the future of access by consumers to legal services is being reshaped, alongside the legal profession organising itself to meet those needs and, as a consequence, the future approach to regulation and ethics.[32] He drew upon the Background Paper which the Law Council prepared for the Legal Futures Summit, and the Law Council refers the Committee to that paper, which is attached as **Appendix 1**, for a comprehensive assessment of current issues in technology in the legal sector.[33]

42. While it is important to read the Background Paper in its entirety, some of its key points are set out as follows:

    (a) Examples of LegalTech or LawTech:

        (i) Moving beyond human interaction with an on-line service provider, the term 'robot lawyer' refers to computer applications that enable consumers to deal with a legal issue without requiring the involvement of a legal practitioner.[34]

        (ii) The socio-legal clinic model of responding to the needs of consumers of legal services is a combination of the NewLaw model and emerging 'technology centric' models for service delivery, with a focus on the use of online handbooks, resources and 'chat help' for the purposes of early intervention and client safety.[35]

        (iii) The (almost) complete shift of property conveyancing transactions in Australia to the e-conveyancing platform PEXA. PEXA is a national online property exchange system providing for: preparation of electronic dealings and verification of lodgement acceptability; electronic settlement

[30] See, ibid 12-13.
[31] Ibid 13.
[32] Morry Bailes, 'Opening Address: Legal Futures Summit' (Legal Futures Summit, Sydney, 13 September 2018) <https://www.lawcouncil.asn.au/docs/1e743462-a1bc-e811-93fc-005056be13b5/Futures%20Summit.pdf>
[33] Law Council of Australia, 'Legal Futures Summit 13 September 2018 – Background Paper' (13 September 2018) <https://www.lawcouncil.asn.au/docs/002689ca-c104-e911-93fc-005056be13b5/Background%20Paper%20-%20Futures%20Summit.pdf> (*'Background Paper'*).
[34] Ibid 12.
[35] Ibid 15.

of real property transactions including payment of settlement monies, duties, taxes and any other disbursements; and electronic lodgement of dealings to the appropriate Land Registry.[36]

(b) The digital revolution is changing the way the legal profession does many things. However, a digital divide still excludes a significant proportion of Australians with low incomes, education and employment, as well as regional and remote communities.[37]

(c) When thinking about a definition of 'technology' and the consumer experience of the law, how can a consumer be confident that the process of applying organised knowledge by ordered systems of people and machines creates quality products that enable practical tasks to be undertaken that are legally correct?

(d) The internet is an abundant source of legal information and provides free or low-cost access to a growing range of legal-related 'self-help' tools. However, there are risks involved when a consumer consults 'Google QC', such as: whether the information is legally correct; whether the information or self-help tool is up to date and relevant to the consumer's jurisdiction; whether the consumer has properly understood and applied the information; and whether the consumer has any redress for losses suffered if the information or guidance is wrong.

(e) There seems to be a growing demand for on the one hand, unbundled and limited scope/limited retainer legal services, and on the other, joined up services involving socio-legal service combinations and legal/financial and other professional services combinations.

(f) The legal profession does not have a good understanding of either the current or the emerging market for legal services. There appears to be a need for new ways to segment the emerging market to better understand the needs and characteristics of consumers in light of the influences that technology and other forms of services are having on them. The growth of technology in law has been stated to be underpinned by five principles, namely: the exponential increase in computing power; the evolution of cloud computing; the availability and cheap access to mobile technology; the increase in economic pressures to reduce costs; and the healthy profit-margins enjoyed by many law firms.[38]

(g) Finally, regulation of the legal profession is extensive. For the most part it has evolved in response to problems after they have emerged, an underlying cause of which is the negative consequences of information asymmetry. The legal profession is being required to think deeply about how it should preserve the 'quality guarantee' for consumers and the administration of justice provided by statutory regulation and professional ethics, while also fostering innovation and harnessing the opportunities and benefits of technology.[39]

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[36] See, NSW Land Registry Services, 'What is PEXA?' (online) < http://rg-guidelines.nswlrs.com.au/e-dealings/faqs/general/what_is_pexa>, as referred to at ibid 33.
[37] Background Paper n 32, 23.
[38] Joel Barolsky et al, 'State of the Legal Market: Australia – 2016' Melbourne Law School and Thomson Reuters Peer Monitor (27 September 2016), 10, Table 1. See, Background Paper n 32, 22.
[39] Ibid 47.

FUTURES SUMMIT

13 September 2018

Background Paper

Law Council
OF AUSTRALIA

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Introduction

Just as supply is linked to demand, consumers are inextricably linked to the legal profession – essentially, we couldn't have one without the other. There is a growing recognition of the need to link legal services with other services under a holistic, interconnected and client-centric view to better suit the needs of consumers and, more broadly, the community interest in an efficient, effective and responsive legal profession. This is particularly relevant for improving access to justice for the vulnerable, disadvantaged and marginalised in Australia, and the 'missing middle', although the same trend is evident for many other consumers of legal services.

At the same time, there are a diverse range of emerging influences which are commonly regarded as capable of disrupting the nature of legal services, and the way in which those services are delivered to consumers. The impacts of technology, coupled with changing demographics of the profession, have led to the beginning of a modern legal landscape. *NewLaw* firm models have emerged against the backdrop of more traditional law firm models. Younger generations of lawyers may need to possess more than just legal acumen and practical legal skills to be employable in this new environment, and at the same time may be seeking more flexibility in the way they work, including the ability to work remotely or by freelancing.

The regulatory and ethical environment in which law is practised and legal services are delivered is extensive and complex. Statutory regulation has been evolving – or perhaps accreting - for well over 100 years, for the large part in response to specific problems as they have arisen. Regulatory reform exercises have by and large focussed on creating a high degree of uniformity, or at least harmonisation, of regulatory laws across the States and Territories. Legal ethics is also a product of history, of the development and adoption of ways of thinking and behaving as members of a profession, as the legal profession has evolved. Regulation and ethical prescriptions that arise only in response to identified problems are essentially backward looking. To deal with the emerging future we need to try and think ahead, so that statutory regulation has the scope and flexibility, and the profession can continue to act ethically, in response to the evolving technological context of legal practice.

This Summit draws together thought leaders to explore these key national and international issues that may shape and influence the future directions of and for the Australian legal profession and discuss how the legal profession can best prepare itself for the foreseeable – and even unforeseeable - changes that ultimately await. The outcomes of the Summit will assist the Law Council to identify the areas of future policy focus that it should prioritise now, so that the legal profession is at the forefront by having an actionable future vision for the provision of legal services in the future.

The sessions of the Summit will be centred around three core themes: Consumers of legal services of the future; Characteristics of the legal profession; and Regulation and Ethics.

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PART A: CONSUMERS OF LEGAL SERVICES OF THE FUTURE

How will the consumer's legal services experience change?

1. So much continues to be said about 'big trends' facing the legal profession in the years to come that will fundamentally change the profession and the way law is practised. The number of these 'trends' varies from commentator to commentator – sometimes 3, sometimes 9 and sometimes 10 'ground-breaking' trends are evident.

2. Sweeping statements abound – "digital transformation is revolutionizing every industry — product and service industries alike"; "relentless disruption"; "the legal profession is undergoing a paradigm shift"; and "legal hyper-change becomes the rule, not the exception".

3. This Part of the Background Paper steps back from the hype to describe some of the trends and disruptors, from the consumer perspective. ("Consumer" is used here as a generic descriptor for any user of legal services.) Gaining an appreciation of different ways in which consumers of the future (and indeed present) might, and do, access legal information and services can help us better navigate the complexities of fostering better access and better user-experiences for consumers.

In the first session of the Summit we will explore who are the future consumers of legal services and how will their experience change in response to, for example:

- the adoption of new technologies, including artificial intelligence (**AI**), which can assist the profession to automate processes to provide more efficient services, to ultimately better connect consumers with the legal services they need when they need them;
- the impact that intelligent technology tools will have on the structure of future legal practices, including by using technology as a stand-alone legal service, and as a tool in legal practice;
- exploring innovative ways of working to improve access to justice, for instance including using technological communications to improve the delivery of services to clients remotely (including those living in rural and regional communities).

If consumers are to rely on new technology-based products and non-traditional providers of legal services, we need to ask questions about:

- how to assure the quality of those products and the services delivered by non-traditional providers;
- what standards of responsibility should apply to product creators and service providers in areas such as legal liability, avenues for redress and other consumer protections when digitally assisted legal advice and the services of non-traditional provided through goes awry; and
- the advantages, limitations and risks (including privacy and cyber-security concerns) of technology-based tools and new service provider models.

Digital inclusion and access

4. According to the 2016 Report of the Victorian *Access to Justice Review*, community expectations are changing as a result of the digital revolution. People can book into the doctor or hairdresser online, and outside of regular business hours. They can ask questions and resolve problems with their telecommunications provider, bank or airline online, sometimes instantly. They can have documents and reminders sent directly to their electronic devices. People are becoming more familiar with, and expect, mobile and flexible services, designed around the ways that they work and live.

5. According to the Review, if government complaints bodies, dispute resolution services, and the justice system fail to adapt, there is a risk that the formal institutions of government could become a second-rate service or even irrelevant to meeting the community's needs. The Review found examples of successful initiatives by service providers and other justice system institutions to use different technological platforms to reach members of the community. It has also identified further opportunities to make greater use of technology that would require investment by government in design, infrastructure, and implementation.[1]

The digital divide

6. Any discussion of digital inclusion also needs to consider the 'digital divide' – that is, the disadvantage faced by those who, for many reasons, are being left behind in this 'revolution' in information and communication technologies. The Australian Digital Inclusion Index 2017[2] reported that the "gaps between digitally included[3] and excluded Australians are substantial and widening":

> *Across the nation, digital inclusion follows some clear economic and social contours. In general, Australians with low levels of income, education, and employment are significantly less digitally included. There is still a 'digital divide' between richer and poorer Australians.*
>
> *In 2017, people in low income households have a digital inclusion score of 41.1, which is 27 points lower than those in high income households (68.1).*
>
> *Worryingly, the gap between people in low and high income households has widened over the past four years, as has the gap between older and younger Australians. Particular geographic communities are also experiencing digital exclusion.*

7. While technology-based tools and services (discussed in the next section) potentially offer consumers a greater range of more useful, targeted and less costly

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[1] Victorian Access to Justice Review, Summary and Recommendations 2016 [9].

[2] Thomas, J, Barraket, J, Wilson, C, Ewing, S, MacDonald, T, Tucker, J & Rennie, E, 2017, *Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2017*, RMIT University, Melbourne, for Telstra. Available at URL: https://digitalinclusionindex.org.au/wp-content/uploads/2016/08/Australian-Digital-Inclusion-Index-2017.pdf

[3] Ibid, the Australian Digital Inclusion Index is a measure of three dimensions of digital inclusion: access, affordability, and digital ability.

ways to undertake legal transactions or solve legal problems, we also need to think about more useful, targeted and less costly ways in which the significant proportion of digitally-excluded Australians can access these new tools and services.

Technology

8. The word "technology" does not have a simple or generally accepted meaning. A useful definition for our purposes can be found in a collection of definitions put together by Adam Thierer[4]:

> *Technology may be defined as the application of organized knowledge to practical tasks by ordered systems of people and machines. There are several advantages to such a broad definition. 'Organized knowledge' allows us to include technologies based on practical experience and invention as well as those based on scientific theories. The 'practical tasks' can include both the production of material goods (in industry and agriculture, for instance) and the provision of services (by computers, communications media, and biotechnologies, among others). Reference to 'ordered systems of people and machines' directs attention to social institutions as well as to the hardware of technology. The breadth of the definition also reminds us that there are major differences among technologies.*[5]

Artificial intelligence

9. The July 2018 *Human Rights and Technology Issues Paper*[6] by the Australian Human Rights Commission provides a digestible overview of AI.

