



Law Council
OF AUSTRALIA

Resilience and resourcefulness: embracing change and opportunity

Speech delivered by Fiona McLeod SC, President of the Law Council of Australia, at the National Association of Community Legal Centres Conference, Canberra.

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Resilience and resourcefulness

Standing in front of this audience of dedicated lawyers, I'm tempted to wonder what I can tell any of you about the subject for this session.

In recent years, legal assistance services have proven time and again that there is no lack of resilience and resourcefulness in the sector.

In the face of ideological opposition and very difficult financial circumstances, legal assistance services have continued to perform their absolutely essential task, putting clients first and improving justice outcomes.

A benefit the entire community shares.

This is not to downplay the enormous pressure that has been placed on the sector and individuals who work within it.

Rather, it is to indicate to all of you that I'm not here to teach granny how to suck eggs.

Instead, I want to take this opportunity to build on what my fellow panellists have already said in respect of the enormous opportunities in embracing change and innovation.

I want to talk about what this might look like for the legal profession more generally, particularly in respect of legal technology as one of the key, emerging drivers of change.

There is an urgent need for the profession to keep pace with technological transformation.

As a self-confessed sci-fi nerd, I grew up on a steady diet of social dystopia – Kubrik, Asimov, Bova and others.

More recently, I have been an avid consumer of the more hopeful, futuristic visions of *Arrival*, *Passengers* and *The Martian*.

But the tone of what has been said about the potential impact of legal technology has been far less hopeful.

Given the apparently impending doom of the legal profession, perhaps a better reference would be *The Terminator*, where:

A seemingly indestructible humanoid cyborg is sent from 2029 to 1984 to assassinate a waitress, whose unborn son will lead humanity in a war against the machines, while a soldier from that war is sent to protect her at all costs.

Replace “humanoid cyborg” with “infallible robot lawyer”, “waitress” with “developing line of precedent” and “soldier” with “application for legal aid” and it's not hard to see why some believe the legal profession doomsday clock is ticking dangerously close to midnight.

Sounds exciting!

And the truth is we should all be excited.

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

In an environment characterised by growing demand for legal assistance services and shrinking resources, the development of legal technology could provide ways for lawyers to work with their clients to resolve their legal problems quickly and efficiently.

Our capacity to make change happen

We shouldn't fall into the trap of thinking that we are without agency in the face of changing circumstances.

The legal profession, especially CLCs and legal assistance services, has proven that it is a powerful and persuasive force that can make change happen.

On 29 March 2017, the Senate passed a historic motion calling for immediate action on the funding crisis affecting Australia's legal assistance sector and the Federal Courts, including a call for the Government to:

- immediately reverse cuts to Community Legal Centres (CLCs) and Aboriginal and Torres Strait Islander Legal Services – that were to take effect from 1 July;
- commit to adequate and sustainable longer-term funding contributions to the legal assistance sector;

This motion was passed following sustained advocacy from the legal profession.

The Law Council alone had dozens of meetings with Federal Parliamentarians from all parties including the crossbench. We know that NACLC has also been working incredibly hard on this front.

The Australian Senate is a diverse and often difficult group.

Major and minor parties alike seem to have difficulty agreeing on anything within their party rooms, let alone across the dispatch box.

But they do agree with us.

On 24 April 2017, following a year of concerted effort by NACLC, the broader legal assistance sector and other peak bodies including the Law Council - we achieved a major change for the good.

The Attorney-General cancelled \$35 million of proposed cuts to legal aid and legal assistance services.

Major factors in this success were our collective capacity to drive positive change and our resilience and resourcefulness throughout the campaign.

Turning around the \$35 million cut was important, but the bigger picture remains dire.

We all agree that much more is needed to address the structural and systemic underfunding caused by over 20 years of funding neglect by successive Federal Governments.

For example, there has been no action taken to implement the 2014 Productivity Commission recommendation for an additional \$200 million per annum to fund necessary civil legal assistance services.

The challenge now is to translate this motion into real action – this is part of the reason for the Law Council’s Justice Project.

Although consultations for the Justice Project are still underway, the evidence is already demonstrating that integrated solutions – legal and non-legal – work best.

We need a whole of government approach to access to justice.

We need to convince policy makers that justice is relevant to every government portfolio, not only the Attorney-General’s portfolio.

To do this, we need to hear from you about what is already working well and what needs to change.

