

**LAW  
INSTITUTE  
VICTORIA**

**Report of the Future Focus Forum 2018**

# **(Re)moving the boundaries: Legal advice~legal information**

**Technology and the Law Committee of Council**

Published February 2020



## Contents

<u>Contents</u> .....	1
<u>Summary of Report</u> .....	2
<u>Part A: Background</u> .....	3
<u>The Technology and the Law Committee of Council</u> .....	3
<u>Purpose of the Future Focus Forum</u> .....	3
<u>The 2018 Future Focus Forum</u> .....	3
<u>Feedback for the Future Focus Forum</u> .....	4
<u>Part B: Keynote speech on “Legal regulation and technology - Challenges and opportunities”</u> .....	5
<u>Speech Summary</u> .....	5
<u>Part C: The context of modern lawyers, modern legal practice and modern clients</u> .....	7
<u>Expert perspectives on the question</u> .....	7
<u>The current legal services market and its changes with technology</u> .....	8
<u>Transformations in the legal profession</u> .....	9
<u>Insurance of legal risk with the legal information/advice question</u> .....	10
<u>Part D: The issue – Blurring the boundaries of legal information and legal advice</u> .....	12
<u>What is the burning issue around legal advice and legal information?</u> .....	12
<u>Definitions</u> .....	12
<u>Why is the distinction an issue?</u> .....	13
<u>Why a burning issue?</u> .....	13
<u>Burning questions for today</u> .....	13
<u>Part E: Discussion questions and themes</u> .....	14
<u>Format</u> .....	14
<u>The Eight Discussion Questions</u> .....	14
<u>Common themes emerging from the Eight Discussion Questions</u> .....	15
<u>Part F: Suggestions and Options</u> .....	19
<u>It will be increasingly difficult to draw a clear line between legal advice and legal information</u> .....	19
<u>How can regulation best/better carry out its purpose?</u> .....	19
<u>As to the regulations themselves</u> .....	19
<u>What to do about the lawyers’ monopoly?</u> .....	20
<u>New technologies may require new regulatory approaches</u> .....	20
<u>Thank you and Future Forums</u> .....	21

## Report of the Future Focus Forum 2018

# (Re)moving the boundaries: Legal advice~legal information

## Technology and the Law Committee of Council

Published February 2020

### Summary of Report

The regulation of the legal profession in Australia is based on a distinction between legal advice provided by a lawyer and tailored to the client and legal information (provided to the public at large. Traditionally, this distinction was clear. But with technology, it is becoming less so. For example, is a legal chatbot providing advice or information?

Over 60 key members of the legal profession and community gathered to listen to experts and the keynote speaker, and then considered eight questions to this emerging problem.

The Participants in the Forum concluded that:

- It will be increasingly difficult to draw a clear line between legal advice and legal information as technology advances
- Existing regulation needs to be amended to better achieve its purposes
- What to do about the lawyers' monopoly needs further consideration, and
- New technologies are likely to require new regulatory approaches.

## Part A: Background

**Fabian Horton**

**Lecturer, Technology Researcher, and Director of ConnectLaw**

### The Technology and the Law Committee of Council

The LIV established the Technology and the Law Committee of Council in October 2014. This is a volunteer group of dedicated lawyers with a keen interest in a range of technologies.

The purpose of the Technology and the Law Committee of Council is to:

- Monitor and advise the LIV of issues and opportunities relating to technology and the law; and
- Educate the legal profession about the use, risks and benefit of technology to promote greater uptake and understanding of technology in legal practice.

In this role, the Technology and the Law Committee of Council undertakes a number of thought leadership events. The goal of these events is to consult widely, to gather information and to provide insights around important issues affecting the legal profession and disseminate the information in an appropriate format.

One thought leadership event is the Future Focus Forum. This is an annual event coordinated by and hosted by the Technology and the Law Committee of Council.

### Purpose of the Future Focus Forum

As an invitation-only forum, the Future Focus Forum aims to work with experts and key members of the legal profession and community to discuss and respond to some of the law's most important and challenging questions. The Future Focus Forum concentrates on issues likely to occur in the near-future, that is, which are burning issues. The Technology and Law Committee identify areas of the law that have a technology component and are currently or are likely to significantly affect the legal profession.

The Forum aims to invite thought leaders, technology experts and experienced legal industry participants to investigate, debate, and make recommendations about the topic. Sometimes, keynote speakers present on diverse perspectives on the topic to provoke and assist the participants in assessing the questions asked.

### The 2018 Future Focus Forum

In 2018, the Future Focus Forum was held on Wednesday 12 December at LIV premises. The focus was on a significant question facing the legal industry in Australia and internationally: With automated legal services, online legal advice and external competitors, how best can or could we regulate the Australian legal profession?

The Committee set a number of goals for the Forum to learn and consider:

1. Explore the modern changing world as to how legal information/advice is obtained
2. Discuss what lawyers, especially when technology can provide automated advice/information
3. Discuss current risk management and regulation relating to legal advice-information, and
4. Explore the why, if, and how, to best manage risks and regulations presented by automated legal services in the near-future world.

The participants in the Forum were given the opportunity to:

- Receive unique insights from a range of expert speakers on discrete issues affecting the current legal environment
- Examine the evolving dynamics of modern legal practice, including the practitioner-client relationship and regulations that govern legal advice – both now and in five years' time;
- Debate the role of the legal advisor in the near future;
- Present their views on how the issues raised and make recommendations as to how the issues might be managed going forward; and
- Participate in group breakout sessions designed to challenge their perspectives and to come together and address the pressing issues.