> *There is no universally accepted definition of AI. Instead, AI is a convenient expression that refers to a computerised form of processing information that more closely resembles human thought than previous computers were ever capable of. That is, AI describes 'the range of technologies exhibiting some characteristics of human intelligence'.*
>
> *There are two basic types of AI:*
>
> - *'Narrow AI' refers to today's AI systems, which are capable of specific, relatively simple tasks – such as searching the internet or navigating a vehicle.*
> - *'Artificial general intelligence' is largely theoretical today. It would involve a form of AI that can accomplish sophisticated cognitive tasks on a breadth and variety similar to humans. It is difficult to determine when, if ever, artificial general intelligence will exist, but predictions tend to be between 2030-2100.*
>
> *AI applications available today are examples of narrow AI… Narrow AI is being integrated into daily life. 'Chatbots' can help with simple banking tasks. AI can use natural language processing to book a restaurant or haircut. It is being developed to debate with us, using a machine learning algorithm and deep*

[4] *Defining "Technology"*, Adam Thierer, at URL: https://techliberation.com/2014/04/29/defining-technology/
[5] Ian Barbour, Ethics in an Age of Technology, The Gifford Lectures 1989-1991, Volume 2 [3]-[4]
[6] Available at URL: https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-and-technology-issues-paper-2018

neural networks to present arguments and better inform public debate. If properly implemented, such applications may provide significant benefits.

[T]oday's AI-informed decision making is most reliable when applied to relatively simple rule-based calculations. It is far more difficult to use narrow AI to perform what is considered quintessentially human or subjective judgment, such as assessing whether a painting is beautiful, or a joke is humorous.

10. "Artificial intelligence" as a category is therefore not necessarily the most useful lens for understanding the types of tools that may be employed in the delivery of legal services. Particularly when it comes to understanding the ethical implications and risks of deploying particular tools, a far more fine-grained analysis is necessary. The real question is not whether AI is involved but rather what the tool does and whether it is appropriate in the context in which it is being deployed.

11. For example, pre-programmed logic can be built into a system that navigates a user through a set of queries relevant to their legal issue, where the path is based on answers to earlier questions. It is possible for such tools to direct a user to the appropriate legal team or service, to provide legal information relevant to their issue, to prepare a draft document (such as a will) that takes account of their individual circumstances and preferences, to complete a form (with their individual details), and so forth. The logic for such systems is programmed into the system – the intelligence really lies in the human programmer (and others that they may consult) rather than the system itself. Nevertheless, such tools can replace roles that might otherwise have been played by a lawyer or administrative staff.

12. Such tools are quite different from those that rely on patterns and trends in historic data, as is the case for machine learning tools. Machine learning has various applications in legal practice, including in the context of electronic discovery, where it can be used to group documents together, rethread email conversations, or identify documents that may be discoverable. Here, the logic is not entirely pre-programmed in but rather "learnt" by the algorithm based on patterns in how humans identify discoverable documents in a "training" data set. So, for example, the algorithm may note that documents flagged as discoverable originate from particular persons or organisations, are stamped with dates in a particular range, contain particular subject lines, words, phrases or images, and/or are stored in particular locations. Such things are not programmed into the algorithm; but they correspond (broadly speaking, relying on probabilities) with how humans have classified documents in the training set.

13. Not all machine learning techniques work in the same way. They vary along several dimensions. An algorithm may be unsupervised, meaning it detects clusters and patterns in a data set that has not been subjected to classification by a human. An algorithm may be more or less able to give "reasons", comprehensible by humans, for classifications it makes or clusters it identifies. It may give more or less weight to outliers (that have an unusual classification, for example). It may prefer false positive or false negatives (to varying extents), or weight them evenly. Particular algorithms

may have particular properties and be more useful at some tasks compared to others.

14. In summary, while 'Narrow AI' offers (and in many contexts already delivers) easier ways of going about ordinary aspects of daily life, caution is needed in its application to legal transactions and legal problems. The case of *Wisconsin v Loomis*[7] and the reliance upon the COMPAS algorithm in profiling an offender's likelihood of reoffending (see from paragraph 158 below) is a timely reminder that tools need to be assessed at the micro-level (of a particular tool used in a particular context) rather than at the macro-level of "artificial intelligence".

The internet

15. While there is an abundance of legal information available on the internet, this might not generally be seen to be user-friendly, particularly by those unfamiliar with the law and legal process. On the other hand, obtaining personalised legal advice is unaffordable to the majority of the most vulnerable and disadvantaged members of the community, as well as the 'missing middle'.

16. The internet offers a huge resource for those with the skills to use it well, and the confidence to 'do it themselves'. Using the internet as a learning tool, accessing online legal products and services and navigating the legal system may well become the regular "first step" for many consumers in understanding a legal problem, deciding what to do about it, undertaking a legal transaction or self-representing before courts, tribunals and alternative dispute resolution processes.

17. While there are opportunities for consumers there are also risks, particularly around whether the information is legally correct, whether the information is up to date and relevant to the consumer's jurisdiction, whether the consumer has properly understood and applied the information, and what redress a consumer may seek for losses suffered if the information or guidance is wrong.

Online legal services

18. According to Dan Hunter, Foundation Dean of Swinburne Law School, because of the "twin effects of venture capital and rule-based computer systems" on automation capability, areas including property transactions, probate, family law and criminal law will not be "good bets" on practice areas for lawyers over the next ten years due to their consumer focus and the ease with which they can be codified.

> *"Where the law is simple, and where there are lots of potential consumers, we will see well-funded entrepreneurs swoop in with automation solutions that will supplant lawyers…This will involve a lot of basic document automation, chatbots and mobile apps.'"*[8]

19. There are already a huge number of online websites guiding consumers through the process of preparing legal documents. On such example is Law Central[9] which

[7] 881 NW 2d 749 (Wis, 2016)
[8] See: LawyersWeekly, 30 July 2018 at https://www.lawyersweekly.com.au/biglaw/23727-law-professor-forecasts-deluge-of-further-disruption
[9] Available at URL: https://lawcentral.com.au/Default.asp

"uses interview technology that asks you questions and provides you with helpful legal hints. Your answers are then used to customise and produce a document to suit you and your needs. Every Law Central legal document is written and maintained by a lawyer and signed-off by the authoring law practice."

20. Documents relating to creating and managing trusts, partnerships, self-managed superannuation funds, for wills and estate planning, for commercial transactions, employment and companies are available. According to the website, Law Central is also a "Preferred Supplier":

> *Law Central's legal documents and interview technology cater for a variety of users and situations. As such, users build documents for themselves and for their clients. Law Central is a preferred supplier within several professional industries, such as accounting and financial planning. It is now one of the largest suppliers of Australian legal documents online with over 30,000 registered users.*

21. Will the commoditisation of basic legal documents bring about a significant change in consumer attitudes and behaviours to legal transactions, particularly the demand for legal services from traditional law practices?

Online service providers

22. There is a constantly growing supply of online service providers, information and facilitators that are changing the way consumers can access legal advice and services. Some examples are:

- legaladvice.com.au[10] provides a service that "will help you obtain the legal advice you need to pursue your legal rights and legal remedies". The consumer completes a free on-line 'legal enquiry form' setting out the "details of your legal matter", the area of law and contact details. The service the website provides is to put the consumer "in contact with an Australian Lawyer who is ready, willing and able to assist you with your legal matter and provide you with the legal advice you need." The "Terms of Use" include:
  - the information on the web-site is not intended to constitute professional legal advice;
  - the legal practitioner to whom the legal enquiry form is referred may be obliged to pay a referral fee to legaladvice.com.au that depends on the type of matter and any legal restrictions on payment of a referral fee applies;
  - waiving any legal professional privilege and/or confidentiality attaching to tax invoices issued by the legal practitioner and agreeing to permit the legal practitioner to provide legaladvice.com.au with a copy of the tax invoice together with a written summary of the outcome of the legal matter.

[10] URL: http://www.legaladvice.com.au/

- Tan and Tan Lawyers[11] provide a free email-based service that answers straight forward legal queries. The service is "for quick questions that can be answered without a proper consult. Some legal issues require a proper consult to ensure that you get the best advice possible." The web-site carries a disclaimer that "unless we are properly retained as your lawyers, the advice service does not render us responsible to you." In addition to the email service, the law firm offers "Skype Low Cost Legal Advice", "Phone Low Cost Legal Advice", "See a Lawyer for Legal Advice" (an appointment booking form), and an "After Hours Lawyer" service.

23. This trend is not limited to private law practices or commercial providers. The Legal Services Commission of South Australia[12] provides the following free services:

- a telephone legal advice service "for preliminary information, advice and referrals";
- an appointment-based service with a legal adviser "to identify the client's problem, to inform the client of their rights and obligations and to help them understand what course(s) of action can be taken. The adviser may also draft letters for clients where appropriate";
- a Legal Chat service, which is made available as a public service "for information purposes only and should not be relied upon as a substitute for legal advice";
- 24Legal, for guided access to legal information "24 hours a day, 7 days a week" through common questions and answers.

24. Another example is the *Not-for-profit Law* website developed by JusticeConnect[13] which provides web-based access for not-for-profit organisations to:

- legal information;
- telephone advice from in-house lawyers on a call-back basis;
- a referral for pro bono assistance from a member law firm (for more complex legal matters); and
- referral to another body who may more appropriately help, including referral to other legal services.

25. Moving beyond human interaction with an on-line service provider, the term 'robot lawyer' refers to computer applications that enable consumers to deal with a legal issue without requiring the involvement of a legal practitioner.

26. For example, in the United Kingdom, the AI-driven **Do Not Pay** app helps determine whether people have a case for not paying their parking tickets. The **Do Not Pay**

[11] URL: https://www.tanandtanlawyers.com.au/free-email-legal-advice/
[12] URL: https://lsc.sa.gov.au/cb_pages/legal_advice.php
[13] URL: https://www.nfplaw.org.au/legal-advice

app overturned $3 million in parking tickets in its first few months of service, and 375,000 [tickets] over a two-year period.[14]

27. In Australia the Melbourne law firm Doogue O'Brien George has made available a free tool, **Robot Lawyers,** "as part of their pro bono contribution to the legal system". According to Victoria Legal Aid,[15] the free tool:

"aims to help people who cannot afford a private lawyer and don't qualify for a grant of legal aid. There are many people who appear in the Magistrates' Court to plead guilty without a lawyer. These unrepresented accused have to tell their story alone and often under the pressure of an unfamiliar and very public environment. Many people in this situation find it difficult to tell their story clearly. This slows the courts down and may not provide the best outcome.

Robot Lawyers is an example of innovation in the legal aid system and provides a service where currently there is a gap. It will inform magistrates of the main issues relevant to a sentence, and minimise the need to cross-examine the accused.

Andrew George, partner, Doogue O'Brien George says,

> *'this in no way can possibly take away the role of a lawyers. It simply helps those who cannot afford a lawyer and their only choice is to represent themselves before the court'.*

Robot Lawyers does not replace a lawyer and does not give legal advice. It guides users through a series of questions which the court is likely to want addressed in deciding the appropriate sentence. It then takes that information and puts it into a single document, which the self-represented person can then hand up to the court.

28. Robot Lawyers is only designed for people who intend to plead guilty or are not contesting or disputing the facts in the case. There are currently 5 Robots: Driving Robot; Assault Robot; Drug Robot; Theft Robot; and Drink/Drug Driving Robot.[16]

Unbundled services

29. Unbundled legal services, also known as limited scope or limited retainer legal services, are described as the representation of a client – without expectation of the traditional full-coverage of a given legal matter by the lawyer. This is generally seen as the lawyer assisting their client with specific issues or tasks, at a lower cost than full representation, without the expectation that the particular lawyer will be the party's personal lawyer, 'on call' or assisting in future matters.[17]

30. The concept of unbundled services is encapsulated in the *NewLaw* legal practice model, as the two concepts are client focussed and results driven. Unbundling is

[14] See URL: https://www.forbes.com/sites/danielnewman/2017/08/29/top-5-digital-transformation-trends-in-legal/#20b695d076f8
[15] See URL: https://www.legalaid.vic.gov.au/about-us/news/robot-lawyers-innovation-in-criminal-law-and-legal-aid-system-0
[16] See URL: https://www.robot-lawyers.com.au/
[17] Forrest Mosten, 'Unbundling of Legal Services and the Family Lawyer' 28 FAM. L.Q. 421 (1994).
NB: Mosten coined the term 'unbundling'.

also a significant aspect of provision of legal services by legal aid commissions and community legal services.

