



Law Council
OF AUSTRALIA

The Law and Legal Technology – Our Changing Work Practices

Speech delivered by Mr Morry Bailes, President-elect, Law Council of Australia at the 2017 Australian Young Lawyers' Conference, Sydney.

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Introduction

Thank you.

What a pleasure it is to be here this morning, talking to the future of the profession, about the future of the profession.

The Law Council of Australia, as the national peak body representing Australian lawyers, is very aware of the need for the profession to keep pace with technological transformation.

I chaired the Law Council's Legal Profession Futures Committee.

Its work was to understand current and emerging trends, and provide information to lawyers and legal practices to help them negotiate this period of innovation and change.

Through this I have had the opportunity to skim the mind-boggling array of predictions and projections about the evolution of our profession and professional services more broadly.

Yet although the divergence of expert opinion on the topic is broad, one thing I can say with absolute confidence is this: you are beginning your careers in the law at arguably the most vigorous period of change in our profession's history.

Technological advancement and rapidly shifting economic norms will have transformed our profession beyond recognition long before any of you retire.

The powerful forces that will reshape the way legal work is performed have already begun their work.

Some seek solace in the ancient character and tradition of our profession.

They hope that regulatory restraints, public policy considerations and the need to uphold and defend the independence of the courts will preserve their relevance in the 21st century.

But any belief that things will remain more or less as they have always been, is truly misplaced.

We cannot assume that emerging legal technology will be designed to accord with existing regulations – like Uber, it may attempt to skirt around regulation.

We also cannot assume that legal technology will demonstrate fidelity to law, consider important public and legal policy questions or, as a matter of first priority, seek to preserve the authority of the courts.

Legal technology, as with other forms of modern computing technology, has the potential to be a very disruptive influence.

This is a real challenge for the profession – to ensure that legal technologies are designed holistically to enhance justice outcomes and do not obscure serious and important legal problems behind an interface, styled as an alternative to traditional legal services.

To meet this challenge, the profession, especially young lawyers, will need to be actively involved in shaping technology as it comes online.

Will tech cost jobs?

Unfortunately, most of you are probably thinking about this issue in terms of – this is all great, but what am I going to do for work when my senior partner replaces me with a chat bot?

The dominant storyline is that the law is on the same trajectory as manufacturing in terms of employment demand.

In 2016, the Law Society of New South Wales published a report based on its landmark commission of inquiry into the Future of Law and Innovation in the Profession – the FLIP report.

It found the legal profession is undergoing change at a pace never previously recorded.

In fact, it found many practices are now shifting in directions most lawyers would have found hard to predict, even at the beginning of this century.

Among other things, the FLIP report found that along with tech advancement itself, it is also the evolving expectations of clients in the digital age that is driving rapid change.

Aware of the tech advance across other sectors, clients will be expecting more and more from their legal services.

And innovation in the legal sector will undoubtedly chase that expectation.

Clients now expect their legal advisors to be online and digitally capable.

Artificial intelligence will clearly be a key tool for any successful legal practice.

With this research in mind, it does seem certain that legal tech will fundamentally change the contours of the employment market.

This is most obvious in terms of the skills that legal employers now desire in their young recruits.

And this begs the question: how would we ideally educate the future lawyer?

We might need to rethink how we educate undergraduates.

One Law School Dean I spoke to recently was candid with me when he said: *“the education of the future lawyer is a subject we’re just not nailing at the moment.”*

The education of the new generation is of critical importance to the entire profession.

I, as a managing partner, know I can't enact significant change in the firm by teaching old lawyers new tricks.

The real trick over time will be to infuse, or infiltrate, the firm with new skills, so we end up with the right capabilities for the future.

Graduates with STEM (Science, Technology, Engineering and Maths) backgrounds will have some clear advantages.

Richard Susskind, a leading thinker on the future of professional services, is in fact actively encouraging law undergraduates to abandon the traditional humanities as an ancillary qualification in the pursuit of their legal careers.

But don't write-off arts students – graduates who are fluent in Asia-Pacific languages and cultures, will continue to be highly competitive.

Students who understand the Philosophy of Logic – a subject firmly entrenched in arts and central to basic computing processes – are also surely not wasting their time.