The unique purpose and structure of the Future Focus Forum provides an excellent platform for thought leadership in the technology and law space.

These annual Future Focus Forums are one of the rare opportunities in Australia for technology experts and the legal profession to come together for open dialogue. The Forums have proven to be an invaluable contribution to the ongoing development of scholarship and understanding of topics that significantly affect the future of law.

This Report extends this opportunity to the LIV membership.

### **Feedback for the Future Focus Forum**

Feedback from the Forum included “Timely discussion led by the LIV on how regulators should address legal information vs legal advice as legaltech continues to grow in influence”, “It is gratifying to see LIV is proactively engaging with the legal market’s stakeholders on this topic” and “Hit the zeitgeist!”.

The 2018 Forum demonstrates that the opportunity to discuss such vital issues has been embraced by the profession and the community, endorsing the value of the LIV’s ongoing support for this event.

## Part B: Keynote speech “Legal regulation and technology - Challenges and opportunities”

**Fiona McLeay**  
Legal Services Commissioner, Victoria

*Fiona McLeay is the Victorian Legal Services Commissioner and the CEO of the Victorian Legal Services Board.*

*Before her appointment to the Board and Commissioner in January 2018, Fiona was CEO of the access to justice organisation, Justice Connect. Fiona has also previously held the positions of General Counsel at World Vision Australia and Special Counsel at Clayton Utz in the construction dispute resolution practice.*

*Fiona holds the degrees of BA (Hons) from University of Melbourne majoring in psychology with honours in criminology, LLB from University of NSW and an LLM in international law from University of Melbourne. Fiona has graduated with LLM from New York University Law School and has attended Harvard and Stanford Business Schools.*

### Speech Summary

- **My commitment.** As Legal Services Commissioner and Board CEO, I am committed to listening, to learning, and to improving the way the VLSB+C responds to all emerging issues for the profession.
- **Our goals.** As the regulator of the profession, our goal is to support and enhance public trust and confidence in the legal profession in Victoria. We do this through three main functions:
  - Protect consumers by effective regulation of the legal profession
  - Manage the public purpose fund for effective regulation and in order to improve access to justice
  - Support the profession to achieve the highest standards of ethics and legal practice – this is what today’s conversation will focus on, specifically around how we can support the profession in the face of emerging technologies
- **Where are we now?** The starting point of any discussion like this must be the consumer and potential consumer of legal services – that is, not just those who make it to a lawyer and become a client. We must understand that when they look for help, it’s because they have a problem – they make no distinction between advice and information, they just want help. We need to understand how they use technology to get the help they need. We do know that many people with legal problems get no legal help; that few find self-help guides currently available online to be of significant assistance. There is a significant opportunity for lawyers to help with simple legal needs with technology and from there, to work out how to provide better service for more complex needs. Lawyers should also recognise that clients have needs for different types and levels of service at different stages in their lives.
- **Where to from here?** As in any area of the market, new service provisions disrupt old ways of doing things simply because the new model is more desirable for consumers: witness the example of the Netflix model destroying the business of Blockbuster Video. As a profession, we need to embrace the opportunities that new technology provides. As a regulator, we cannot turn back the tide and the reality of the market, rather, we need to work with the profession as it adapts. We are open to emerging issues and ideas, and clear about the regulatory ‘non-negotiables’ of legal practice.

- **Challenges and opportunities for the profession.** The profession now must deal with the heightened expectations of clients in the timeliness and delivery of services, and in how they differentiate and explain their value to potential consumers;  
  
Opportunities include development of new service products for the ‘missing middle’ who currently are unable to afford legal services; changing their own work practices to standardise and streamline processes and free up lawyers to concentrate on the areas where they can add unique expertise. Lawyers can also use technology to run a better business.
- **Challenges and opportunities for the regulator.** As a regulator, our challenge is to support the profession through these changes, and to adjust our regulatory approach to enable the profession to innovate and meet the market need. As regulator, we have many opportunities to enhance our own activities, including providing resources for the profession to assist in innovation, and to help consumers by providing better information and guidance, and opportunities to assist with resolution of disputes with lawyers through such tools as Online Dispute Resolution.
- **We welcome innovation and new ways of doing business.** To undertake this important work, I’ve appointed Jennie Pakula to the new role of Manager, Innovation & Consumer Engagement. Among other initiatives, Jennie will be developing our local version of a ‘regulatory sandbox’ to enable the trialling and testing of new service ideas. We want to start a conversation with you to support the profession as it moves into the future.

## Part C: The context of modern lawyers, modern legal practice and modern clients

### Expert perspectives on the question

As part of investigating the issues that surround and inform the question of how better to manage a distinction between legal information and advice, we asked experts with a divergent range of perspectives for their insights. This both acknowledges that the law and its practice is informed by many aspects of society, and accepts that lawyers do not have all the answers when it comes to the legal industry and especially when we interact with the technology industry.

The Future Focus Forum was fortunate to host five experts from both law and technology, from legal and regulatory perspectives, technological and operational perspectives, client- and customer perspective – all allowed for a deeper analysis of the topic.