31. Unbundling is for clients who do not seek full representation, or have a specific need, and who would not substantially benefit from full representation or those who do not seek full representation. The three categories of unbundled services are: general counselling; limited court appearances including assisting in conducting discovery; and assisting in the preparation of court submissions and other legal forms.[18]

32. Unbundled legal services are not suited to every situation however, if a client's needs extend beyond a single issue, or prolonged contact over a longer period of time is necessary for completion of a matter, then full representation by a lawyer is the more appropriate choice.[19]

33. The aim of unbundled (targeted) services is to fill the space between a lack of representation and full representation, with a focus on people who cannot afford full representation or would be disadvantaged if they were left to self-represent.[20]

How unbundled legal services might affect access to justice

34. Many of the issues that were presented in the 'Big Law' model [and it is suggested, in traditional law firms] involved clients being required to have an extensive and personal relationship with their lawyer. This as a result is expensive and does not assist in access to justice for disadvantaged clients, who cannot afford full representation.[21]

35. Although the marketplace for legal services is growing, the cost of legal services consistently increases, with the access to legal representation in regional, remote and rural communities becoming increasingly harder to achieve. The people in these demographics are often unable to afford a lawyer and are known to benefit from case specific services or one-time assistance from socio-legal clinic services.[22]

36. In general, the community's knowledge of the law is variable – while people are aware that they have rights and protections under the law, they may not know the intricacies sufficiently well enough to traverse the labyrinth of legal principles required to advocate for the protection of their rights.[23]

37. An increase in access to unbundled legal services could go some way to improving access to justice by 'filling the gap' between no legal representation and the full-service model (which is unaffordable for many).

38. The accessibility of unbundled services provides relief to the parties involved, by focusing on issues that are immediately presented without time spent on issues that

[18] Barbra Bailey, 'Unbundled Legal Services' *Law Council of Saskatchewan* (October 2013), p 1-3.
[19] Ibid, 3.
[20] Ibid.
[21] Ibid, 4.
[22] Ibid.
[23] Ibid.

do not require immediate resolution. Furthermore, the use of dispute resolution processes in conjunction with limited scope representation could empower litigants to resolve issues more efficiently and preserve the rights of clients who may have self-represented as an alternative.[24]

Joined-up services

39. There is a growing recognition of the need to link legal services with other services under a holistic, interconnected and client-centric view of the profession to better suit the needs of consumers. This is particularly relevant for improving access to justice for the more vulnerable, disadvantaged and marginalised individuals in Australia.

40. But the underlying approach is equally significant for commercial and other consumers of legal services. While the holistic, client-centric approach is not new, the scope for converging different services is enhanced when information technology systems can interact with each other, and businesses and professions have the ability to meld legal and other professional services within multi-disciplinary structures.

Socio-legal clinics

41. The socio-legal clinic model of responding to the needs of consumers of legal services is a combination of the *NewLaw* model and emerging 'technology centric' models for service delivery, with a focus on the use of online handbooks, resources and 'chat help' for the purposes of early intervention and client safety.

42. The model was pioneered by the Canberra Community Legal Clinic and has been increasingly embraced by legal aid commissions throughout Australia. The socio-legal model and the *NewLaw* model have many shared principles, including the importance of client outcomes and efficient disposal of matters.

43. The approach taken by the socio-legal clinic model assumes there are multiple facets to issues presented by the client, both social and legal. The benefit to this approach is that the clinics are equipped with a specialised focus on the 'wrap around needs' of a matter, where they can address social issues that arise from legal issues, for example housing or tenancy instability caused by family disputes and provide care and support to clients in these matters.

44. The socio-legal model expands on the services provided in *NewLaw* models, by allowing non-lawyers to assist clients through providing advice, conducting legal research for a client and simple representation in some dispute cases. These services are generally not available to family law matters due to privacy concerns, complexity of the issues and the requirement for specialist training or qualifications.[25]

[24] Ibid, 16.
[25] Alison Creighton and Matt Hall, 'Less and More: Providing Legal Aid in Family Law Matters' (1999) 75 ALRCRJ, 60.

Integrated services

45. There is said to be an increasing trend toward the integration of legal services with other professional services, facilitated by the availability of the multi-disciplinary partnership and incorporated legal practice, which enables a law practice to provide legal services as well other services. The Law-Society of Western Australia's August 2017 Position Paper *People Unlawfully Engaging in Legal-Work: Protecting the Community*[26] (**Position Paper**) noted, at [9.3]:

> *… other industries such as accounting, investment and others are crossing over into the legal arena and offering multidisciplinary services. Major accounting firms are increasing the size of their legal teams to manage this demand of integrated services, with several having become providers of these integrated, one-stop services; and*
>
> *There is an increasing trend of businesses handling more legal work in house. Lawyers Weekly (July 2017) asked the profession "in the next 12 months, which of the following economic/market disruptors will have the biggest impact on the legal industry?". Nearly 40% of respondents answered that it would be corporate counsel taking more work in-house. That is because corporate counsel are becoming more specialist in their roles and are able to act as business advisors, rather than just as the legal sign-off at the end of a deal as they may have been in the past.*

46. This trend is also not limited to private law practices or commercial providers. For example, Health Justice Australia[27] notes on its website:

> *In Australia many people on low incomes have three or more legal problems a year. Evidence shows they are more likely to talk about these with a trusted health professional than a lawyer. And those legal problems can often contribute to – or even cause – their health problems.*
>
> *That's why we're working with lawyers and health professionals to create health justice partnerships (HJPs) that facilitate better health and justice outcomes for everyone. Through research, resources and advocacy, Health Justice Australia is working to realise the benefits of local HJPs on a national scale.*

47. There are currently 46 Health Justice Projects across Australia, where hospitals or health clinics have partnered with Legal Aid Commissions, community legal services and other legal assistance services.

Unregulated legal services providers

48. The Law Society of Western Australia also identified a number of trends toward alternative ways of undertaking (and therefore, from a consumer perspective, of accessing) legal services or products by unregulated providers – that is, by people

[26] Available at URL: https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2017AUG04-Law-Society-Position-Paper-People-Unlawfully-Engaging-in-Legal-Work-Web.pdf
[27] See URL: https://www.healthjustice.org.au/

not qualified and authorised to engage in legal practice. The three typical circumstances identified are:

- a lay person performs legal work outside the context of carrying on any profession for which he or she is qualified;
- a professional, who is not a legal practitioner, performs legal work in the course of other activities associated with the practice of their own profession. Examples might include tax agents, accountants, patent attorneys and contract managers;
- a non-lawyer who is permitted by legislation to undertake legal work. Examples are where a party is authorised to be represented by a non-lawyer in proceedings before the Liquor Commission or the Fair Work Commission; Patent Attorneys and Migration Agents.

49. Other developments identified in the Position Paper include:

- financial planning firms who offer their services of representation for a percentage of the obtained financial settlement;
- public officers in the government sector who are permitted to provide legal services as part of their employment duties;
- people with legal qualifications only who provide legal advice as part of their employment without adequate supervision; as well as business brokers and consultants;
- websites that allow the general public to access many legal forms and documents, in all areas of law such as, for example, wills and estates, property, partnership and joint ventures, employment, business, corporate and intellectual property. Users can either download forms to complete themselves or input prompted information so that a personalised document is produced.

Who will be consumers of legal services in the future?

50. Consumers of legal services are not a homogeneous group. To help us understand the potential impact of present and possible changes in law, policy, justice systems and legal services, we find it useful to define and categorise consumers into cohorts and sub-cohorts based on similarities across needs, characteristics or experiences.

51. In the (improving) access to justice policy context, we generally refer to two cohorts - the *vulnerable and disadvantaged* and the *missing middle* and within these cohorts we identify sub-cohorts.

52. Among the *vulnerable and disadvantaged* cohort we can identify sub-cohorts based on, for example, those who can and those who cannot access legal aid, indigenous communities, refugees and asylum seekers, people with disabilities, and people who are homeless.

53. The *missing middle* are “the ordinary working people who cannot afford legal representation for everyday legal concerns such as commercial matters, family law,

injury compensation. Those in the 'missing middle' would never be able to qualify for legal aid assistance so they fall through the cracks in our justice system."[28] Among the missing middle cohort we can identify sub-cohorts based on, for example, those who rely on community legal services and pro bono services, self-represented litigants, and citizens in rural, regional and remote communities without adequate access to legal services

54. There is a third cohort outside of the (improving) access to justice policy context, without a specific name, which encompasses the rest of the consumers of legal services. Within this cohort we can identify sub-cohorts based on, for example, consumers who engage the private legal profession for private and domestic matters (for example, wills, probate, conveyancing, consumer matters and family law); consumers who engage the private legal profession for business matters (for example, contract law, business structures, business regulation, mergers and acquisitions); and consumers who engage the private legal profession in criminal and civil offences matters. We can also identify other cohorts such as governments, corporations with in-house legal departments, and the courts.

55. To get a better understanding about the impact of emerging and future changes in the legal landscape, we need to ask whether these cohorts are useful for understanding the needs and characteristics of consumers of legal services of the future. What changes are occurring or anticipated to impact cohorts and sub-cohorts of consumers of legal services? Are these cohorts changing (for example growing or diminishing) relative to one another? To better understand the impact of emerging and future changes in the legal landscape do we need to discard some old cohorts and define some new ones?

Segmenting consumers – UK Research

56. The Legal Services Consumer Panel, an independent arm of the Legal Services Board (UK), published a Paper in March 2017 *Segmenting Consumers: understanding the needs of legal services consumers*, to promote awareness of what segmentation can do to better understand the needs of legal services consumers in England and Wales.[29] While primarily undertaken to assist regulators, the Report noted there are benefits for providers of legal services in that segmentation can:

- identify opportunities to offer consumers different methods of service delivery at different prices;
- help identify new needs;
- identify opportunities to innovate in order to meet those needs; and

[28] Morry Bails, Law Council of Australia President, 16 March 2018. see URL: https://www.australasianlawyer.com.au/news/rule-of-law-not-accessible-to-all-in-australia--law-council-president-247787.aspx

[29] Legal Services Consumer Panel, Legal Services Board (UK), *Segmenting Consumers: understanding the needs of legal services consumers,* March 2017, available at URL: http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/30.3.17%20Consumer%20Segmentation%20Final%20Report.pdf

- help deliver better tailored services to cohorts of consumers, for instance vulnerable consumers.

57. Drawing on a range of research, including the Panel's *Tracker Surveys*, the Legal Services Consumer Panel had the following insights:

    - in 2018, 13% of consumers took the unbundled approach, particularly in probate (34%) and advice and appeals about benefits or tax credits (33%) however the overall proportion of consumers taking an unbundled approach had fallen from 19% in 2017;
    - around one in five transactions include some element of unbundling; and
    - unbundling services primarily benefits consumers with good literacy and capability and those looking to reduce costs and maintain a degree of control, rather than those for whom money is a barrier to accessing legal services. This is significant if unbundling is to be used to increase access to justice rather than purely to reduce cost. It reinforces that unbundling is not a one size fits all approach and that different levels of support will need to be offered to different groups of consumers;
    - the proportion of consumers having legal services delivered through email or the internet/on-line had increased from 21% in 2012 to 30% in 2018, while the proportion who receive face-to-face service had remained stable over the past three years at 46%;
    - face-to-face services are predominantly used in will drafting (80%) and power of attorney (64%) while email or the internet are mostly accessed in conveyancing (52%) and problems with consumer services or goods (37%). Telephone services are highly accessed for accident and injury claims (42%);
    - consumers in higher social grades are more likely to use legal services over the internet (31%) than those from lower social grades (21%);
    - 73% of consumers pay for their legal service themselves or with the help of family and friends - an increase of 17% since 2012 – while reliance on other types of funding has slightly fallen in most areas – for example, reliance on funding through legal aid had decreased from 5% in 2017 to 2% in 2018; and
    - consumers who use conveyancing, power of attorney and will drafting pay for the fees themselves (94%, 86% and 84% respectively); 35% of those using legal services for criminal charges and offences fund it through legal aid, and when using legal services for employment disputes, 36% fund it through their employer.