The content of the legal curriculum is an issue the Law Council has been grappling with, primarily through our Education Committee.

It is also an issue that will be a key focus for the Law Council during discussions throughout 2018 on the future of the legal profession.

As for the concern that the number of legal jobs for young lawyers must decline because of the introduction of legal technologies, this is something that needs to be considered very carefully.

There is not enough evidence to prove that legal technology is taking opportunities away from young lawyers.

However, there are some important demographic trends revealed by the New South Wales Law Society's National Profile of Solicitors Report, 2016.

For example, this Report found that "Between 2014 and 2016, the youngest age cohort (24 years or younger) decreased by -14.9 per cent".

This was "the strongest decrease compared to all other age brackets". However, it should be noted that this age group has historically only comprised a small portion of the practicing profession – between 1-2 per cent. So although this figure is on a downwards trend, it is important to note that changes in small numbers appear more significant when expressed in terms of percentage change.

Most lawyers are aged between 25 and 39 years old.

The Report also found that 23 per cent of the profession is 65 years or older – there could be some openings coming from the top.

The arrival of legal technology presents a unique, once in generations, opportunity for the legal profession to develop solutions for clients.

It is an opportunity to focus on how lawyers and machines will complement each other to provide new and better legal services into the future.

My advice to young lawyers thinking about whether they have a future in the law would be – yes, young lawyers are essential to the future of the profession and will have a place in the profession.

What legal technology is doing is taking over certain legal processes, especially those that are time consuming and that involve vast amount of detailed information.

Rather than removing the human element, legal technology is actually providing the tools to enable the profession to bring their human qualities and judgement to bear more rapidly.

Far from running out of things to do, lawyers will have the opportunity to better understand their client's needs and to deliver strategic legal advice that is faster and more comprehensive, but doesn't cost the earth.

When recruiting young lawyers, an important consideration will be capacity and willingness to work with legal technologies.

An important aspect of this will continue to be a well-developed understanding of the law and legal concepts, properly constructed in the context of changing social norms and expectations of the law.

This is a human capacity that machines may mimic, but cannot match.

All said, that is my view, and many differ in opinion.

A potential skills gap

While I don't agree that a generation of law graduates will be replaced by legal technologies, I am concerned about the potential skills gap that may emerge as the legal profession moves between worlds.

It is important that legal practices invest in their staff, to enable them to develop a new, more complex skill set that can make the most of emerging legal technologies.

An interesting analogy is driverless cars.

There has been a great increase in the sophistication of technology built into cars.

Some models can drive themselves but still require human attention and intervention to avoid accidents.

Drivers of these vehicles are now obliged to understand how the new technology works and how to use it effectively, while maintaining the 'old' set of basic skills necessary to drive safely should they need to take back control.

Should an accident occur, the driver is still legally responsible.

I think we are at a similar point with legal technology – we are being called on to operate in an increasingly automated environment.

But we are not yet at the stage where we can prudently abandon the basic legal skills that have been fundamental to legal practice for so long.

We are not at the stage where anyone – anything? – but the lawyer in charge of the matter, and their principal, will be held to account for the consequences of poor legal decision making.

Technology will continue to develop until a point is reached, where human operators of cars will not need basic driving skills to use cars safely and effectively.

Perhaps legal technology will follow a similar course, and lawyers will one day no longer rely on the same set of basic skills that they do today.

As with other technologies, a new set of basic skills will become necessary.

The challenge will be to manage the transition. Law schools will play a part in preparing graduates to enter the legal profession.

Equally, law practices will need – as they have always done – to invest in the ongoing education of their workforce.

When we talk about the savings from adopting legal technology, the concept of reducing legal spending for clients dominates.

This is understandable given the level of competition in the legal sector. However, we should also start talking about how law practices should reinvest these savings to prepare their staff to use a new set of legal skills.

What is artificial intelligence (AI)?

From the perspective of legal practice as a business, where money can be saved and processes abbreviated, the advance of AI will continue to gather pace.

There is also the prospect that it will give access to legal services to those who cannot currently afford it.

Given the alarming statistics about the level of unmet legal need in Australia and throughout the Asia-Pacific region, the advent of AI will have an important role in increasing access to justice.