Name	Title & Organisation	Topic
<b>Eric Chin</b>	Principal Alpha Creates	The current legal services market and its changes with technology
<b>Terri Mottershead</b>	Executive Director Centre for Legal Innovation at the College of Law	Transformations of and to the legal profession
<b>Justin Toohey</b>	Chief Executive Officer Legal Practitioners' Liability Committee	Insurance of legal risk with the legal information/advice question
<b>Victor Brooker</b>	Senior Designer Fjord	The user experience with legal problems and technology
<b>Alistair Leathwood</b>	Executive Director TNS Australia, Kantar Group	Modern client expectations of lawyers and technology

These experts gave the forum participants a view into the world outside of legal practice, yet in varying ways, intimately connected.

The talks explored questions such as:

- How is the legal profession engaging with technology?
- How is the technology industry evolving with the legal industry?
- How do the legal profession, legal regulators and insurers see technology?
- What does technology mean for lawyers' jobs?
- What position do the insurers really take?
- How do technology designers see the legal services market?
- How do our customers interact with technology? What do they expect from lawyers?

The subject areas assisted the forum participants to bring to the discussion new and deeper understanding of the drivers underlying the issues being considered.



## The current legal services market and its changes with technology

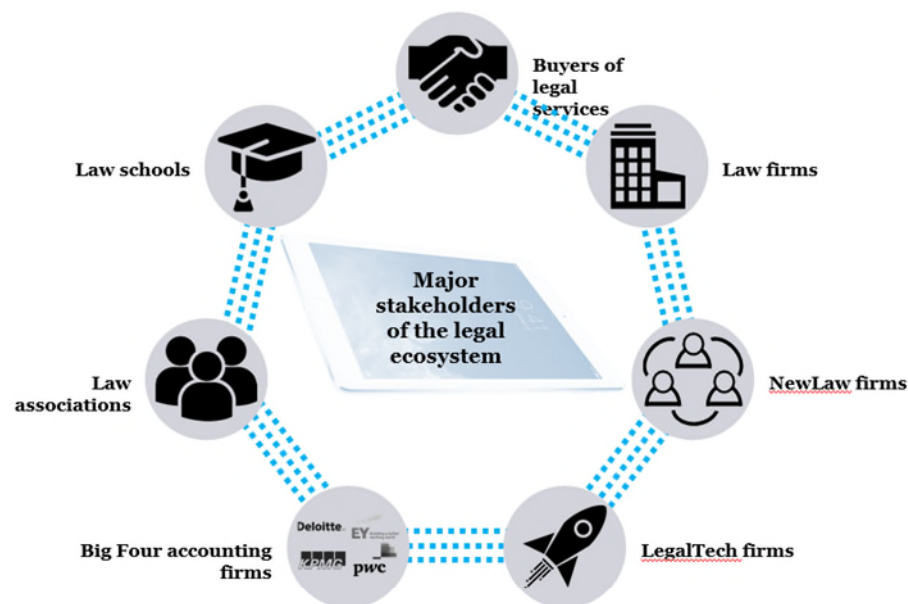
**Eric Chin**  
Principal, AlphaCreates

*Eric consults to LegalTech, NewLaw and BigLaw on strategy and other issues facing the accounting and legal professions. Recognising the changing paradigm of law, Eric coined the phrase NewLaw in 2013.*

### The legal services market and technology

Eric brought to the Forum an in-depth understanding of the changing legal industry environment where the Australian legal services industry is a \$23 billion market (IBIS World). Eric informed the Forum as to the current stakeholders in the legal ecosystem including the competitive landscape for law firms and their buyers of services.

The legal ecosystem is made up of seven major categories of stakeholders...



© 2018 [EricYChin](#)

Eric explained challenges for law firms and the BigLaw paradigm, the rise of new forms of legal practice such as NewLaw, the increasing number of legaltech firms across multiple areas, the big four accounting firms' investment in law and the actions of law associations and legal education institutions to such legal technology innovations.

As a result of a strong movement of technologists, lawyers and entrepreneurs, the modern legal practice seeks to bring innovative solutions to everyday people with complex legal problems. One form of modern legal practice is termed NewLaw. NewLaw firms are businesses that use labour arbitrage at the centre of their business model in the delivery of legal services. This challenges the traditional BigLaw business model built by large law firms around expertise arbitrage for corporate legal departments.

Of particular interest are legaltech firms leveraging technology to arbitrage the delivery of legal services to clients. Legaltech's solutions combine data analytics and machine learning to equip lawyers with relevant skills to provide valued outcomes for consumers of legal services. These are not law firms. Indeed CodeX's Techindex finds 9 categories of legaltech firms, including legal practice management, legal document automation,

e-discovery, legal marketplace, legal analytics, legal research, legal compliance, legal education and online dispute resolution.

Eric's research revealed that there are over 80 Legal Tech firms in Australia – with the biggest segment being document automation. Technology in the legal industry paves the way for legaltech firms to provide technology solutions that improve lawyers' efficiency and effectiveness and so providing cost savings and improved value to consumers.

## **Transformations in the legal profession**

### **Terri Mottershead**

#### **Executive Director, Centre for Legal Innovation, College of Law**

*Having worked with some of the world's leading law firms for more than 20 years, Terri is a thought leader in legal innovation. In 2016, Terri was the founding Director of the Centre for Legal Innovation.*

### **Transformations in the legal profession**

Terri explored the changing relationship between lawyers and technology. Terri showed that, far from being the lawyer's enemy, technology offers lawyers a range of new opportunities that were previously unimagined.