Segmenting consumers – some Australian perspectives

58. Segmentation studies in Australia about consumers of legal services have tended to focus primarily on cohorts or specific problem areas rather than studies across all consumers of legal services (as the UK research appears to have done).

59. A comprehensive survey-based nation-wide picture of legal need is contained in the *Legal Australia-Wide Survey: Legal Need in Australia*, published by the Law and Justice Foundation, New South Wales in August 2012.[30] Undertaken from a 'legal problems experienced' perspective, the Law and Justice Foundation reported:[31]

- 50% of the Australian population experience a legal problem in any one year;
- the most common legal problems relate to consumer matters (21%), crime (14%), housing (12%) and government (11%);
- legal problems tend to occur in clusters that might be connected in some way:
    - consumer/crime/government/housing and money problems;
    - credit/debt and family problems;
    - employment/health/personal injury and rights problems.
- legal problems are dealt with in various ways:
    - seeking advice from legal and non-legal professionals (49-53%);
    - communicating with the other side (34-39%);
    - consulting relatives and friends (17-24%);
    - court or tribunal proceedings (8-12%);
    - formal dispute resolution sessions (7-10%);
    - taking no action (16-21%);
    - overall only 12-17% of respondents sought advice from a legal professional.
- legal problems are finalised in several ways:
    - via court or tribunal proceedings, or formal dispute resolution and complaint-handling processes (<10%);
    - via agreement with the other side (27-32%);
    - via not pursuing the matter any further (28-31%);
    - via decision or action of other agencies such as government bodies, insurance companies or the police (13-17%).

60. However, as the Productivity Commission pointed out in 2014 "it is widely acknowledged that data on the civil legal system leave much to be desired ... The absence of data has hampered policy evaluation and caused a reliance on qualitative assessments."[32] The Productivity Commission reported that there is strong qualitative evidence indicating unmet legal need in several different areas of

[30] Available at URL:
http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Australia.pdf
[31] Ibid, see Chapter 9 generally – *Findings Across Australia in context.*
[32] *Access to Justice Arrangements*, Productivity Commission Inquiry Report No.75, Overview [33]

law and among different groups in society, concentrated among the most vulnerable and disadvantaged cohort, however, attempting to quantify unmet legal need in a consistent manner is much more difficult.[33]

61. Also, the Productivity Commission noted that while the *Legal Australia-Wide Survey* covered criminal and civil law problems, it "excluded events with legal implications that did not result in problems or disputes, such as purchasing or selling a house or making a will without any problems."[34]

62. Getting a useful picture of the characteristics of legal services consumers in the third cohort is problematic. Insights need to be gleaned from multiple studies and surveys.

63. The *2017 Legal Benchmarking Report* by Macquarie Bank[35] analysed 275 survey responses from a cross section of law firms from one-person practices to large national firms. The Report contained the following insights:

- among the most successful large firms (annual gross fee income over $20 million) 73% use, or plan to use decision dashboards, 54% use, or plan to use data mining and 45% use, or plan to use predictive analytics;
- the successful mid-sized firms (annual gross fee income between $4 million and <$20 million) are cost sensitive and have invested in "efficiency enhancing" technologies such as document management and scanning tools (63%), electronic document signing (43%) and e-discovery (23%);
- the successful small firms (annual gross fee income < $4 million) tend to be specialists, earning fees from relatively few practice areas. Uptake of new technologies (aside from back-office technologies) was not reported as a trend or characteristic; and
- lower profit firms are more frequent investors in innovative but arguably less mature technologies, such as artificial intelligence (38% using or planning to use) and automated document review and creation (69% using or planning to use).

64. The University of Melbourne composed annual reports, *State of the Legal Market*. The reports in 2015, 2016 and 2017 took statistics from the 'Big 8' firms and a majority of large firms to gain an insight into the trends that are taking place in the Australian legal services market.[36]

65. The conclusion of the 2015 report exposed that there was a decline in the demand for legal services, specifically amongst the 'Big 8' and other large firms, attributed to tighter margins in the corporate world and an increase in price-based competition. The approach taken by many of the larger clients is that they will no longer accept

[33] *Access to Justice Arrangements*, Productivity Commission Inquiry Report No.75, Vol 1, [98]
[34] *Access to Justice Arrangements*, Productivity Commission Inquiry Report No.75, Vol 1, [87]
[35] Available at URL: https://www.macquarie.com/au/business-banking/campaigns/legal-benchmarking-2017/
[36] Joel Barolsky et al, 'State of the Legal Market: Australia – 2015' *Melbourne Law School and Thomson Reuters Peer Monitor* (27 September 2015).

average lawyers with high fees, and a move toward fiscal responsibility and 'paying for a product' are increasingly becoming the trend.[37]

66. The 2015 report noted a move toward education and the importance of cultural cohesion and diversity in legal practice, with agility and discipline in resolving issues further separating successful lawyers from the group.[38]

67. At the end of the 2017 report it was proposed that law firms who want to expand or break into the international market must ask themselves "how will the use of technology better our practices?"[39] This is due to the move toward efficiency, security and utilisation of technology to assist practices.

68. The report found the legal market of the 2017 financial year was underwhelming and suspected that the work practices of many firms in times of uncertainty is to exploit their strengths and explore ways to adapt their business, a concept known as organisational ambidexterity.[40]

69. A fresh look at the *NewLaw* model (to be discussed later) could be attributed to the decrease in the billed rates from the years 2015 – 2017, although the billed rates were steadily increasing between the years 2012 – 2015.[41]

70. Another interesting trend is the consistent decline of demand in the practice area of banking and finance, with a -10.5% loss in the 2015 financial year,[42] to -1.3% in 2016,[43] and further 5.6% in 2017.[44] These declines would have significant effect on the total perceived demand of the two areas, as they comprised 12% of the total practice demand in the last three years.

71. The two highest rated "pace of change"[45] macro trend categories for the recent 2017 report (both scoring a +5) were the supply of legal graduates and growth of legal technology.[46]

72. The growth of technology in law was underpinned in the report by five principles; exponential increase in computing power, evolution of cloud computing, the availability and cheap access to mobile technology, an increase in economic pressures to reduce costs, and the healthy profit-margins enjoyed by many law firms.[47]

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[37] Ibid, 15.
[38] Ibid.
[39] Joel Barolsky et al, 'State of the Legal Market: Australia – 2017' *Melbourne Law School and Thomson Reuters Peer Monitor* (27 September 2017), 16.
[40] Charles O'Reilly and Micheal Tushman, 'Organizational Ambidexterity: Past, Present and Future' *Academy of Management Perspectives* (11 May 2013), 4.
[41] Ibid, n 4, 11, Chart 11; Above n 1, 8, Chart 10.
[42] ibid n 1, 5, Chart 4.
[43] Joel Barolsky et al, 'State of the Legal Market: Australia – 2016' *Melbourne Law School and Thomson Reuters Peer Monitor* (27 September 2016), 10, Table 1.
[44] ibid n 4, 11, Chart 6.
[45] "Pace of change" refers to situations where the data and market results have been rated on a scale of -5/+5 for the positive or negative nature of the trend.
[46] ibid n 4.
[47] Ibid, 7.

Summary

73. The digital revolution is changing the way we do so many things, however, there is still a digital divide excluding a significant proportion of Australians with low incomes, education and employment, as well as regional and remote communities.

74. When thinking about a definition of “technology” and the consumer experience of the law, how can a consumer be confident that the process of applying organized knowledge by ordered systems of people and machines creates quality products that enable practical tasks to be undertaken that are legally correct?

75. The internet is an abundant source of legal information and provides free or low-cost access to a growing range of legal-related “self-help” tools. Yet, there are risks involved when a consumer consults ‘Google QC’, such as: whether the information is legally correct; whether the information or self-help tool is up to date and relevant to the consumer’s jurisdiction; whether the consumer has properly understood and applied the information; and whether the consumer has any redress for losses suffered if the information or guidance is wrong.

76. Also there seems to be, on the one hand a growing demand for unbundled and limited scope/limited retainer legal services, yet on the other there is a growing demand for joined up services, involving socio-legal service combinations and legal/financial and other professional services combinations.

77. We do not have a very good understanding of either the current or the emerging market for legal services. There appears to be a need for new ways to segment the emerging market better understand the needs and characteristics of consumers in light of the influences that technology and other forms of services are having on consumers.

PART B: CHARACTERISTICS OF THE LEGAL PROFESSION

78. The demographics and landscape of the legal profession and its professionals is continuing to change. The workforce is becoming more diverse by way of gender, race, age, sexual identity and other characteristics as workplaces embrace inclusive measures to ensure they are equipped with the best and brightest and are able to best represent their client's needs.

79. More individuals are seeking flexibility in their way of working to assist their family and other aspirations, and in many cases value this over remuneration and traditional partnership rewards. Advances in technology allow professionals to be mobile and work remotely. Technology provides multiple ways of communicating and accessing services 24 hours a day, seven days a week and will be second nature to the next generation of legal practitioners and their clients. Does the 'forever accessible' nature of communication technology present a significant challenge to practitioners who are seeking a different work/life balance?

80. In order to meet client needs and the demand for legal services, the profession needs the right number of lawyers, with the right set of skills, in the right locations, at the right time. The next generation of lawyers need to be adaptable to this new and changing environment to be successful. But success in this sense involves matching the needs of clients in accessing legal services to the aspirations of legal practitioners in pursuing a career in the law. Just as consumers are not a homogenous group, so to lawyers will not be a homogenous group.

In the second session of the Summit we will explore issues such as:

- implications for legal education, including preparing today's law students to be effective in the legal landscape of the future;
- technology implications for law practices;
- what law firms will look like in the future – including the sustainability of the traditional law firm partnership model as opposed to *NewLaw* models;
- implications of mobile, technology enabled workforces on clients and legal practitioners;
- how many lawyers will we need, and where will they come from.

Implications for legal education, including preparing today's law students to be effective in the legal landscape of the future

Technology

81. The loss of jobs due to automation is regularly discussed in terms of its impact on unemployment, the economy, and ways of life. Although much of the rhetoric related to automation and the legal industry is around 'supporting' rather than 'displacing'

lawyers,[48] the profession should acknowledge the potential for significant disruption and recognise areas of need in relation to legal education.

82. The incorporation of technology, in particular different forms of AI, into the law curriculum is an essential step towards ensuring that automation provides appropriate support for the legal industry, rather than replace it. This was identified by the UNSW Law Mini-Curriculum Review in 2017.[49]

83. That report suggested that there will be two main uses of technology in the legal profession in the future. The first is the back-office use of technology, allowing lawyers to better run their own practices. The second is client service applications, where legal services are provided by technology. In relation to these areas of need, the report stated:

> *For the law student seeking to be a legal practitioner the aptitude needed involves a number of elements. The lawyer needs to understand technology sufficiently to be able to identify technology that should be employed in any given situation because it is the more efficient way to proceed. It will achieve the client's objective or obligation in a cost-effective manner. To do this the lawyer must understand what the technology does. They do not need to create the technological solution, or have the skills to create it, rather they need to be able to use it. The Law Society of NSW's Future of Law and Innovation in the Profession (FLIP) report stated that "Being at least technology-literate, and preferably having some hands-on ability with technology were a central focus of representations to the Future Committee.*[50]

84. Most Australian universities offer technology focused law courses. Many of these subjects revolve around traditional subject matters. Intellectual Property Law and Information Technology Law courses are obvious examples of traditional law subjects that have had to adapt to understand the technological context of the fields in which those areas are placed.