We will need to tell stories about people’s lived experiences and present the data.

One possible recommendation under consideration is the introduction of “Justice Impact Tests”.

These could help to ensure that the impact on the legal assistance and justice sector is factored in and planned for as an integral part of the legislation making process and that Parliamentarians are fully apprised of potential justice impacts before enacting legislation.

This concept could be usefully applied to new legislation as well as to executive and administrative actions taken by government.

The challenge ahead

Today, we have an opportunity to begin thinking about how the legal profession can engage with the vast changes being brought about by the rise of legal technology.

In 2016, Justice Nettle addressed the Bar Association of Queensland Annual Conference on the topic of “Technology and the Law”. Justice Nettle discussed the “computational law systems that can make the intellectual decisions which fashion and perhaps ultimately determine the outcome of a case.”

Computational law programs can learn as they go, manage projects, triage new cases, analyse legal problems, draft submissions, and assess the likelihood of various rulings and sentencing outcomes.

Jordan Furlong, a leading Canadian analyst of the global legal market wrote in 2012 that:

We’re at least 10 years away, probably more, from machines that can completely replace lawyers. But we’re already in the era when machines can displace lawyers, take on some aspects of their work, some percentage of their tasks, bump them aside, jostle into their seats, force them to go do something else. And that percentage is going to grow.¹

At the halfway mark of Mr Furlong’s timeline for the eradication of humankind – I mean lawyers – we are definitely beginning to see both the potential of AI systems to replace lawyers and some important limitations of AI driven processes.

¹ <https://www.law21.ca/2012/10/and-the-walls-came-down/>

We are beginning to see some of the possible ways that legal technology could enhance access to justice generally.

However, it is also becoming clear that it is very unlikely that technology will provide a panacea for the issues faced by many of the most vulnerable clients of legal assistance services.

We must continue to be cautious about emerging legal technologies and the circumstances in which we make use of them.

As with so much of the work conducted by legal assistance services, legal technologies will need to be capable of adapting to the needs of individual clients.

Rules, assumptions and heuristics

A recent cautionary tale, which would support a cautious and incremental approach, comes from the role of social media newsfeeds in the 2016 US Presidential elections.

Here we saw AI-driven systems – most prominently, Facebook – delivering information to users on the basis of a continually refined assessment of past behaviour to determine interests and preferences.

These systems were intended to ‘deliver relevant content’ about the things that users wanted most to know about.

However, in practice they had the perverse effect of ensuring that swathes of people were less informed than would have been the case without this ‘assistance’.

Worse, there was no outward indication that different users were receiving different results and it appears that many people made important decisions about how to vote without access to important countervailing facts.

Rules, assumptions and heuristics operated silently within these systems, deliberately obscured in the name of a clean and simple user interface.

Imagine if the Facebook news AI had been applied to legal research.

With each subsequent keyword search further narrowing the field of computer generated responses, leading advocates down an increasingly narrow path of legal argument towards conclusions that ignore both law and sense.

The hapless lawyer may not even be aware that this is taking place.

Granted, this scenario may seem unlikely.

The design parameters for a ‘legal research program’ will clearly be different to those for a “social media and entertainment platform”.

However, the reality is that legal technology is being developed using code that relies on assumptions and heuristics that run in the background and are often not acknowledged.

In this developing world, it is foreseeable that legal argument may turn on why one computational analysis should be trusted over another.

The fundamental capability of lawyers to understand, in detail, how different legal authorities interact and when there may be reason to depart from established authority will be more valuable than ever.

Departing from precedent is one area where the machines will struggle.

Computational law could foreseeably identify circumstances where a precedent can be applied to new circumstances by analogy.

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

Justice Nettle refers to an essay, titled "Concerning Judicial Method", where Sir Owen Dixon discussed this problem:

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.²

We can see that computational law programs will likely struggle to know when old interpretations of law no longer match society's expectations and might lack the creativity necessary to overcome new legal problems.

Despite the limitations of computational law, it is also apparent that lawyer and machine will make a great team.

Just as medical science uses refined software to assist with diagnosis of cancer and other life-threatening diseases, legal technology can help the profession to better serve clients and the courts.

Particular challenges for legal assistance bodies

Changing technology is changing expectations for the profession.

Across the profession generally, legal clients will want fast, efficient and online services and will increasingly prefer digitally capable and app-enabled legal advisors.