The legal profession landscape is changing rapidly; the traditional lawyer-client relationship is being questioned. Clients expect lawyers to be highly-skilled, continually trained, adhere to professional standards and provide quality assurance. Clients also expect that the legal profession will be extensively regulated, to ensure public confidence in the profession. This has led some sectors of society to accuse lawyers of imposing a monopoly on justice and increasing costs as a result.

The legal market is currently being commoditised in some areas by LegalTech and some NewLaw firms. Digital disruption is changing the way law firms do business as usual. Yet complex, highly skilled tasks will continue to require keeping the role of the human lawyer. However, the rise of LegalTech services could change this. To keep the distinction of legal advice versus legal information, the question then becomes how are lawyers' roles justified? That is, do lawyers provide sufficient value to the consumers of legal services to sustain the current profession?

Terri then asked what new legal skills and new legal roles are required as lawyers adapt and evolve to the changing landscape? She suggests, as a profession, working with the technology industry and AI, lawyers will need to engage with other professionals with diverse skills, while also retaining the skills most critical to working with complexity such as critical thinking, creativity and complex problem-solving. In particular, "Our greatest capability will be our humanity".

Future managers of the profession will need to integrate a multi-disciplinary, multi-generational, multi-talented workforce to create a digital workforce that innovates and disrupts the traditional somewhat antiquated profession. In times of major disruption and technological advancement, efficiencies are created in providing legal services to consumers.

There is a need to understand the traditional lawyer-client relationship and its historical context to compare and contrast to the current lawyer-client relationship. We need to maintain the integrity of the traditional paradigm while providing value-laden legal services through technology. Consumers expect professionalism from their lawyers and also to understand how a digital environment can enhance the lawyer-client relationship and provide their lawyer with a flexible life-work balance. Technology can provide the opportunity to be mobile, have flexible working hours and collaborative virtual workspaces to innovate creative

solutions for their clients. Experienced lawyers will need to be relationship-focused and listen for feedback, find opportunities to lead and learn with technology. By being value- and outcomes-focused, current day lawyers will be disrupters in the marketplace.

The future role of the lawyer may well be a hybrid role, whether it be developing legalbot technology services, blockchain developer, data analytics lawyer, legal automation specialist, Fintech practitioner, online conflicts resolution mediator and/or risk analyst/manager.



It is important that in the face of unprecedented innovation and change that the legal profession, and law firms, prioritise and proactively manage innovative succession planning to evolve and adapt to a changing legal marketplace to meet consumer demand.

The legal profession must be managed for lawyers and for all other external stakeholders, associated professionals in innovative professions and consumers. Terri argues that in a tech-driven world, lawyers must continue to transform and to grow their mindset to take on new challenges to strive for excellence in their level of professionalism.

## Insurance of legal risk with the legal information/advice question

**Justin Toohey**

**Chief Executive Officer, Legal Practitioners Liability Committee (LPLC)**

*Justin was appointed CEO of the Legal Practitioners' Liability Committee in 2018, having been Deputy CEO with primary responsibility as Head of Claims since 2005. The LPLC provides comprehensive professional indemnity insurance and risk management services to Victorian solicitors and barristers as well as Australia's large national law firms.*

### Insurance of legal risk

LPLC's insurance scheme provides a broad indemnity to insured firms against civil liability in connection with a firm's practise of law or provision of legal services. LPLC insures all types of private law practices, whether they might be referred to as "biglaw", "old law", "new law" or any other type of entity that is authorised to carry on practice by legal regulators.

Every year the LPLC receives over 500 notifications of claims and circumstances from practitioners. Often inquiries raise complex professional ethics dimensions and practitioners are often stressed and vulnerable as a result of same. The areas of practice in which claims most commonly arise are real property transactions, commercial transactions, mortgage lending, civil litigation, wills and estates and family law.

The reason these areas give rise to claims is because when something goes wrong with a transaction due to a lawyer's negligence, clients will often lose money and want compensation for the economic loss inflicted upon them. That is what LPLC's insurance is there to address.

LPLC tends not to see many claims arising from criminal law matters or areas of practice concerned with the protection of individual liberties and freedoms, residential tenancies or

other areas of social justice and advocacy – not because they are unimportant, but because LPLC's insurance responds to financial losses.

One of the questions sometimes asked of LPLC is whether changes in the way of legal advice and the delivery of legal information through the use of new technology has any implications for the profession from a risk (liability exposure) or insurance (coverage) perspective?

As to risk, there is always speculation that disruption to established business models creates new risks, but to date, LPLC has not seen evidence of claims against 'new law' firms. The risk we are talking about is really the risk of human error in connection with the use of technology, regardless of the particular business model used by a firm.

The biggest emerging risks LPLC sees are from social engineering (assisted by technology) giving rise to:

- emails to and from law firms being fraudulently intercepted and altered by cybercriminals to change payment details and re-direct the electronic transfer of client funds; and
- the compromise of law firm email systems, giving rise to privacy breaches and the potential exposure of confidential client data.

LPLC has commenced a new cyber-risk campaign to warn practitioners about these growing threats and educate them in risk mitigation.

There are also risks around increasing provision of legal advice through the use of email or other social media networks (for example, WeChat, WhatsApp). Increasing the speed of advice and response time means advice is not always thoroughly considered before being sent. It also raises challenges for traditional record-keeping methods and a lack of useable trail when claims arise (especially if the advice is being dispensed through a client-controlled platform).