85. Fewer, however, are the subjects that directly address the need for law students to be technologically literate in order to address the two main uses of technology identified above. Some law schools are, however, making good progress on this front.

86. The University of Melbourne Law School, for instance, offers a course called "Law Apps", where students "design, build and release a live legal expert system that can provide legal information to non-lawyers", therefore providing students with a

[48] SA Mathieson, "AI Automation Starts to transform Legal Profession" *Computer Weekly* (March 2017), < https://www.computerweekly.com/feature/AI-automation-starts-to-transform-legal-profession >
[49] Michael Legg, "UNSW Law Mini-Curriculum Review Report on Technology and the School Curriculum" [2017] *UNSWLRS* 90, < http://classic.austlii.edu.au/au/journals/UNSWLRS/2017/90.pdf >
[50] Ibid, 5-6.

"unique opportunity to explore and apply the potential of artificial intelligence to provide practical solutions to common legal problems".[51]

87. The University of Technology Sydney Faculty of Law has recently initiated a standalone major within their Bachelor of Laws degree, being a Legal Futures and Technology Major. The new major is designed to prepare "Graduates for careers that require a capacity to work with technology and its impact, innovation and new law as a result of unprecedented change and disruptive technologies".[52]

88. A similar course is available at the University of New South Wales. The University of Queensland offers a different course but with similar learning outcomes.

89. It is also clear that this sort of technology is at the forefront of many young lawyers' minds. The Legal Forecast, an Australian not-for-profit organisation run by early-career lawyers, has organised well-attended workshops and a "Disrupting Law" competition, where teams of law-students were partnered with law firms and challenged to develop the next big idea to advance legal practice in a novel way utilising technology. Of the 13 ideas created by the 13 teams, the Legal Forecast predicted that at least four to five ideas would eventually be taken to market.

90. It is essential that young lawyers are actively engaged and thinking about the ways that technology can assist their careers. Universities should also make the most of opportunities such as those offered by The Legal Forecast and should encourage student engagement in such initiatives.

91. Good lawyers are widely recognised as not only technically and intellectually gifted, but highly emotionally intelligent.[53] With the move towards automation in many industries, legal practitioners will be required to better demonstrate emotional intelligence in order to stay competitive in a market that will increasingly utilise technology and AI in the place were lawyers once stood. Our legal education must assist law students to become emotionally intelligent so that they are able to differentiate their value from services that are automated.

92. Research from the University of the Sunshine Coast supports the importance of incorporating emotional intelligence into Law School curricula.[54] Susan Douglas, in a 2015 paper titled 'Incorporating Emotional Intelligence in Legal Education: A Theoretical Perspective', concluded that 'emotional intelligence provides a conceptual framework from which to give space to the reality of human emotional experience'. As well as assisting law students with their own wellbeing, Douglas found that 'Clinical legal education programs provide optimal sites for learning about and developing emotional intelligence'. Specifically for law curriculum developers, she stated as follows:

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[51] University of Melbourne website, accessed 6 July 2018 <https://law.unimelb.edu.au/students/jd/enrichment/pili/subjects/law-apps >.
[52] See URL: http://www.handbook.uts.edu.au/directory/maj09443.html
[53]Ruth Hudson, "The importance of emotional intelligence for lawyers" *Lawyers Weekly* (20 December 2016) < https://www.lawyersweekly.com.au/corporate-counsel/20258-the-importance-of-emotional-intelligence-for-lawyers >
[54] Susan Douglas, "Incorporating Emotional Intelligence in Legal Education: A Theoretical Perspective" (2015) 9(2) *e-Journal of Business Education & Scholarship of Teaching* 56.

EI can be incorporated into exercises designed to foster reflective practice. Components of EI can be related to issues arising in client care and communication, ethics and law reform. A series of reflective prompt questions has been suggested above, which are aimed to facilitate reflection on the emotional responses of clients and practitioners and the impact of those emotions on legal practice.

Lawyers in a pluralistic society

93. To meet the needs of an increasingly pluralistic Australian society, lawyers will need to demonstrate improved adaptability and understanding of the varying needs of culturally and linguistically diverse (**CALD**) communities, Aboriginal and Torres Strait Islander peoples, people from non-nuclear family units, people with disabilities, LGBTIQ people, and people from different cultural practices generally.

94. This is not a new issue, particularly with respect to legal education and CALD communities. In a 1996 paper entitled "Thinking Culture in Legal Education", Anthony O'Donnell wrote that:

> *Calls for cross cultural education of professionals have been an enduring theme of official reports from the 1978 Review of Post Arrival Programs and Services for Migrants onwards.*[55]

95. Improving cross cultural understanding has two important purposes for lawyers. The first is to ensure that lawyers are appropriately able to discharge their professional duties in their practice. For instance, Aastha Madan in the American Probate and Property Magazine wrote that in order for "estate-planning attorneys to stay relevant and continue serving new clients effectively, cultural competency will be key".[56] Ensuring that young lawyers are able to effectively understand the cultural needs of any client who walks through the door will be ever more important as Australia changes.

96. The lawyer-client relationship is characterised by power imbalance and is therefore a breeding ground for stereotyping and developing cultural bias.[57] Improving cultural awareness in turn helps serve a second important purpose, being improved access to justice by way of reduced cultural biases.

97. O'Donnell goes on to list a number of strategies which may assist curriculum setters in developing young lawyers with an understanding of modern, pluralistic Australia. Although the paper was drafted over 20 years ago, some of these strategies ring true today, including the following:

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[55] Anthony O'Donnell, "Thinking Culture in Legal Education" (1996) 7(2) *Legal Education Review* 135. < http://www8.austlii.edu.au/cgi-bin/download.cgi/au/journals/LegEdRev/1996/6 .

[56] Aastha Madan, "Cultural Competency and the Practice of Law in the 21st Century" (2016) 30(2) *Probate and Property Magazine.* < https://www.americanbar.org/publications/probate_property_magazine_2012/2016/march_april_2016/2016_aba_rpte_pp_v30_2_article_madaan_cultural_competency_and_the_practice_of_law_in_the_21st_century.html >

[57] Antoinette Sedillo Lopez, "Beyond Best Practices for Legal Education: Reflections On Cultural Awareness—Exploring The Issues In Creating a Law School And Classroom Culture" (2012) 38(3) *William Mitchell Law Review* 1176, 1177.

Structure learning experiences to address cross cultural communication difficulties, e.g. the presence of interpreters in simulated clinical or advocacy settings.[58]

Organising clinical placement, if available, with cross cultural groups or agencies which expose students to experiential learning about intercultural issues.[59]

98. A number of Law faculties in Australia address the issues facing diverse groups of Australians through specific elective courses. However, few law schools have compulsory courses which specifically consider the demands of cultural awareness. This is generally approached as a graduate attribute rather than specific courses.

99. It is important to develop these skills in students, as literature from the United States suggests that legal culture is shaped to a significant extent at law schools. Antoinette Sedillo Lopez, Professor of Law at the University of New Mexico School of Law, noted in a 2012 journal article that:

> *A body of American literature about law practice suggests that lawyers develop "local legal cultures" that shape their conduct and sense of professionalism. Lawyers are socialized in law school and develop concepts of professionalism within their practice networks.*[60]

100. It is relevant to note that this education should continue beyond the classroom and into the profession. Indeed, in relation to Aboriginal and Torres Strait Islander cultural awareness, former Chief Justice French noted in an extra curial speech in 2015 that there have been "long established indigenous cultural awareness programs for judges and magistrates which have been coordinated by the national Judicial College of Australia".[61]

101. It may be beneficial, therefore, for law students (as well as judicial officers) to receive cultural awareness training as part of an integrated law school curriculum in order to start a shift towards better cultural awareness in the Australian legal profession. That way, a grassroots movement towards cultural awareness in the legal profession may be started, supplementing the ongoing education that professional leaders and judicial officers receive in cultural matters.

The use of technology to improve access to justice for individuals living in rural, regional and remote (RRR) communities

102. Recent and projected advances in technology and legal disruption have generated significant discussion surrounding the potential for technology to transform legal

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[58] Anthony O'Donnell, "Thinking Culture in Legal Education" (1996) 7(2) *Legal Education Review* 135. < http://www8.austlii.edu.au/cgi-bin/download.cgi/au/journals/LegEdRev/1996/6. >
[59] Anthony O'Donnell, "Thinking Culture in Legal Education" (1996) 7(2) *Legal Education Review* 135. < http://www8.austlii.edu.au/cgi-bin/download.cgi/au/journals/LegEdRev/1996/6 >
[60] Antoinette Sedillo Lopez, "Beyond Best Practices for Legal Education: Reflections On Cultural Awareness—Exploring The Issues In Creating a Law School And Classroom Culture" (2012) 38(3) *William Mitchell Law Review* 1176, 1176 < https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1456&context=wmlr >
[61] Chief Justice Robert French, "Judicial Council on Cultural Diversity National Roundtable – Access to Justice for Culturally and Linguistically Diverse Women Opening Remarks" (Canberra, 24 June 2015). <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj24June2015.pdf >

service delivery for individuals living in rural, regional and remote communities. It is critical to examine both the extent to which law practices servicing these communities adopt technology, the specific needs of individuals in these communities, the degree of digital inclusion in these communities and the specific deficiencies in the use of technology as compared to relevant face-to-face or traditional alternatives.

103. The deficiency in current service delivery to these clients was unequivocally demonstrated in the Report into the Rural, Regional and Remote Areas Lawyers Survey prepared by the Law Council of Australia and the Law Institute of Victoria in 2009. In particular, the findings of that research were that 43% of surveyed RRR principal practitioners believed that their practice did not have enough lawyers to service their client base.[62]

104. In providing technology-based solutions to improve access to justice for individuals living in rural, regional and remote communities, it is critical to ensure that the quality of services and fundamental principles of fairness are not sacrificed or infringed upon. This is particularly so considering that in addition to the obvious geographical challenges faced by RRR individuals in accessing justice, RRR communities and individuals have specific needs. Hook, Giddings and Nielsen write:

> *Rural practitioners need certain skills beyond those required of metropolitan practitioners. In particular, they require local knowledge and sensitivity to the particular needs and concerns of clients in their community in order to practise effectively…*
>
> *The distinct experience in rural legal practices is significant, particularly as developments in legal service delivery by means of telecommunications may bring metropolitan practitioners in contact with rural clients in greater numbers. For new forms of legal service delivery to be successful and accessible, awareness of the specific needs of both rural clients and practitioners is necessary.*[63]

105. Government and not-for-profit organisations are already employing new technologies to enhance service delivery to RRR areas. The work achieved in this space by health and education professionals has paved a path for lawyers to consider non-face-to-face service delivery as a viable option. Nonetheless, the use of information technology currently presents some general concerns to clients and lawyers alike:

> *For clients, such technology is often unfamiliar and the delivery of non-face to face services may be seen as threatening and unsupportive. Use of computers and the Internet is often not a way of life for rural clients and training, cost and ongoing support may be an issue. For lawyers, looking*

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[62] *Report into the Rural, Regional and Remote Areas Lawyers Survey*, Prepared by the Law Council of Australia and the Law Institute of Victoria, July 2009 <http://rrrlaw.com.au/media/uploads/RRR_report_090709.pdf>.

[63] Giddings, Jeff; Hook, Barbara; Nielsen, Jennifer, "Legal services in rural communities: Issues for clients and lawyers", (2001) 26(2) *Alternative Law Journal* 57.

outside of their own communities for legal work may be unfamiliar, and the clients wary of the technology. For city practitioners, such forays into rural communities may raise legal issues they are not familiar with or are incapable of recognising. This has the potential to operate to the distinct disadvantage of clients.[64]

106. In addition to this, it is important to consider whether the development of disruptive legal technologies is too driven by the commercial demands of metropolitan legal service providers to usefully service the needs of RRR communities. A great deal of the discourse surrounding the impact of technological disruption on the future of the legal industry revolves around how emerging technologies can be managed and manipulated for commercial gain on a vast scale.[65] This discussion is important, however it leads to the conclusion that in order for new technologies to have a meaningful and beneficial impact on the experiences of RRR legal clients and practitioners, more resources should be channelled into their deliberate development for this purpose.