With respect to technology, two key questions we are asking in direct consultations with Justice Project stakeholders are;

- When is technology an appropriate answer; in what circumstances and for whom?
- When is it inappropriate?

A theme is beginning to emerge through the Justice Project that reliance on IT to help people help themselves, simply will not work for many vulnerable clients.

For example, a move towards online civil courts, as discussed on Lateline last week, 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.

² 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.

Nevertheless, the growing number of free, online legal tools will be very tempting sources of help for many of the 160,000 people who are turned away from legal assistance services each year due to chronic under resourcing of the sector.

But, 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 NBN 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 CLCs and other legal assistance bodies is to ensure that legal technology brings clients closer to resolving their legal problems and does not introduce yet another barrier to justice.

These limitations mean that legal technology alone cannot provide a satisfactory alternative to immediate funding boost for all legal assistance services.

In addition, there is the *Facebook news* problem of hidden rules, assumptions and heuristics.

At present, online and app based legal tools generally deal with areas of law with clearly defined processes and parameters, such as traffic matters and sentencing for minor criminal offences after a guilty plea.

The threshold question is often, "do you intend to plead guilty?"

Only by answering yes can users access useful information.

Already we can see that these systems rely on at least three assumptions.

Firstly, that a person understands the implications of pleading guilty.

Secondly, that even though information about alternatives to pleading guilty is not available within the eco-system of a particular app, a person would not enter a guilty plea without obtaining information about other options.

Thirdly, that the user is able to identify and access information about those other options.

So that's three strikes for many clients who might turn up at legal aid or a CLC.

It's probably three strikes for anyone going through their first court appearance.

Given these limitations, legal assistance bodies will continue to play a fundamental role in helping clients to make sense of how the law applies to them.

The underlying opportunity in this example is for legal assistance services to use apps to triage new clients based on eligibility and capability, helping those with greatest need who meet eligibility criteria to get an appointment, get organised and get the right legal assistance.

Those who are ineligible can be referred to private legal service providers, publicly available legal information and precedent documents relevant to their legal problem.

From a legal system perspective, there is also a significant justice dividend to be had.

Justice Nettle notes that “[computational law] has the capacity so to reduce unit costs of advice and preparation for trial as to make legal services a more realistic option for people of ordinary means”.

Although cost saving cannot be the sole, or main, driver of uptake of legal technology, the potential application of this principle to CLCs and other legal assistance services is obvious.

There is also a need to consider technology driven savings through the lens of justice reinvestment.

For example, police and prison services are currently pocketing substantial financial savings as more and more remanded prisoners appear by video link.

There is a case to be made that these savings should be invested in services to keep more people out of the justice system in the first place.

Making legal tech work for legal aid and CLC clients

So, how can we make legal technology work for legal aid and CLC clients?

The Law Council’s Justice Project is an attempt to grapple with this and many other questions, and to find solutions.

So far results from the Justice Project suggest that legal technology can be helpful in certain circumstances, for example:

- 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.

Beyond technology, the Justice Project seeks to shine a light on access to justice issues as they are experienced by Australia’s most vulnerable people, while uncovering systemic flaws and identifying gaps in access to justice.

It hopes to reveal methods of addressing and dissolving those barriers to justice and help to create a path toward equal access to justice that is clear and easily accessible for Australians who experience disadvantage.

However, to do this, it needs the expertise of people such as yourselves, as well as the voices of vulnerable people.

In this regard, I note that an accessible 'Easy Read' version of the Justice Project consultation paper and audio-reading tools are available on the Law Council website.

I sincerely encourage all of you to get involved by making submissions and by collecting stories from your clients about their experiences of the justice system.

Conclusion

Effective legal services begin and end with understanding the client and their needs.

We should be wary that technology does not separate lawyers from clients.

However, there can be enormous benefits if the legal profession actively engages with the opportunities in emerging legal technologies, including more time for direct engagement with clients whose legal matters will benefit most from close attention.

This is especially important in addressing the justice-gap for disadvantaged client groups that often have difficulty accessing legal information online and engaging with emerging legal technologies.

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

Embracing technology in the delivery of legal services will improve outcomes for the profession, clients and the justice system.

Rather than focus on the legal profession's Judgement Day, we all have much to look forward to – and much to gain – from the Rise of the Machines.

Thank you.

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