But there is also upside (elimination of risks) in the use of technology to deliver better and safer legal services too. Good use of technology tools can help to standardise legal processes and eliminate mistakes that previously arose through oversight or clerical error. Technology-assisted document review has been proven to be quicker and more accurate than humans. And technology also creates opportunities for legal advice to be provided in more client-centric ways.

As to coverage, the policy wording is technology-neutral. It responds to claims against law practices regardless of the way in which the firm might choose to deliver its legal services and whether or not the advice is tailored (bespoke) or generic.

There is a debate about where the boundary between (unregulated) legal information and (regulated) legal advice sits, and whether the development of legal technology solutions for clients is potentially shifting the boundary, or at least blurring it. It is the role of the Legal Services Board as regulator to monitor and where it thinks fit, to prosecute unqualified legal practice. LPLC only insures law practices.

One current challenge facing LPLC is the increasing use of short-term 'contract' lawyers engaged within firms. This challenges LPLC's traditional method of premium assessment for those firms where premiums are still assessed under the traditional headcount model for employee practitioners. Use of a single premium assessment date for the number of employees working in a firm can lead to premium anomalies between firms. LPLC is addressing this challenge through the phased introduction of gross fee income premium assessment for smaller firms. LPLC is ever-conscious of the need for the premium burden to be spread equitably and transparently across differently structured firms.

## Part D: The issue – Blurring the boundaries of legal information and legal advice

**Judith Bennett**

Business Advisor, Lawyer, Researcher, and Director of [www.business4group.com](http://www.business4group.com)

### What is the burning issue around legal advice and legal information?

My story is one of many stories on the Technology and Law Committee of Council. As part of a multi-disciplinary team, we were researching automated legal advice-giving tools. We saw how new tools had the potential, and increasingly, the capacity, to deliver a range of benefits such as enabling cheaper and quicker access to the law, removing mundane routine tasks from lawyers, and opening up new markets.

A key issue was the boundary drawn between new law technologies and more traditional lawyers' areas of work based on the distinction of legal advice as compared to legal information. We found three responses:

- Legalistic: We will sue you if you give legal advice
- LegalTechnologists: "Well, we've read all the advices ... and we're protected because this is only providing legal information ... not legal advice"
- Consumers: "We do not care. We just seek an answer to our problems".

These varied responses mirrored concerns discussed in our Technology and Law Committee, and how such a fundamental question is highlighted when technology is involved. For example:

- Why draw a technical and/or technological line?
- Is that line justifiable in today's changing legal environment and new risks?
- Why is it "one size fits all"?
- How better to integrate underlying purposes to achieve social and equitable goals?

### Definitions

Advice-giving is a core lawyering function ... and at the heart of legal regulation.

In contrast to the more liberalised UK yet similar to the US, Australia takes a broad definition of legal advice.

Conceptually it is agreed that in Australia "legal advice concerns a legal problem or question specific to a client" and "is taken as being tailored to [and specific to] the individual circumstances of the 'client'" (Giddings & Robertson, 2001). However, a fundamental issue is that we do not really have a clear definition of legal advice.

Sometimes legal advice is straight forward, sometimes more complicated, and at times irreducibly complex. Some legal advice-giving can involve the nuanced interplay of a broad range of knowledge, skills and professional expertise. Legal advice is not always just about technical knowledge of the law, but also about what is the context. It can be a much broader conceptualisation that involves a mix of not just legal information, commercial information, and also people skills, financial nous and awareness about the client's situation.

In contrast, commonly, legal information is described as generic and not addressing the particular circumstances of the client.

## Why is the distinction an issue?

The distinction between legal information and legal advice matters for our current regulatory system in Victoria and Australia.

While in theory there is a clear boundary, in practice it is not always so clear cut. Indeed it can be quite blurry. It is hard to separate legal information and legal advice. Providing legal advice can be difficult to distinguish from providing legal information. What if legal information is provided before and as part of giving legal advice? This blurring of legal advice~legal information is highlighted with technology.

There are also underlying policy issues. Legal advice is seen as a quasi-market good to be regulated to protect consumers, while legal information is seen more like a more public good that should be free and accessible.

Currently, the legal profession's regulation controls who has the capacity to give legal advice. It uses the fundamental yet quite complex distinction between legal information and advice. This is not directly based in legislation but through case law on the scope of legal practice. The Uniform Law uses the term "ordinary course of legal practice" yet relies on the case law seen in Phillips CJ decision in *Cornell v Nagle* (1995).<sup>1</sup>

Taking a wide definition of legal practice in Australia reserves much work to the legal profession. Regulation demarcates the providing of unregulated legal information from regulated legal advice-giving. Thus it controls the supply side and who has access to the legal services market. Questions include; where we draw the line, or do we extend the line? More complex questions include whether the line is justifiable in our current environment?

## Why a burning issue?

This distinction is now a burning issue due to forces driving fundamental, irreversible changes for the legal profession, such as:

- Increasing globalisation
- More demanding clients with the "more for less challenge" (Susskind, 2013)
- Changing the values of young lawyers, and
- Exponential changes in technology capability.

Technology is pervasive now. Current technology enables, for example, rapid communication, the transformation of standard routine work and automated legal tools. Near-future technology enables the performance of lawyers' tasks and changes to the nature of legal work seeing the emergence of "enhanced practitioners" (Susskind & Susskind, 2015).