But AI has become something of catch-all term for a diverse range of emerging technologies.

It is often used to cover straightforward computer programming, like automated word searches in documents.

An example is Beagle, a technology that highlights the most important clauses in a contract and uses user feedback to refine what clauses are considered most important.

It also provides a real-time collaboration platform that enables lawyers to easily negotiate a contract or pass it around an organisation for quick feedback.

Is that AI?

A step above automated searches is technology that claims to be able to make sense of the vast morass of information that constitutes and is generated by the law.

An example of this is ROSS Intelligence, which has been nicknamed “Siri for the law.” ROSS is a legal research tool that enables users to obtain legal answers from thousands of legal documents, statutes, and cases.

The question can be asked in plain English, and not necessarily in legal form.

ROSS’ responses include legal citations, suggested articles for further reading, and calculated ratings to help lawyers prepare for cases.

Is this AI?

Something closer is IBM’s Watson Debater, a new feature of IBM’s well-known Watson computer. When asked to discuss any topic, it scans its knowledge database for relevant content.

It then selects what it believes are the strongest arguments and constructs sentences in natural language to make points both in favour and against the topic.

Applied to the law, it can assist lawyers by suggesting the most persuasive arguments and precedents when dealing with a legal matter.

These are the kind of AI applications that are at the vanguard of legal tech.

No doubt, at least some of what is being said about legal technology is marketing hype – mere puffery.

But the trend is moving inexorably from claimed to realised capability.

At the most complex end of the spectrum, we are beginning to imagine AI that is capable of interpreting and making use of data about the legal system in ways that even the most experienced and sophisticated lawyers cannot match.

But we aren't there yet, and we are only beginning to imagine where this path could ultimately take us.

In these circumstances, perhaps it would be more useful to consider how human and machine intelligence are similar, and how they differ.

Differences between human and machine intelligence

It strikes me that despite how new and alien AI feels, it has an undeniably close connection to human intelligence.

Human intelligence, after all, is the creator and benefactor.

AI is imbued with nothing more than what we give it.

As demonstrated by Tay, the Microsoft chatbot that began making racist tweets less than 24 hours after going online, technologies inherit the biases of its inventors and trainers.

Because of this, the limitations of these emerging technologies will often resemble our own.

However, there is a tendency to personify and attempt to humanise AI, which I believe is redundant and a failure of imagination.

Although AIs and humans must be able to communicate, there is no need for AIs to take on humanoid characteristics in order to do so.

The urge to give AIs physical, humanoid features and names is also indicative of a preoccupation with the idea that AI will replace human lawyers. This then leads us to think, and fear, that the emergence of AI and other legal technologies will separate lawyers from clients.

The question shouldn't be, 'How can we replace human lawyers with something better but comfortingly familiar?'

Rather than waste effort trying to haul AI driven robot lawyers out of the uncanny valley, it will be more useful to focus on how lawyers and AIs can complement each other to provide new and better legal services into the future.

We should ask ourselves, 'How can AI support lawyers to be more human in their interactions with clients?'

The opportunities for the legal profession to improve its services and the ways that these are delivered are abundant.

Nevertheless, we should also remain clear eyed about those areas of legal work where machines will need human help.

One such area will be deciding when to depart from established precedent.

AI in legal practice could foreseeably identify circumstances where a case can be applied to new circumstances by analogy.

However, it would currently struggle to define the point where similar circumstances become dissimilar.

Sir Owen Dixon served on Australia's High Court for 35 years, was the Court's sixth Chief Justice and a leading common law jurist of his time. Justice Nettle, appointed to the High Court in 2015, refers to an essay written by Sir Owen, titled "Concerning Judicial Method", where he discussed the problem where similar circumstances are made dissimilar:

Courts may validly "share the feeling that there is something wrong with the conclusion" that precedent dictated, and that there is much that "a court animated by [that] feeling" might do and yet not depart from the traditional method of judicial reasoning.¹

We can see that AI will likely struggle to know when old interpretations of law are no longer as valid and might lack the creativity necessary to overcome new legal problems.

Another interesting dimension is the different ways that human lawyers and AIs may approach legal problems.