Online dispute resolution

107. Access to dispute resolution is widely regarded as a key barrier of access to justice faced for individuals living in rural, regional and remote communities. In his book "Tomorrow's Lawyers",[66] Richard Susskind canvasses a range of disruptive and transformative legal technologies which may increase the level of service that can be provided to these consumers of legal services. In particular, Susskind addresses the nascent idea of Online Dispute Resolution (**ODR**). Susskind predicts that "in the long run, I expect it to become the dominant way to resolve all but the most complex and high-value disputes".[67]

108. As RRR clients widely experience difficulty in accessing resolution through courts and tribunals, due to geographical isolation, and extended waiting periods as a result of limited resources, ODR may seem like an attractive solution. However, as outlined previously, RRR legal clients have unique needs specific to their communities which are unlikely to be met using generic online dispute resolution tools.

109. In a conference paper titled *Pro bono legal services via video conferencing: Opportunities and challenges*, written by Leanne Ho of the Australian Pro Bono Centre, Ho notes that support to understand advice delivered remotely and take relevant follow up actions is critical to producing positive experiences for RRR clients who receive remote service delivery.[68] It is thus important to consider whether ODR could holistically service the ongoing needs of RRR clients.

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[64] Ibid.
[65] See for example, *Lawyers and Robots? Conversations around the future of the legal industry*, LexisNexis Whitepaper, <https://www.lexisnexis.com.au/__data/assets/pdf_file/0003/187644/Lawyers_and_Robots_Whitepaper.pdf>.
[66] "Tomorrow's Lawyers: An introduction to your future", Richard Susskind, 2013, Oxford University Press, Oxford, United Kingdom.
[67] Ibid, 102.
[68] *Pro bono legal services via video conferencing: Opportunities and challenges*, Written by Leanne Ho, Senior Policy Officer, Australian Pro Bono Centre. Presented at 3rd National Rural Law and Justice Conference, "Reframing Rurality: Driving Innovation in Rural Justice", 3-4 July 2015, Orange NSW

Automated Legal Advice Tools

110. Automated legal advice tools are another emerging technology with the power to deliver an increased diversity of services to RRR clients. A recent discussion paper titled *Current State of Automated Legal Advice Tools*, noted:

> ALATs are identified as a critical technology in terms of market disruption. The giving of legal advice is a central function of the legal profession. ALATs create opportunities, notably of commoditisation of advice-giving. The potential for automated legal advice to reduce costs and open-up latent markets is significant, particularly in the context of current debates around declining access to justice.[69]

111. The paper noted there has been significant uptake in the use of ALATS by CLCs and Legal Aid services, due to their limited resources and disadvantaged clients. This points to the possibility that these services could be developed in a way that could appropriately service RRR clients. In particular, ALATS could be usefully employed by RRR lawyers to enhance the diversity of areas of law in which an individual firm is able to advise clients.

Technology implications for lawyers

112. Designing products and services that meet the needs of modern clients will require more than legal input. These questions require input from other disciplines – for example, designers, technologists, user interaction experts. As a profession, lawyers are not accustomed to working in interdisciplinary teams. To meet the needs of a modern consumer, lawyers must embrace approaches from other disciplines and make space for the input of specialists from outside of the law.

113. To create great products and services, with a human centred design approach (a key characteristic of the *NewLaw* model) there are many methodologies proposed, from design thinking, circular design, to t-shaped people and teams, strategic design and more. Would introducing these approaches to legal education, both at university and from a professional development perspective help the profession more towards a consumer-centred approach?

114. The profession needs to adopt adequate base-line technologies, and then needs to be agile, flexible and responsive in order to be adaptable to the new landscape that emerging technologies bring. New systems, technologies and processes should be designed with the key users in mind. If the legal profession stays the same, it will not be keeping up with community needs and expectations

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<https://probonocentre.org.au/wp-content/uploads/2015/09/ProBonoLegalServicesViaVideoConferencing-OpportunitiesAndChallenges040615.pdf>.

[69] *Current State of Automated Legal Advice Tools*, Networked Society Institute Discussion Paper 1, April 2018 <https://networkedsociety.unimelb.edu.au/__data/assets/pdf_file/0020/2761013/2018-NSI-CurrentStateofALAT.pdf>.

Lawyer involvement in creating and understanding a tool

115. It is crucial that lawyers using tools have a sufficient understanding of what such tools do, how they work and, hence, what their limitations are. This does not require lawyers to be able to write or read computer code, but it does require a degree of technological literacy.

116. Precisely what should be understood will depend on the context in which a tool is employed. For a basic online form used to allocate clients to the relevant legal team, lawyers should be aware of data protection and cybersecurity measures as well as any potential for data to be lost. For machine learning applications used to predict the outcome of litigation, lawyers should understand that predictions are probabilistic and based on correlations identified in historic data. The prediction does not necessarily measure the strength of a client's case doctrinally or the likely weight of particular evidence. Where data sets are small (for example, if a particular type of litigation is relatively rare in a particular jurisdiction) or inaccurate, predictions are virtually meaningless. Further, predictions may suffer from feedback loops, where (for example) there is an initial error in the system that causes settlement payments to be higher or lower than they "ought" to be, but that generates further data points from which future predictions are made.

117. Lawyers need not develop software, but it is important that lawyers oversee its development in order to ensure that it is being deployed appropriately. An understanding of the context in which it will be deployed is crucial both to its effectiveness in that context and to compliance with professional obligations that arise in that context.

118. In its 30 November 2017 Submission to the Digital Economy Strategy Consultation Paper, Justice Connect observed:[70]

> *Many of the lawyers currently practising in Australia received no education about the role that technology can play in systems. Many of these lawyers were educated at a time when technology was beginning to have a profound impact on the legal system when it was clear that change was coming.*
>
> *Several law schools across Australia have recently introduced technology-focussed classes or interdisciplinary streams and we strongly support these initiatives. However, these initiatives have come years too late. As we work to implement our digital transformation alongside other legal organisations seeking to do the same, there are simply not enough appropriately qualified interdisciplinary practitioners in Australia to support this transition.*
>
> *In the modern world, it must be queried whether, for the practice of law, it is more important to have a sound understanding of niche areas of law, which a graduate is statistically unlikely to encounter in their career, or to build an understanding about the role that technology plays in institutions,*

[70] Available at URL: https://consult.industry.gov.au/portfolio-policy-and-innovation-strategy/the-digital-economy/consultation/view_respondent?_b_index=60&uuId=1040838879 [13]

organisations, society and the public sphere – an issue that almost every graduate is going to encounter in their career.

We consider that understanding system architecture, logic mapping, user experience, cloud storage, encryption and security and the difference between a content management system, client relationship management system, and client management system are all as important to the modern practice of law as trust accounting has been in years past.

119. In summary, there is a need for lawyers to know how a computer-based tool has been developed (and an appreciation of its usefulness and limitations) but do we have a coherent sense of how much knowledge is needed and how that might be acquired and assessed?

Systemic-level technology

120. Innovation is also happening at what might be described as 'systemic levels'.

121. A notable example is the (almost) complete shift of property conveyancing transactions in Australia to the e-conveyancing platform **PEXA**. PEXA is a national online property exchange system providing for: preparation of electronic dealings and verification of lodgment acceptability; electronic settlement of real property transactions including payment of settlement monies, duties, taxes and any other disbursements; and electronic lodgment of dealings to the appropriate Land Registry.[71]

122. A recently announced consortium between CSIRO's Data61, the law firm Herbert Smith Freehills and IBM intends to build "Australia's first cross-industry, large-scale, digital platform to enable Australian businesses to collaborate using blockchain-based smart legal contracts."[72] In its News Release CSIRO's Data61 said:

> *Known as the Australian National Blockchain (ANB), the new platform has the potential to represent a significant new piece of infrastructure in Australia's digital economy, enabling companies nationwide to join the network to use digitised contracts, exchange data and confirm the authenticity and status of legal contracts.*
>
> *Once completed, the ANB will enable organisations to digitally manage the lifecycle of a contract, not just from negotiation to signing, but also continuing over the term of the agreement, with transparency and permissioned-based access among parties in the network. The service will provide organisations the ability to use blockchain-based smart contracts to trigger business processes and events.*
>
> *ANB will provide smart legal contracts (SLC) that contain smart clauses with the ability to record external data sources such as Internet of Things (IoT) device data, enabling these clauses to self-execute if specified contract conditions are met.*

[71] See URL: http://rg-guidelines.nswlrs.com.au/e-dealings/faqs/general/what_is_pexa
[72] See URL: https://www.csiro.au/en/News/News-releases/2018/New-blockchain-based-smart-legal-contracts

ANB will be the first large-scale, publicly available blockchain solution available to businesses of all kinds across Australia, and designed for Australian legal compliance.

Supply and demand

Supply of new lawyers

123. There has been considerable debate about whether there are too many students graduating from law schools to satisfy the demand for lawyers in the legal profession.

124. One view put forward is that nearly 15,000 people finish their law degree each year and enter a market where there are only 66,000 solicitors.[73] The Council of Australian Law Deans undertook a survey of 39 law schools across Australia and put the number of graduates (in 2015) at 7,583 with 74% of graduates finding employment four months after graduating.[74]

125. Obtaining a law degree is the first of four steps toward becoming a legal practitioner – the next three steps are completion of a practical legal training program, formal admission to the profession by a Supreme Court and the grant of a practising certificate. The *National Profile of Solicitors 2016* report prepared for the Law Society of New South Wales by Urbis reported that of the 71,509 solicitors holding practising certificates nation-wide in 2016, 8.4% (6,007) had been admitted to the legal profession for one year or less.[75]

126. A (very) rough insight to draw from comparing the number of law graduates in 2015 as reported by the Law Deans (7,583) with the number of solicitors who had been admitted[76] for one year or less in 2016 as reported by Urbis (6,007) is that around 80% of law graduates go on to become solicitor legal practitioners and 20% (1,576) do not. After accounting for the (unknown) number of graduates who go onto to become barristers and the (unknown) number of overseas qualified people who gain admission in Australia, we could surmise that around 1,500 law graduates each year do not go on to become solicitor legal practitioners. As said above, this is a very rough insight – we do know, for example, that it is quite common for many law graduates to spend time in other kinds of employment before completing all of the steps needed to become a solicitor legal practitioner, and so we can't assume that the law graduates of 20015 directly correspond with the solicitors who had been admitted for one year or less in 2016.

[73] http://catallaxyfiles.com/2016/08/18/law-school-for-lawyers/
[74] https://cald.asn.au/wp-content/uploads/2017/11/Factsheet-Law_Students_in_Australia.pdf
[75] https://www.lawsociety.com.au/sites/default/files/2018-04/NATIONAL%20PROFILE%20OF%20SOLICITORS%202016.compressed.pdf [14]
[76] That is, those who had been admitted to the legal profession and gone on to obtain a solicitor practising certificate.