## Burning questions for today

Today we aim to consider many of the questions about where we draw the line. Moving from a binary "right/wrong" to a more nuanced model. And asking the larger questions:

- As technology becomes more advanced, is it appropriate to regulate as now?
- What is the impact of trends changing the risk environment?
- Why and how should/could regulation operate?
- What is the role of regulation? Does one size fit all?
- Are there ethical issues to consider beyond what technology can do and what the law requires?

---

<sup>1</sup> For analysis, see Beames, E. (2017). Technology-based legal document generation services and the regulation of legal practice in Australia. *Alternative Law Journal*, 42(4), 297–303.

## Part E: Discussion questions and themes

### Format

Participants divided into eight groups. Each group discussed one question and developed input for recommendations. Each group then presented their recommendations

### Eight discussion questions

- 1. In the legal services industry, the current regulations cover the service/process of delivering legal advice, the output produced, and the supplier (lawyer).**
  - What are your recommendations in relation to the future regulation of the legal services industry? Please provide reasoning for your recommendations
- 2. Currently lawyers have a monopoly on providing legal advice.**
  - What are the benefits and detriments to clients, lawyers and society on retaining the lawyer monopoly?
- 3. The current laws and regulations seem to create a dividing line between legal advice and legal information.**
  - Is there a dividing line between legal advice and legal information and where is it?
- 4. Some argue that removing any real or implied distinction between legal advice and legal information, and allowing non-regulated legal service providers to give legal assistance, opens up access to justice to the 'missing market' of clients who cannot afford lawyers.**
  - What do you recommend in relation to opening up access to justice to the 'missing market'?
- 5. Currently lawyers are specifically regulated as to the provision of legal services.**
  - Is specific regulation of the legal industry required now? Do you recommend other approaches, such as pure open-market or a multiple tiered system?
- 6. Forces that are affecting the legal market are dynamic and accelerating. The needs of society are changing.**
  - Are these forces understood enough to make an informed decision as to the regulation of the legal industry for now and the future?
- 7. Increasingly other entrants (lawyers and non-lawyers) are entering and beginning to compete in the Australian legal services market – including from overseas and other industries.**
  - Is action required to produce a level playing field for the legal industry?
- 8. Technology has different benefits and detriments for different sections of the legal services market.**
  - How do you recommend using regulation of legal work to enhance innovation and potential access to justice?

## Common themes emerging

Themes that emerged included the following.

### The “dividing line” between legal advice and legal information

The Participants explored the concepts of legal advice and legal information.

The discussion which followed discussed more broadly the current laws and regulations which seemed to create a dividing line between legal advice versus legal information.

Was legal advice considered radically different from legal information in the context it is provided to consumers? A distinction between advice and information might provide guidance to consumers on the capacity of the professional providing the advice, whether it be a legal practitioner or legal support officer, versus a legal chatbot.

Traditionally legal information has been disseminated in the form of standard print brochures and information sheets. The consumer can now engage with technology-based legal services such as automated machine-learning tools and automated document generation services, which are changing the previously passive nature of receiving that legal information. For example: Fitzroy Legal Service law Handbook, Victoria Legal Aid (VLA) brochures, or VLA family law self-representation guide; and promotional legal advice brochures, such as explaining Wills and Enduring Powers of Attorney.

Legal information is now more readily available through tech-enabled, process-driven, and client-centric providers who are leveraging innovation through legal chatbots. This may be seen as a threat to the professionalism of legal providers. It potentially challenges the dynamic and discrete role a lawyer has when informing a client of legal options in their circumstances, providing bespoke legal advice by taking into account their factual context. Legal information may misguide or confuse consumers as to what their legal position is and their options moving forward.

The blurring of lines between legal information versus legal advice may make it difficult for lawyers to show their value to clients. Do lawyers need to innovate by incorporating technologically focused legal information providers to assert their capacity to provide creative legal outcomes as viable options for consumers?

Artificial intelligence (AI) in the legal framework often uses decision-tree tools to make traceable, structured recommendations to consumers based on the answers given by the user. More advanced legal AI uses machine learning where the reasoning cannot be traced. This doesn't necessarily replace the role of the lawyer with analytical legal reasoning. Consumers should, therefore, have different expectations of legal professionals to provide affordable solutions with satisfactory outcomes.

Consumers are primarily concerned with finding correct and often affordable solutions. Whether this takes the form of advice or information is largely immaterial to the consumer. When do consumers require more than legal information? This remains contentious. Often the ultimately the answer is “depends” on the circumstances. Some consumers may benefit from something in addition to information, this does not necessarily mean that it needs to be legal advice. For example, a speculative solution could sit somewhere between legal information and legal advice. However, if a consumer seeks only limited legal information, such as using a legal-bot, the information may not necessarily achieve the outcomes they seek.

### Current regulation?

The Participants focused on identifying the purposes of the regulatory framework, that is, what harms are being prevented, who is protected by the regulator and at what cost?



Regulation was thought to be primarily concerned with protecting consumers from negligent and unprofessional behaviour of solicitors.

Why do we assume that all consumers need protection? Can we instead only protect those who need the protection?