For AIs, the process seems to be to collect information to identify a single option with the greatest prospects of success. Their 'thinking' is directed towards finding the probability of an outcome. This may be of little consolation to a client who finds themselves on the wrong side of that equation.

In comparison, as a human lawyer gathers more information, they also tend to generate more options. Even though they may share an AI's assessment that the law is not on their client's side, a human lawyer will gather more information until a satisfactory range of options emerge. They can then work with their client to develop a legal strategy to realise a client's objectives.

For example, an AI might recommend against litigation because the facts of the case and the weight of precedent are not in the client's favour.

However, a lawyer could legitimately recommend litigation using an arguable, but far less than certain point of law to encourage the counter-party to negotiate.

Another interesting difference is the different approach to failure taken by human lawyers and AI.

Human lawyers place a premium on providing comprehensive advice based on known information. Where there are uncertainties, these are clearly identified and quarantined. While it is impractical to explain every legal detail, the human lawyer carefully weighs all possible outcomes, even if these are improbable. The human lawyer emphasises preservation of clients' rights by avoiding failure.

¹ Dixon, "Concerning Judicial Method" (1956) 29 *Australian Law Journal* 468 at 473, quoted by Nettle J, "Technology and the Law", address to Bar Association of Queensland Annual Conference, 27 February 2016, p18.

In comparison, AI learning is driven by failure. AI learns by trying a possible solution, observing the consequences and using these observations to refine future attempts. The number of iterations it takes to reach a satisfactory solution is immaterial because of the incredible speed of each learning cycle.

I doubt that clients would appreciate that the failure of their matter is an important data point in an ongoing AI learning process. Thus, at this stage, they are a tool only.

Ethical considerations of AI

This is just one of many ethical considerations created by the use of legal technology.

Legal regulators currently restrict permission to practice law on the basis that this is necessary to preserve the high standards of the profession and to protect clients from poor practice.

Can we imagine a world in which the principal of a legal practice entirely delegates to an AI the task of ensuring the legal advice provided by the firm is legally sound?

What if this was not an act of supreme laziness or a sign of incompetence, but something that is virtually mandated by the lawyer's duty to act with due skill and diligence?

Will lawyers be obliged to upgrade to software that has a better track record of evaluating cases than their current technological tools?

Is it problematic to use a legal AI and to fail to advise the client?

Is private client data contributing to a firm's AI database, and being used to assist all other clients of the firm ok?

Could an AI become the principal of a legal practice?

Perhaps we are entering an age where the capability of legal technology will exceed the minimum standards set out in legal profession regulations.

To finally determine what we mean by "artificial intelligence in the practice of law" we may first be forced to redefine what we mean by the practice of law, and the categories of persons and things that are permitted to practice and provide legal services.

Cybersecurity as an ethical obligation

Cybersecurity is an absolutely central issue for legal technology and legal ethics.

Cybercrime and cyberespionage are among the most serious challenges facing the world today, with significant implications for every sector of the modern global economy.

Individuals, organisations, and nation states are looking to breach computer networks to commit any number of crimes — from sabotage, to data theft, to insider trading, and far beyond.

Hacking tools, and hackers for hire, are proliferating.

The possibilities for malicious behaviour if the private information of law firms is accessed by people who know what they are doing are increasing as legal practice and legal technology become integrated.

Just consider the kind of highly sensitive information the legal profession has that could be viewed as a glittering prize for cybercriminals.

There is sensitive client and firm business information, confidential client information, and client intellectual property.

Corporate clients, in particular, will often have shared details about undisclosed mergers and acquisitions that could be stolen and used easily for insider trading.

There is also litigation and negotiation strategies, settlement parameters, and analysis of evidence that can be used by an opponent.

And there's the firm's office and trust accounts.

All this is patently alarming and a source of ethical risk for the profession.

In addition to potentially serious losses and embarrassment for clients, these threats strike directly at client confidentiality the core of the client/lawyer relationship.

So not only are law firms, and lawyers more broadly, an atypically attractive target for sophisticated hackers — we are atypically sensitive as well.

It is fundamental, therefore, that lawyers are able to demonstrate to their clients and regulators that they understand the nature of risk and are adequately prepared to address the threat.