127. In addition to law graduates who do not go on to become solicitor legal practitioners there seems to be a trend toward junior lawyers leaving the private practising legal profession. The Mahlab Report 2018 *Private practice lawyers' salaries* reported:[77]

> ***Flexibility key to job satisfaction***
>
> *Lawyers reported working consistently longer hours than in the past, with more juniors leaving after only two years in a firm in search of a better work-life balance. This has exacerbated the skills shortage and firms have responded in some practices (particularly corporate law and banking and finance) by offering large premiums to attract new staff. In 2018, this increase in departures combined with difficulty recruiting replacement solicitors meant many teams became smaller. Overall, this has provided an opportunity for younger lawyers to take on more senior work and responsibilities. This was appealing for most, provided they were given appropriate training and development opportunities and could achieve reasonable work-life balance.*
>
> *In a bid to attract the best staff, firms emphasised their value propositions and policies around diversity and flexibility. Job sharing has increased, as more employers embrace the concept, and is popular with male and female lawyers. The resulting flexibility and talent diversity of lawyers is also attractive to clients.*
>
> *For those opting out of the major firms, a career in-house is the most popular alternative. This year, more lawyers than the previous financial year have left law firms to pursue careers in-house or overseas and are doing so earlier in their legal career. Working in-house is recognised as being a more sustainable career choice than private practice in terms of demands, varied workload, career paths and work-life balance.*

Demand for new lawyers

128. The Council of Australian Law Deans survey report noted that all graduates "may not be employed in the legal profession, but as the data suggests, a law degree places law graduates in good stead to secure employment across a variety of fields." On the other hand, the former Prime Minister made national headlines[78] when he said, "A lot of kids do law as though it is a sort of interesting background qualification and it is not." The Prime Minister's reported view was that people should not study law unless they wanted to be a solicitor or barrister - "Why would you do dentistry if you don't want to be a dentist, or medicine if you don't want to be a doctor?"

129. Having perhaps around 1500 law graduates across Australia each year who do not go into the practising legal profession raises interesting questions about why they do not enter the practising legal profession, what kinds of careers they pursue instead, and whether the costs of educating these people in law is outweighed by other benefits to Australian society.

[77] Available at URL: http://www.mahlab.com.au/report18-privatepractice.pdf
[78] http://www.abc.net.au/news/2018-02-02/malcolm-turnbull-says-too-many-kids-do-law/9387508

130. Given the concerns about the level of unmet legal need among the 'vulnerable and disadvantaged' and the 'missing middle' cohorts of consumers, might there be ways in which these legally qualified people could be utilised in meeting the unmet demand?

Models of legal practice

131. There are three terms now in vogue to describe law practices:

- *TradLaw* – the traditional law firm approach, within which the term *BigLaw* is applied to the traditional large law firm model; and
- *NewLaw* – the non-traditional law firm that leverages technology with flexible, client-focussed multi-skilled teams, and outcomes-based pricing.

The *TradLaw* and *BigLaw* models

132. The traditional legal business model has been described by Mira Stammers of La Trobe University as encompassing some, if not all, of the following characteristics:[79]

- Structured as a partnership
- Charge tiered hourly rates according to seniority
- Focused on bespoke and technically excellent work
- Attract and retain top legal talent
- Leverage full-time technically excellent lawyers to do the bulk of the work servicing the clients
- Create billable hour targets for lawyers
- Create competition amongst the lawyers to motivate lawyers to become equity partners
- Restrict the number of equity partners
- Marketing efforts focused on traditional networking and referrals

133. Stammers highlights the main problems with the traditional *BigLaw* model as:

- They are inherently lawyer (not client) focused – have we asked clients whether we are giving them what they want?
- Hourly rates promote inefficiency, which creates a potential conflict of interest – why would lawyers work faster or use technology when they are paid more for taking their time?
- Hourly rates mean the risk is not evenly balanced – the risk is placed wholly on the client
- Hourly rates measure inputs, not outputs – clients are interested in outputs
- There is a strong perception of elitism – hierarchies and fancy offices do not help
- They create issues of affordability for most clients – which in turn increases the 'justice gap'

[79] BigLaw v NewLaw: The economic viability of the traditional legal business model, Mira Stammers, November 6, 2017 at https://law.blogs.latrobe.edu.au/2017/11/06/biglaw-v-newlaw-economic-viability-traditional-legal-business-model/

- There is a lack of transparency/accessibility for the client – what about affordable online services?
- Lawyer burnout/depression increases with the increased pressure to meet billable targets
- Equity partners pocket the profit and are not invested (at least financially) in changing the business model – why would they risk losing money when they have worked so hard?
- Marketing efforts are traditional and are not reaching large segments of clients – not to mention how often written marketing material/blogs are written in legal jargon.

134. However, others in the profession take a different view. Most, if not all, large partnerships are not only cognisant of the need to embrace innovative practices, but to demonstrate leadership in the development of technologies and strategies to improve outcomes for clients and solicitors. Indeed, the (generally) greater financial and human resources of large partnerships have provided strong platforms to do so.

135. For instance, large Australian partnerships have in recent years:

- embraced artificial intelligence and virtual workspaces to improve the efficiency of legal services;
- partnered with research institutions to establish research centres focused on technology and law;
- established research and development teams within firms to oversee and develop innovative practices and technologies to meet client challenges;
- created legal practices to support start-up companies;
- launched new technologies for legal practice;
- offered training to lawyers in computer coding; and
- partnered in such activities as 'hackathons', where students and lawyers work together to develop innovative responses to complex legal problems.

The *NewLaw* model

136. Jordan Furlong describes *NewLaw* as *any model, process, or tool that represents a significantly different approach to the creation or provision of legal services than what the legal profession traditionally has employed*.[80] Furlong explains that *NewLaw* firms *encompass not just law firm models, but also new legal talent combinations, legal service managers, and technology that both changes how lawyers practice and places the power of legal service provision in clients' hands.*

137. Characteristics of *NewLaw* firms, which are said to set them apart from traditional law firms have been identified as:

[80] https://www.law21.ca/2014/05/incomplete-inventory-newlaw/

- (Jordan Furlong) - aligning human talent with legal tasks, including project/flexible/dispersed legal talent providers and managed legal support services;
- (Jordan Furlong) - applying technology to the performance of legal tasks, including tools to help lawyers do work differently, to help clients resolve disputes directly, and to help clients conduct their own legal matters;
- (Rebecca Lim)[81] - a willingness to innovate by investing in tech products to deliver greater intra-business connectivity, communication, practice management, cost reductions and process efficiencies;
- (Rebecca Lim) - encouraging flexible working – unlike *BigLaw* firms "which were structured in the manner of a high-overhead pyramid, with a core number of partners supported by a larger cohort of associates and lawyers, all charging clients at hourly rates", *NewLaw* firms, enabled by remote-working technology match "a lean, low-overhead, highly skilled legal team with the client's specific requirements";
- (Rebecca Lim) – a client-centric approach that lets "the client choose to pay for the services they think they need, rather than purchasing a lawyer's full services over the course of a case", which therefore does away "with the traditional model of billing based on hours and volume of 'manpower' in favour of alternative pricing structures such as blended rates, volume or value-based billing, fixed pricing or risk-reward billing";
- (Ilina Rejeva)[82] - firms that use virtual workspaces; "supertemps" (lawyers with flexible work arrangements), a project-based approach, alternative fee arrangements and the active use of technology.

138. The Law Society of New South Wales' Commission of Inquiry Report *The Future of Law and Innovation in the Profession* (the **flip Report**)[83] noted:

> *In New South Wales today there is evidence of various ways of working, including ways of pricing, structuring practices, managing projects, and engaging with clients. These include:*
>
> - *paperless practices*
> - *networks of firms*
> - *inhouse practices, outsourcing and "insourcing" work*
> - *single principals with panels of freelance lawyers*
> - *chambers practices*
> - *legal "hubs" or "marketplaces"*
> - *part law firm/part technology companies*
> - *online and virtual firms*
> - *"alternative fee arrangement"/time-based billers*

[81] What is a True NewLaw Firm? Rebecca Lim, December 8, 2016 at http://insight.thomsonreuters.com.au/posts/true-newlaw-firm
[82] What Is NewLaw and How It Is Changing the Legal Industry Forever! Ilina Rejeva, April 2016 at https://legaltrek.com/blog/2016/04/what-is-newlaw-and-how-it-is-changing-the-legal-industry-forever/
[83] Available at URL: https://www.lawsociety.com.au/sites/default/files/2018-03/1272952.pdf

- *multidisciplinary practices.*

New ways of working are being adopted not only by inhouse practices but in community legal centres, by traditional law firms looking to innovate and by small practices whose agility can be a great advantage.

Drivers of change

139. Mira Stammers has identified three key drivers that can explain why the *NewLaw* model is increasing in prominence.

Clients demand more-for-less

- Traditional legal services are unaffordable for most, but this makes little sense as the majority of legal work does not need to be bespoke. *NewLaw* models recognise this and have systematised, packaged and commoditised some forms of legal work in response. Combined with technology, these services become scalable and therefore affordable.
- In-house lawyers are increasingly under pressure to reduce external legal spend.
- Consumers and small business owners need and want legal help, but due to pricing pressure they often go without, so there is an incentive for *NewLaw* firms to capture that market by increasing affordability and access to legal services (virtual services/fixed fees etc).

Liberalisation

- Lawyers and law firms are heavily regulated. Certain types of legal work can only be provided by qualified lawyers in an effort to ensure certain standards and protections for consumers. Some argue that this creates exclusive communities of legal specialists, which in turn reduces choice for consumers and ensures the legal profession maintains a monopoly over legal services with anti-competitive practices.
- Many have campaigned for a relaxation of the laws and regulations regarding who can offer legal services and/or run a legal services business. This led to the introduction of Alternative Business Structures in Australia and in some other jurisdictions around the world (non-lawyer owners/outside investment/sharing of profits). These structures are perfect for *NewLaw* business models that intend to utilise technology.

Technology

- Technology has disrupted most markets around the world (think Netflix, Google, iPhones). The legal profession is no longer immune to technological disruption.
- The appropriate use of technology can reduce a lot of the monotonous legal work and can ultimately change the way lawyers practise law (e.g., online templates, live chat, AI in real time chat).
- Global competition (online/LPOs).

Converging models?

140. While *NewLaw* model firms initially presented a point of differentiation, the "traditional" and *BigLaw* firms have, as noted above, been moving in similar directions. From the practitioner perspective, the new value propositions achievable though diversity, flexibility, mobility and remote working are increasingly becoming the norm under all law firm models. From the consumer perspective, the new value propositions achievable through technology, service mix and service delivery innovation may no longer be regarded as defining characteristics of only the *NewLaw* firms.

141. The Mahlab Report 2018 *Private practice lawyers' salaries* reported:[84]

> *The implementation of New Law was less prominent this year with many law firms having already adopted the practices of these competitor businesses, and in some cases collaborated with them to develop new, efficient ways to deliver legal services. Like their peers in the accounting and finance industries, law firms are now also seeking to diversify their client offerings, including establishing or acquiring consulting and project management arms. In 2018, the number of professionals employed to work in specialist innovation and operation roles in the legal profession grew substantially.*
>
> *For example, Gilbert & Tobin collaborates with Legal Vision to manage routine work for corporate clients and offers fee certainty through a subscription model. The firm is also pursuing its own innovations to deliver lower-cost solutions to clients. Corrs Chambers Westgarth is collaborating with the University of Western Australia to develop applications for legal service efficiencies for not-for-profit clients. Mills Oakley has formed a partnership with Swinburne University of Technology to work on a project aimed at improving legal processes. Most firms have indicated budget spend on technology will continue to increase.*

Summary

142. We are at a point in time where many influences are converging that are reshaping the characteristics of the legal profession and the value proposition for consumers from law firms. These influences include:

- technology and its place in legal education alongside academic study of law and practical legal training;
- technology use in legal practice and the delivery of legal (and other) services;
- the role and responsibility of legal practitioners in developing and deploying technology-based or driven legal products and services;
- the need for greater emphasis on emotional intelligence and responsiveness to the growing cultural and linguistic diversity of Australian society;

[84] Available at URL: http://www.mahlab.com.au/report18-privatepractice.pdf

- growing demand for more client-centric approaches, from unbundling/limited scope through to joined-up services models under multi-disciplinary business structures;
- heightening awareness of the importance of the traditional law practice model making adjustments to meet the diversity, flexibility, career, reward and work-life balance aspirations of many new entrants to the legal profession; and
- while the *NewLaw* model made early gains by differentiating from the *TradLaw* and *BigLaw* models, *TradLaw* and *BigLaw* model firms have responded by moving in similar directions, potentially changing in fundamental ways the value proposition to consumers of all law firms, regardless of which 'label' is used.