The regulator is concerned with the issue of competence, quality and therefore focuses on the education of legal practitioners. The regulator may also need to distinguish between more complex legal work, requiring legal practitioner input, versus simple legal work where legaltech providers may focus currently. Regulating by service type could be a solution, with the level of risk involved equating to the degree of regulation.

A concern was how does the regulator ensure the same competence and quality provided in a space where legaltech providers are operating without borders and potentially without regulation and where liability for negligent client outcomes is untested in common law?

Regulation has the capacity to enhance innovation by clearly delineating what behaviours are acceptable in disseminating legal information to consumers and improving access to justice. Innovative technologies can provide clear self-help remedies to consumers through legaltech and legal-bots. However, the level of regulation depends on the degree of harm a consumer will experience if new technologies are incorrectly applied to various circumstances a consumer may face, for example, the potential harm of incorrect advice when appealing a parking fine versus facing a prison term are vastly different

### **What is the best purpose of regulation?**

Current legal profession regulations focus on the process of delivering legal advice, the output of the advice and the qualifications of the supplier of that advice. The regulator is concerned with the quality of legal services, ensuring it is not unprofessional or negligent in delivering the desired outcomes for consumers.

The future focus of the regulator can be on blending current and future legal services in a framework where regulations can be technology neutral, addressing and resolving issues with alternative models providing legaltech services.

Participants also considered whether the certain legaltech providers of legal information of low value and/or low risk to consumers be excluded from regulation. Alternatively, how can the regulator assess satisfactory outcomes for consumers when legal innovation is used by traditional legal practitioners?

Participants generally agreed that:

- Regulations must be simple enough to understand and incorporate to everyday practice but also be broad enough to encompass the day-to-day activities of non-lawyers working within the legal profession
- Legaltech providers must also regulate their own activities by providing a sufficient explanation of their role to consumers, and clearly indicate their level of accountability for client outcomes; and
- The legal reasoning of self-help remedies needs to be made transparent when accessing these self-help remedies.
- Regulations around technology need to address issues of explain-ability, reasoning and bias so justice is seen to be done

### **Benefits and detriments of lawyers' monopoly**

Participants saw that if lawyers continued to hold a monopoly on legal services then possible benefits might include: higher standards of training, ongoing innovation in delivering legal services and quality assurance in the range of outcomes provided to consumers.

Consumers would be provided with the necessary safeguards already offered by their solicitors, being transparency in cost disclosures, professional indemnity insurance, high standards of professional behaviour and ethical obligations. Failure would result in disciplinary procedures and access to damages.

Legal professional privilege of legal practitioners was highly valued, with practitioners trusted by their clients to protect confidential information.

Participants also recognised that a monopoly may insulate the legal profession from innovation. This could act as a barrier for providing low-cost legal services and prevent innovative and/or creative consumer outcomes. This could also limit the creativity of legal practitioners.

It was generally agreed that if the monopoly was liberalised and/or less controlled by the regulator, there would be increased innovation in legaltech services. This would enable increased competition and enhanced low-cost alternatives both inside and outside of the legal profession. Enabling bespoke advice at a reduced cost, greater transparency, accountability and trust, would add value and satisfaction to the lawyer-client relationship.

Participants suggested that lawyers also need to accept that there has already been a shift in the current monopoly of the legal market. The reality is that there is no monopoly on providing legal information. Allowing flexibility around low-risk advice too would allow for a cheaper service, improving access to justice for those who cannot afford or access a lawyer. The regulator should take this into consideration when regulating legaltech providers.

### **Opening up the market – access to justice, competition and Innovation**

The Participants observed how competition and innovation might be affected by a change in the divide between legal advice and legal information.

Increasingly lawyers and non-lawyers using technology and innovation are entering and beginning to compete in the Australian legal services market, both from overseas and other industries such as accounting. This increased competition presents more affordable options to potential clients. Should such non-regulated legal service providers be allowed to give legal assistance?

Questions arise as to how to efficiently democratise access to justice to the ‘missing middle’ of clients – including removing the geographical barrier. It is important to identify those who currently have unmet legal needs and consider the harm being caused by the access to justice gap. Challenges for lawyers using technology to provide access to justice requires the profession to clearly identify their value propositions with clients.

Therefore, legal practitioners must re-consider the following questions:

- How do lawyers and other legal service providers gain the necessary training and education to become experienced in servicing consumers to the required standard
- Specifically, how do new entrants to the legaltech gain this experience when basic work is automated e.g. by apps or other technology?
- How do consumers discern quality services and outcomes?
- Will there be two tiers of the profession, being legal services provided by lawyers versus non-lawyer legaltech professionals?

This competition can be advantageous, stimulating new processes and collapsing traditional silos of the profession. From a consumer perspective this allows for greater diversity and means of engaging with legal solutions, and for a lawyer, this provides more interesting focused work. The legal profession should not see this as detrimental, but rather a means of stimulating innovation, providing lawyers with new perspectives and ways of working diversifying their traditional legal services.

## **Client-centredness**

The Participants reviewed the changes in clients and their needs.

In an increasingly globalised and consumer-centric world, clients' demands and expectations are rapidly changing - a disruption to the traditional consumer/lawyer power balance – which now requires lawyers to produce services more closely aligned with customer needs.

The Participants suggested that lawyers in future must listen to consumer feedback and better understand their needs in order to clearly meet new client expectations. Lawyers must now empathise and actively listen to their clients to ensure customer-service excellence. This needs to be combined with a greater openness to new ways of working. Customer feedback loops can ensure their service and professionalism reflect what consumers demand.