Yet it is fair to say there is still a level of complacency within the legal profession that is not at all commensurate with the seriousness of the threat faced.

Some recent research from the legal sector in the UK, for example, indicates 70 per cent of firms do not place cyber resilience within their top five risks, while 85 per cent of firms do not have a documented strategy to improve cyber resilience.

The Law Council is working hard to address this issue.

Last year we launched Cyber Precedent, a new national information campaign to assist the legal profession further defend itself against growing cyber threats.

The information we gathered for the profession has drawn together cybersecurity resources custom-designed for legal professionals, to help ensure the integrity of the confidential and sensitive data lawyers hold.

It is our hope that creating a national hub for cybersecurity action for the profession will facilitate cooperation and information sharing, both within business and with government.

As the Prime Minister noted when launching the Federal Government's Cyber Security Strategy, while governments can take the lead, business needs to ensure their cybersecurity practices are robust and up-to-date.

It is the Law Council's belief that cyber risks should evolve beyond seeing them as an 'IT issue.'

Cybersecurity in legal practices should be managed through a strategic and coordinated approach, and that means making cybersecurity a strategic objective.

RRR

While the risk of cybercrime looms as a potent new threat to the profession, I want to finish today by briefly touching on an area, close to me, where I believe technological advances can start making a real difference today: and that is in rural, regional and remote communities.

Recent research by the Law Council's Justice Project initiative, a national interrogation of access to justice in Australia, has underscored what we already knew: that RRR communities face huge access to justice issues in comparison with Australians living in cities.

Seven million Australians live outside major cities – around 30 per cent of the population.

But only 10.5 per cent of Australian lawyers reside in these areas.

So I am very excited by the possibilities tech presents to help close the access to justice gap.

We are perhaps used to hearing about the enormous benefits tech can bring to medical service in these areas, through remote doctor consultations, and even through remotely conducted surgery.

The challenges for the justice system in RRR areas are complex, but we're not talking about brain surgery.

Legal technology has a clear role to play to promote access to justice in RRR areas by:

- Triaging clients based on eligibility and need and referring them to the most appropriate level of service;
- Helping clients with sufficient legal and technological capability and access, to independently resolve simple legal issues, and to access relevant, interactive legal education;
- Supporting RRR practitioners to access professional networks, training and innovative pro bono help ; and
- Forming part of a multi-pronged strategy, combining face-to-face and technological access points to reach clients.

However, reliance on IT to help people help themselves, simply will not work for many vulnerable clients, especially those in Australia's vast rural, regional and remote areas.

For example, a move towards online civil courts in Australia, will have limited value for many vulnerable people who can't get advice in the first place to resolve their civil legal problems, are digitally excluded and have limited legal capability.

Being fast, remote, online and app-enabled may actually increase barriers to access for disadvantaged client groups who often need face-to-face advice and representation.

A really good app also won't help if you have limited technological capability or access, or you just don't want to use your phone to sort out your legal problems.

It won't help if you can't get mobile broadband or wifi and the National Broadband Network hasn't made it to your street or community yet.

Self-help solutions won't help those who need actually need one-on-one, face-to-face help to navigate complex legal problems.

The challenge for RRR lawyers is to ensure that legal technology brings clients closer to resolving their legal problems and yet does not introduce another barrier to justice.

These limitations mean that legal technology alone cannot provide a satisfactory solution to Australia's justice gap.

Lawyers will have an equally, if not more important role to play.

Conclusion

So how will our self-regulated profession and our conduct rules respond to the use of AI and tech?

These are not abstract questions for futurists. They are upon us now.

Clients need to trust the legal services provider and we are not yet at the point of acceptance of full automation in the delivery of legal service, so there is an opportunity for us to immerse ourselves in new technology and write ourselves into the future.

It is also an important opportunity to take a close look at the practise of law and to ensure that the legal profession is living up to its ideals, defending the rule of law and promoting the cause of justice.

This is a real challenge for the profession – to ensure that legal technologies are designed holistically to enhance justice outcomes and do not obscure serious and important legal problems behind an interface, styled as an alternative to traditional legal services.

To meet this challenge, the profession will need to be actively involved in shaping technology as it comes online, as will the courts.

We must lead rather than be led.

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