PART C: REGULATION AND ETHICS

Objectives of regulation

143. The legal profession, and the provision of legal services, is regulated in the public interest.

144. To this end our legal profession regulatory laws have several stated objectives. For example, section 3 of the *Legal Profession Uniform Law* states:

> The objectives of this Law are to promote the administration of justice and an efficient and effective Australian legal profession, by—
>
> (a) providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession; and
>
> (b) ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services; and
>
> (c) enhancing the protection of clients of law practices and the protection of the public generally; and
>
> (d) empowering clients of law practices to make informed choices about the services they access and the costs involved; and
>
> (e) promoting regulation of the legal profession that is efficient, effective, targeted and proportionate; and
>
> (f) providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.

145. In addition to statute are the ethical rules of the profession, the objectives of which are "to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and these Rules."[85] These set out fundamental ethical principles and duties which include:

- a paramount duty to the court and the administration of justice;[86]
- to act in the best interests of a client, to deliver legal services competently, diligently and promptly; and avoid any compromise to integrity and professional independence;[87]
- to not engage in conduct that demonstrates a solicitor is not a fit and proper person to practise law, or which is likely to be prejudicial to or diminish public confidence in the administration of justice, or bring the profession into disrepute;[88] and
- honour, and ensure timely and effective performance of, any undertaking given in the course of legal practice.

[85] Rule 2.1 of the Australian Solicitors' Conduct Rules
[86] Rule 3.1 of the Australian Solicitors' Conduct Rules
[87] Rules 4.1.1, 4.1.3 and 4.1.4 of the Australian Solicitors' Conduct Rules
[88] Rule 5 of the Australian Solicitors' Conduct Rules

146. Finally there is the common law, through which the courts exercise their inherent powers to manage judicial proceedings and to supervise and discipline legal practitioners, and which defines "professional misconduct" as behaviour that would reasonably be regarded as disgraceful or dishonourable by the lawyer's professional brethren of good repute and competency.

This chapter will explore:

- ethical and professional implications for relying on technology, including AI and predictive results
- how lawyers know whether they are complying with their professional obligations when relying on technology which usurps and/or augments decision-making and other human controls
- ethical implications for (unregulated) non-lawyers who facilitate or provide legal services through new or existing platforms
- client confidentiality and privacy safeguards in an unbundled legal services context

Information asymmetry

147. A root cause of the need to regulate for consumer protection and empowerment is often said to be "information asymmetry". The legal practitioner has knowledge of the law, the processes and procedures of legal systems, legal reasoning skills and the ability and authority to navigate the legal system on the client's behalf. Conversely, consumers normally do not have this knowledge which creates a power-imbalance or dependency-based relationship between the knowledge-poor client and the knowledge-rich legal practitioner that regulation attempts to address.

148. Regulation – from this perspective does three things:

- Firstly, regulation purposefully creates information asymmetry – in the public interest.
    - Examples of this kind of regulation include prescribing legal academic knowledge and practical legal training requirements for admission, admission itself, practising certificates conferring the legal right to practise law, additional knowledge acquisition through compulsory supervised legal practice and bar reading programs, and mandatory continuing professional development.
- Secondly, regulation seeks to protect clients and the public generally against the risks and negative consequences of information asymmetry.
    - Examples of this form of regulation include regulation of trust money and trust accounts, consumer complaint and compensatory mechanisms, mandatory professional indemnity insurance and fidelity funds, professional conduct rules dealing with conflicts of interest, and the power of the court to control and discipline legal practitioners.

- Thirdly, regulation seeks to narrow the information asymmetry gap by "empowering" consumers.

    - Examples of this kind of regulation include costs disclosure rules which require a demonstration that the client understands and has consented to the proposed course of action and costs involved; professional conduct rules requiring the client's informed consent to managing conflicts of interest; a regulator's duty to assist and advise complainants; and a regulator's duty or programs to promote community education about the regulation and discipline of the legal profession.

Regulating for the future

149. The regulatory question that initially arises from the use of technology-based products is whether the provision and use of these products constitutes the provision of a legal service. This is not a new question. There have been cases in Australia and the United States that looked at this, in the context of computer-assisted will drafting services.

150. The 1990 decision of the Supreme Court of Western Australia, *Attorney-General v Quill Wills Ltd*[89] concerned a computer program containing a very large number of clauses, drafted and settled by legal practitioners, from which could be selected various clauses to produce what was claimed to be a valid Will. The Law Society of Western Australia's August 2017 Position Paper *People Unlawfully Engaging in Legal-Work: Protecting the Community*[90] (**Position Paper**) summarised the outcome of the case:

> *The defendant was a company that produced 'do-it-yourself' will kits. The defendant sold the will kits but also offered the services of a representative working with their clients and assisting them to select clauses from a bank of clauses held within a computer program. Despite claims by the defendants that they were not legal practitioners and were not giving legal advice, the court held that the defendants were drawing and preparing a document within the meaning of section 77[91]. It was held that the company had gone beyond "merely giving abstract information as to legal rules and was assisting in the production of a will appropriate to the individual circumstances of the customer".*

151. Similar cases in Australia and in the United States – again involving do-it-yourself Wills - have been a variation on the *Quill Wills* theme and have generally drawn a distinction between products that merely provide abstract information, and products that produce a Will tailored to the client's circumstances, leading to the same outcome as *Quill Wills*.

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[89] (1990) 3 WAR 500; [1991] ANZ ConvR 215.
[90] Available at URL: https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2017AUG04-Law-Society-Position-Paper-People-Unlawfully-Engaging-in-Legal-Work-Web.pdf
[91] *Legal Practitioners Act 1893* (WA). Section 77 prohibited a person other than a certified practitioner from directly or indirectly performing or carrying out or being engaged in any work in connection with the administration of law, or from drawing or preparing any instrument or writing relating to, or in any manner dealing with or affecting, real or personal estate or any interest therein.

152. If we look at our existing statutory definitions, prohibitions and permissions to determine whether or not technology-based tools and their providers fit into what we currently define and regulate, this might simply lead to a round of creativity in crafting products and service delivery approaches that are designed to fall outside the existing regulatory rules and prohibitions.

153. We would, with this approach, perhaps lose sight of what is happening in the real world. Technology is becoming embedded in all forms of human interactions – personal, governmental, social and commercial. The growth of technology products in the legal services industry has come about because these products have filled needs and gaps in the industry. Back-office technology products have filled a need for greater efficiency and reduced costs for law firms. Client-facing technology products have filled a need among consumers for greater knowledge, for better access to justice at lower costs, for cheaper was to resolve disputes directly, and to conduct their own legal matters. Technology tools in the courts have filled a need for greater efficiency and timeliness in administration and dispute resolution.

154. Quite a number of regulatory and ethical risks can be identified about the impact of technology and new ways of providing legal services, for instance:

- do we need to ensure that technology products are the product of the application of highly specialised legal knowledge and skill by their creators, given that we regulate to ensure that legal practitioners possess highly specialised knowledge and skills?
- do we need to ensure that technology-based products empower consumers to make fully informed decisions given that we regulate to empower clients of law practices to make informed decisions about the course of action proposed by the lawyer and the costs involved?
- should a consumer be indemnified (and if so, how) if a technology-product fails to deliver a legally correct and valid outcome?
- how do we ensure that technology and new ways of working in law appropriately protect client confidentiality, avoid conflicts of interest, and meet other ethical duties?

Rethinking regulation and ethics

155. Developing regulation of the legal profession and the provision of legal services has traditionally been a reactive process. Legislative regulation of professional services and providers typically evolves and expands in response to problems that have emerged in the market. Self-regulation (the realm of professional ethics) reflects historical precepts of professional conduct and evolves in response to attitudinal or behavioural problems that have emerged in the practice of the profession. Judicial regulation reflects collective views about the knowledge, skills, values and attributes required of those entering (and remaining in) the legal profession, and the proper, efficient and effective conduct of judicial proceedings.

156. In looking at regulatory responses to the growth of technology and new ways of working in the legal services industry we must ensure that we do not 'regulate-away' the benefits for consumers, courts and the profession, nor should we stifle innovation and competition. If we are too conservative we run a risk of devising overly protective and controlling regulatory measures. It will need to be a careful balancing act. As the **flip Report** said;[92]

> *There is a good reason for regulation. It serves the public by ensuring quality and, in turn, protects consumers. The implication of Professor Susskind's view that in order to meet genuine need in the community, lawyers can no longer provide bespoke services, does not sit comfortably with the standards of service that solicitors are held to by the courts and by the Law Society itself and the Legal Services Commissioner, under legislation designed to protect the public. The guarantee implicit in the qualification and licensing regime for legal practitioners is, like that of an electrician, of a safe, expert service. Today, this system in practice means that there are corners that cannot be cut – not because of any perverse attachment to overservicing, but because of the duties and sanctions that the law imposes on solicitors.*
>
> *If this situation is to change, and the full potential of the enormous implications of technological advancement, new forms of pricing and innovation in service delivery are to be realised in the manner envisaged by Professor Susskind in his most optimistic scenarios, statute and common law may need to be reconsidered to allow the solicitor to lawfully pass risk to the client and bring down the cost of service where appropriate.*
>
> *It is important that the regulatory touch continue to be light but judicious, serve the interests of the public, and foster innovation. As important as regulation is, it is not the only tool available to address accountability and reliability, nor speed or cost of service. Law firms of the future will need to be sustainable as businesses and not just cost-effective for the consumer.*

157. We also need to be mindful that regulation of legal profession and legal services must also promote the administration of justice.

158. One area in which regulation should be considered is the question of whether there should be requirements for transparency of tools used in particular sensitive contexts. An example of the problematic use of legal tools occurred in the case of *Wisconsin v Loomis* 881 NW 2d 749 (Wis, 2016). In this case, risk assessment tools, which relied on machine learning to predict the risk that an individual would re-offend based on similarities with other offenders who had done so, were used by a trial judge in sentencing. Specifically, the circuit court had stated in the context of sentencing:

> *You're identified, through the COMPAS assessment, as an individual who is at high risk to the community. In terms of weighing the various factors, I'm ruling out probation because of the seriousness of the crime and because your history, your history on supervision, and the risk assessment tools that have been utilized, suggest that you're extremely high risk to reoffend.*

[92] Op cit [23] and [103]

159. Neither the defendant in that case nor the primary judge were given the opportunity to access the algorithm or the data from which it drew, due to the COMPAS algorithm being a trade secret of Northpointe, Inc. Not only does this raise natural justice concerns in a particular case, it also makes it more difficult to detect when such algorithms have differential impact on particular communities. For example, researchers found that the COMPAS algorithm discriminates against African Americans, in the sense that there is a significantly higher probability that they will be a "false positive" compared to the general population. Without access to the algorithm and the data on which it relies, it is difficult to determine the reasons for such discrimination, or the extent to which it could be remedied through deployment of a different machine learning algorithm.

160. As discussed above, ensuring that a tool is appropriate to the context in which it is deployed will require the involvement of lawyers in the development and use of the tool. While non-transparent machine learning algorithms may be able to achieve higher levels of predictive accuracy in some circumstances compared to non-transparent tools, there will be some circumstances where their use is not appropriate due to the risks of unfair discrimination and/or inappropriate reliance in decision-making.

161. In the example of COMPAS, it is not clear that a defendant *ought* to have a sentence affected by personal characteristics that correlate with "dangerousness" among the general population. For example, if people whose parents have divorced when they were young are more likely to go onto commit multiple crimes, does that mean that a defendant whose parents divorced should be sentenced more harshly based on that fact? Only by understanding the way a particular tool works can judges and lawyers retain the opportunity to challenge the inappropriate use of particular tools.

Summary

162. Regulation of the legal profession is extensive. For the most part it has evolved in response to problems after they have emerged, an underlying cause of which is the negative consequences of information asymmetry. We need to think deeply about how we should preserve the 'quality guarantee' for consumers and the administration of justice provided by statutory regulation and professional ethics, while also fostering innovation and harnessing the opportunities and benefits of technology.