There is now a shift towards human-centred design and design thinking in delivering legal services to encourage legal service providers to better understand their clients' needs. The legal education toolkit will require ongoing innovation and learning and development tools which meet and satisfy clients' new demands.

The future lawyer's CPD toolkit may include or be informed by:

- Case studies of other industries
- Funds to incentivise firms to develop different skillsets
- Quality assurance program on legal tech for lawyers
- Training such as CPD in law firms to showcase and promote new models of working.

## **Technology has different benefits and detriments for different parts of the legal market**

Participants suggested that legaltech benefits and costs would be felt differently by different parts of the legal market:

- For consumers, access to legal tech justice may be a “postcode“ issue dependent on their location in cities or regional or rural area
- For current SME legal practices, legaltech innovation can be expensive and requires a shift from traditional legal service delivery and may cannibalise parts of current legal practices.
- For legal assistance providers, due to resource restraints, the legaltech market sees more single-issue apps rather than holistic legal solutions.

## Part F: Suggestions and options

The Participants developed a number of suggestions and options.

### It will be increasingly difficult to draw a clear line between legal advice and legal information

In theory, the distinction between legal advice and legal information has a clear boundary. In practice, the distinction is not always clear and becoming less so, even circular. For example, AI solutions such as chat-bots allow for tailored advice without needing a lawyer to look at the facts of each individual case.

Consumers are unlikely to care about the distinction between legal advice and legal information. They are more likely to want clear advice, reasoning they can understand, the best quality solution, justice seen to be done, and this done in a timely way at an affordable price.

### How can regulation best/better carry out its purpose?

Overall, participants considered the current regulations were blurry. They were not sure if current regulation was the best or most transparent method of achieving the multiple aims.

An idealistic option is to “regulate for innovation that enables increasing access to justice”. This contrasts to the argument that reduced regulation offer benefits in increased innovation and access to justice

Another option is an overall approach which considers the risk to the consumer. Regulation should serve the purpose of consumer protection commensurate with the risk to the consumer.

- This management of the risk needs to have several dimensions, including considering the probability and severity of the risk and also having different ways of managing the risk, considering processes and outcomes
- The management the risk also needs to consider the different types of consumer, ranging from sophisticated to the “missing middle” as well as the legally aided.
- Also, consumers may have different risk appetites. Consumers may assess how personalised a service they need based on the risk in much the same way they decide whether to Google their symptoms or consult a doctor.
- The management of the risk also needs to take into consideration that there are different types of legal matters. Some, such as handling traffic fines, are of much lower risk than others, such as a family law matter involving child custody.

### As to the regulations themselves

Regulations need to be simple and “low maintenance”. Such regulations are more likely to be flexible, scalable, and principles-based. The aim is to focus on the tool rather than the occupation of the creator. This can assist where the details of future systems are not yet known.

Regulations are recommended to be in client-centred language for use and understanding by non-lawyers.

## What to do about the lawyers' monopoly?

While the lawyers' monopoly on providing legal advice gives benefits to lawyer and protects consumers as seen above, there are also cost implications for consumers. How can the regulatory regime, as much as possible, maintain the benefits of a monopoly while limiting the costs? Can technology play a role in this?

One option is to retain the monopoly, arguing the benefits outweigh the costs.

Another option is to allow more flexibility around low-risk advice that enables an often cheaper service and also improves access to justice for those who cannot afford a lawyer and those living in remote areas.

The Forum explored whether legal advice and legal information could be regulated by the existing regulations which apply to all goods and services. For example, the provisions prohibiting unconscionable conduct and misleading and deceptive conduct in the Australian Consumer Law, policed by the Australian Competition and Consumer Commission (ACCC)

Some participants saw risks around many types of legal advice high enough that a special regulatory regime is still needed.

Another (longer-term) option is to explore opportunities for deregulation in certain areas; as in the UK legal system. For example, in areas where lawyers are not traditionally involved, such as in VOCAT (Victims of Crime Assistance Tribunal) or where there are new services, such as AI chatbots.

## New technologies may require new regulatory approaches

New technologies are likely to require new regulatory approaches.

Some examples for these approaches may be:

- Set up upfront quality assurance and approval for legal technology solutions
- Run a regulatory sandbox
- Provide LSB+C guidance and rulings which can be used as precedents (Like ATO rulings)
- Offer the ability to test new technologies
- Ensure training and development for creators
- Implement a legal algorithm certifier, ensuring that a standard of quality is upheld in light of advancements in technology led legal services.
- And/or have an experienced provider or lawyer to verify or test the app by which the legal service is provided.
- Regulate the market by scanning new legal technologies and information platforms in ways similar to eBay and marketplace.

Other industries may provide guidance.

- Medicine and health
- Accounting and "FinTech"
- Information Technology e.g. IEEE

## **Thank you from the Future Focus Forum**

The Technology and the Law Committee of Council again thank the experts and the keynote speaker.

The Technology and the Law Committee also wishes to thank the LIV and its support staff for their support and event management

We also thank the members of the Organising Committee of the Future Focus Forum - particularly Fabian Horton and Judith Bennett as Leaders - and each of the Facilitators on the day who gave generously of their time and ideas.

And of course, the Participants!

We look forward to your participation in future LIV Future Focus Forums.

Technology and the Law Committee of Council  
Law Institute of Victoria